BONNEVILLE

PURCHASING

INSTRUCTIONS

TRANSMITTAL 13-4
PARTS 1 TO 28
ISSUED BY THE HEAD OF CONTRACTING ACTIVITY
BONNEVILLE POWER ADMINISTRATION
DOE/BP – 3109
125

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TRANSMITTAL LETTERS, REVISION TYPE, AND IMPORTANT DATES

NUMBER	TYPE	EFFECTIVE DATE	DATE CANCELLED OR SUPERSEDED
Re-Issue 98-1	Re-Issue of BPI	September 30, 1998	N/A
99-1	BPI Update	December 15, 1998	N/A
00-1	Temporary Instruction	August 18, 2000	September 30, 2002
01-1	Temporary Instruction	March 27, 2001	Septebmer 28, 2001
01-2	BPI Update	September 28, 2001	N/A
02-1	BPI Update	September 30, 2002	N/A
03-1	Temporary Instruction	March 12, 2003	September 30, 2004
03-2	Temporary Instruction	September 30, 2003	September 30, 2004
05-1	BPI Update	October 1, 2005	N/A
06-1	Temporary Instruction	October 28, 2005	October 1, 2007
07-1	Temporary Instruction	May 4, 2007	October 1, 2007
08-1	Temporary instruction	February 29, 2008	November 3, 2008
09-1	Temporary Instruction	April 1, 2009	September 4, 2009
09-2	Temporary Instruction	July 31, 2009	October 5, 2009
09-2A Revision 1	Temporary Instruction	October 5, 2009	January 29, 2010
09-2B Revision 2	Temporary Instruction	January 29, 2010	July 10, 2013
09-3	BPI Update	September 4, 2009	N/A
09-4	BPI Update	November 23, 2009	N/A
10-1	BPI Update	April 1, 2010	N/A
11-1	BPI Update	December 16, 2010	N/A
11-2	BPI Update	May 12, 2011	N/A
11-3	BPI Update	August 15, 2011	N/A
11-4	BPI Update	October 1,2011	N/A
12-1	BPI Update	June 15, 2012	N/A
12-1	Temporary Instruction	August 1, 2012	December 21, 2012
13-1	BPI Update	December 21, 2012	N/A
13-2	BPI Update	July 10, 2013	N/A
13-1	Temporary Instruction	July 19, 2013	August 28, 2013
13-3	BPI Update	August 28, 2013	October 1, 2013
13-4	BPI Update	October 1, 2013	Current

INTRODUCTION TO THE BONNEVILLE PURCHASING INSTRUCTIONS

The Bonneville Purchasing Instructions (BPI) draw on the best purchasing techniques available from both government and commercial sources. It provides for a "best buy" purchasing process which considers quality, timeliness of delivery, quantity, and total costs, including administrative costs.

VISION OF THE BPI

To provide regulatory flexibility to enable BPA's market-wise purchasing teams to creatively respond to changing forces in the marketplace while maintaining high standards of public service.

MAJOR GOALS

A. Improve the quality of goods and services purchased by Bonneville.
B. Reduce the length of the purchasing cycle.
C. Reduce the total cost of the purchase, the process, and the total cost of ownership.
D. Create more satisfied customers, contractors, and purchasing professionals.

SUMMARY OF IMPROVEMENTS

A. Select Contractors Using Commercial Principles

1. **Select contractors based on "best buy,"** rather than on minimum requirements, low price, and minimum standards of responsibility and quality.

2. Realign the purchasing cycle to **shift critical decision points closer to the beginning of the process.** Evaluate and qualify contractors <u>before</u> soliciting offers. Select contractors before entering into detailed negotiations.

3. **Measure competition by the <u>quality</u> of competition rather than the <u>quantity</u> of firms solicited.** Solicit from a limited number of well qualified but competitive suppliers to ensure <u>quality</u> at a reasonable cost.

4. Increase emphasis on contractors' past performance during the evaluation process.

5. Eliminate the distinction between "small purchases" and "large purchases" as the method to determine the process used for a particular purchase.

6. **Treat offerors fairly** based on the situation at hand rather than on structured processes.

7. Increase use of person-to-person negotiations in a flexible environment, rather than written negotiations within a structured process.

8. Increase emphasis on using negotiations as a tool to reach understanding and agreement.

9. **Allow contracting officers more discretion** to solicit the optimum number of suppliers to assure **meaningful competition** based on sound business judgment, their assessment of the marketplace, and the costs/benefits of the solicitation process.

10. **Establish "market knowledge" as an important skill** for contracting personnel while reducing the focus on knowledge of the process.

B. Maintain Commitment to Necessary Federal Policies

1. Bonneville will continue to fulfill its obligations as a socially responsible Federal utility. The BPI will:

a. Support labor laws such as the Davis-Bacon and Service Contract Acts.
b. Meet Bonneville's commitment to small and disadvantaged businesses.
c. Maintain and clarify ethical standards.
d. Support BPA's commitment to sound environmental practices.
e. Comply with other applicable laws as well as non-applicable laws which BPA elects to follow to support its commitment to social responsibility.

2. **Implementation** of those obligations **will shift**, where possible, **to emphasize effective "results"** and significantly reduce the current emphasis on "process."

C. Eliminate Or Simplify Procedures

1. Significantly reduce the number of mandatory procedures.

2. Increase contracting officers' use of discretion and sound business judgment to replace rigid procedures.

3. **Emphasize obtaining results** rather than prescribing detailed procedures which may no longer meet the organization's needs in a changing environment.

4. **Reduce contracting officers' role as the "gatekeeper"** and return responsibility for non-purchasing administrative controls to requiring offices.

5. Significantly reduce mandatory documentation for requisitioners and CO's.

6. **Encourage teamwork** between CO's and requisitioners and between Bonneville and contractors.

7. **Make the BPI easy to use** for both contracting officers and requisitioners, including "on-line" access to the BPI.

PART 1 BONNEVILLE PURCHASING INSTRUCTIONS SYSTEM

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1.1 OBJECTIVE.

(a) ***POLICY:*** The Bonneville Purchasing Instructions are based on total quality management concepts and proven purchasing principles. They are designed to obtain the best buy for each dollar spent. A best buy purchase is determined in any given instance by the relation of the quality of the goods or services offered and their overall costs to their intended function.

(b) ***INFORMATION:*** Five major principles were used in developing the BPI philosophy and policies. They generally reflect a private sector approach to purchasing, emphasizing good business judgment, not the Federal procurement process based on bureaucratic procedural control. Proper application of the policies and procedures outlined in the BPI require that the CO apply these principles individually to each transaction. These underlying principles are:

(1) Provide basic policy guidance, but not rigid directives for purchasing goods and services.
(2) Rely on the professional expertise, business judgment, and discretion of the CO to craft a purchase that achieves the “best buy” for BPA.
(3) Select suppliers from among the best available sources.
(4) Evaluate potential suppliers in a fair and objective manner.
(5) Achieve the Government’s socio-economic goals.

(c) ***INFORMATION:*** Best buy principles: Source selection decisions shall be made based on best buy since it provides maximum latitude for the CO to determine which offer is in BPA's best interests. Best buy puts all offerors on an equal basis since they are given the same information prior to closing and are all evaluated on the same set of attributes.

1.2 SCOPE.

INFORMATION:

(a) The Bonneville Purchasing Instructions (BPI) are issued by the Head of the Contracting Activity (HCA) under the authority of the Bonneville Project Act. They establish BPA-wide policies and procedures for the purchase of supplies and services (including construction services) by the Bonneville Power Administration (BPA).

(b) The BPI does <u>not</u> apply to:

(1) Financial assistance awards (see the Bonneville Financial Assistance Instructions- BFAI),
(2) Purchases of Land (see Bonneville Power Administrative Manual- BPAM 20.9(B), 20.14(B)), including leases of property for BPA's administrative use,
(3) Purchases or sales of electric power (BPAM 20.7), except utilities for BPA facilities,
(4) Purchases of energy through power-savings agreements and resource proposals (BPAM 20.8),
(5) Specific field purchases (See BPI 2.3.2.1),
(6) Limited types of work delegated to Senior Vice Presidents, Vice Presidents and others (BPAM 20), or
(7) Some emergency conditions delegated to the Senior Vice President, Transmission Services (BPAM 20.9 (E)).

1.3 AUTHORITY.

INFORMATION:

(a) BPA's Status - Federal vs. Commercial. The Bonneville Power Administration (BPA) was established by Congress as an operational utility that is regional in scope and businesslike in operation. It is funded through its own revenues, not appropriation of taxpayer funds. Although BPA follows many Federal policies, it is directly involved in the utility business world and must be able to operate competitively to meet its responsibilities.

(b) Legislative Authorities.
(1) The Bonneville Project Act, particularly Sections 2(f) and 8 (16 U.S.C. § 832 et seq.), grants authority to the BPA Administrator to contract for supplies and services.
(2) The Federal Columbia River Transmission System Act of 1974, particularly Section 11(b) (16 U.S.C. § 838 et seq.), grants authority to the BPA Administrator to make expenditures without appropriations from Congress or limitation to fiscal year.
(3) The Pacific Northwest Electric Power Planning and Conservation Act, particularly Section 9(a) (16 U.S.C. § 839 et seq.), which reaffirms the need for the special contracting authorities in Section 2(f) of the Bonneville Project Act.

(c) Interpretation of Authorities.

(1) Comptroller General Decision B-159458, October 21, 1966 ruled that the BPA Administrator has the authority to do what he/she finds is necessary, desirable or appropriate to accomplish the purposes of the Act. The Comptroller General noted in particular that although section 8 provides for an "opportunity for competition," such competition, obviously in view of the authority of section 2(b), can be limited by what the Administrator seeks to accomplish. Furthermore, the Comptroller General reaffirmed that the Bonneville Project Act was designed to give the Administrator the authority to operate BPA in business matters as a public utility with powers and effectiveness similar to those of a corporate entity.
(2) Comptroller General Decision B-114858, July 13, 1976 ruled that the BPA Administrator's contracting powers are extensive and are not subject to procurement statutes normally applicable to Federal agencies.
(3) Comptroller General Decision B-227811, October 8, l987 ruled that BPA is authorized to issue its own purchasing instructions based on the broad authorities of the Bonneville Project Act.

(d) Purchases for program operations. BPA contracts for goods and services are entered into under the authority of Section 2(f) of the Bonneville Project Act (16 U.S.C. § 832a(f)). That authority pertains to purchases for BPA's program operations, since it is subject only to the provisions of that Act. The signature of the requisitioner constitutes a determination that the proposed purchase is for such purpose, in addition to certifying the availability of obligational authority.

1.3.1 Clause Usage Prescriptions.

PROCEDURE: The Contracting Officer (CO) shall insert Clause 1-1 Applicable Regulations, in all solicitations and contracts exceeding $50,000. Clause 1-1 shall not be included in solicitations and contracts for the acquisition of commercial items and services.

1.4 PUBLICATION OF THE BPI.

POLICY: The BPI is not published in the Federal Register. The decision not to publish was made on the basis of BPA's status as a regional entity. However, a notice announcing the availability of the BPI is placed in the Federal Register annually.

1.5 PURCHASING POLICY CHANGE BOARD.

POLICY: The Head of the Contracting Activity (HCA) appoints and chairs a Policy Change Board (PCB). This group, made up of standing members, is convened by the HCA, as necessary, to assist in the review of significant changes to BPA's purchasing policies. The PCB will follow a formal process for reviewing proposed policy changes. The HCA may hold formal discussions or provide written materials as deemed appropriate. This group is intended to function as an advisory group and is made up of representatives of

the following organizations: Supply Chain Services, Office of General Counsel, Finance (Accounts Payable), and any others deemed appropriate. The responsibility for establishing purchasing policy remains with the HCA.

POLICY: Proposals to change policy must be submitted on form 4210.01e, "BPI or BFAI Policy Change Proposal." Anyone in BPA with an interest in improving BPA purchase policy may submit the form with the required background information and analysis.

1.6 ORGANIZATION OF THE BPI.
INFORMATION:

(a) Contents: The BPI is organized to contain in one purchasing manual:
(1) Policies,
(2) Procedures which are appropriate for use agency-wide, and
(3) Useful information that is not readily available elsewhere.

(b) Target audience: The BPI is intended as a ready reference for:
(1) BPA's purchasing professionals,
(2) BPA's purchasing requisitioners/customers,
(3) Businesses who sell goods/services to BPA.

(c) Sequence of topics: Topics covered by the BPI are generally organized in the same chronological sequence as the purchasing process. Temporary Instructions and Appendices are included at the end of the BPI and have the same force and effect as the preceding portions of the BPI.

1.7 DEVIATIONS FROM THE BPI.
POLICY: Deviations from mandatory requirements of the BPI (those indicated by the words "shall" or "shall not") must be approved by the HCA and documented before the deviation is made.

1.8 DEFINITIONS.
INFORMATION: Terms defined here are used throughout the BPI, and may differ from those used within panels of the Enterprise Resource Planning (ERP) system, PassPort and PeopleSoft systems, used by BPA. Other terms used primarily in only one subpart will be defined in that subpart.

"BPA" means the Bonneville Power Administration.

"BPI" means the Bonneville Purchasing Instructions.

"BPAM" means Bonneville Power Administration Manual.

"Chief Executive Officer" means the Administrator of the Bonneville Power Administration

"CO" means Contracting Officer, a person delegated authority by the HCA to enter into, administer, or terminate contracts (see BPI 2.2).

"Commercial" means:
(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities and—
(A) Has been sold, leased, or licensed to the general public; or
(B) Has been offered for sale, lease, or license to the general public;
(2) Any item that evolved from an item described in paragraph (1) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a BPA solicitation;
(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) but for—
(A) Modifications of a type customarily available in the commercial marketplace; or

(B) Minor modifications of a type not customarily available in the commercial marketplace and made to meet BPA requirements. Minor modifications do not significantly alter the function or essential characteristics of an item. Factors to be considered include the value and size of the modification in comparison to the value and size of the final product.

(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) Installation services, maintenance services, repair services, training services, and other services if—

(A) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and

(B) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the BPA;

(6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed. For purposes of these services-

(A) “Catalog Price” means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to significant numbers of buyers constituting the general public; and

(B) “Market Price” means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors;

(7) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

“Commercial Off the Shelf” (COTS) means:

(1) Any item of supply-

(A) Other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that has been sold, leased, or licensed to the general public;

(B) That is sold, leased, or licensed in substantial quantities in the commercial marketplace; and

(C) That is offered to BPA, without modification, in the same form in which it is sold, leased, or licensed in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in 46 U.S.C. § 1702, such as agricultural and petroleum products.

"COR" means Contracting Officer's Representative, a person who has been delegated specific responsibilities by the CO for non-technical matters.

"COTR" means Contracting Officer's Technical Representative, a person who has been delegated specific responsibilities by the CO for technical matters, and who has been formally trained and certified at BPA to perform such duties.

"Contract" means any mutually binding legal relationship obligating the seller to furnish supplies or services (including construction) and the buyer to pay for them. Contracts do not include grants and cooperative agreements covered by 31 U.S.C. § 6301, et seq., and described in BFAI.

"Contractor" means a firm or individual that currently has a contract to supply goods or services to BPA.

"Department" or "Departmental" means the U.S. Department of Energy.

"Design-Supply-Construct Contract" means a contract that places the responsibility for total system performance on the equipment manufacturer.

"Furnish and Install Supply Contract" means a contract that purchases equipment, and the installation thereof, which requires no substantial changes to a facility.

"General Scope of the Contract" means the work that was fairly and reasonably within the contemplation of the parties when they entered into the contract. Generally, changes, additions or deletions to specific elements, or parts of the work, are considered "within the scope" as long as the end product of the contract is essentially the same as that contracted for initially.

"Head of the Contracting Activity (HCA)" means the official who has overall responsibility for direction of purchasing activities. At BPA, the Chief Executive Officer delegates this responsibility to the Manager for Purchasing/Property Governance (BPAM 20.14).

"IGC" means Intergovernmental Contract. See Part 25.

“In writing,” “writing,” or “written” means any worded or numbered expression that can be read, reproduced, and later communicated, and includes electronically transmitted and stored information. The scope of the definition includes facsimile transmissions, electronic images of a signed facsimile, and electronic files with an image of a signature.

"Offer" means a response to a solicitation that, if accepted, would bind the offeror to perform the resultant contract. An offer may be called a "proposal."

"Offeror" means a supplier who has submitted an offer to sell goods or services to BPA.

"Purchase Order" means an order for supplies or services. It is signed only by the Contracting Officer. The Purchase Order becomes a contract binding on BPA and the seller when accepted by the seller in writing or by performance. Purchase Orders may be issued for any dollar value. The CO may request that the seller countersign the Purchase Order.

“Purchasing" means the acquiring by contract of supplies or services (including construction) by and for the use of the Bonneville Power Administration. Purchasing includes renting, leasing (but not including leasing of real property under 40 U.S.C. § 472), bartering or otherwise obtaining supplies or services. Purchasing activities include description (but not determination) of supplies and services required, selection and solicitation of sources, preparation and award of contracts and all phases of contract administration. It also includes the sale of property and other types of contractual arrangements other than land, power and energy efficiency service agreements.

“Signature” or “signed” means the discrete, verifiable symbol of an individual which, when affixed to a writing with the knowledge and consent of the individual, indicates a present intention to authenticate the writing. The scope of the definition includes electronic symbols.

"Supplier" means a firm or individual that provides goods or services.

"Supplies" means personal property and does not include real property or incorporeal rights.

1.50 TEXT OF CLAUSES.
The following clause is referred to in Part 1:

1-1 Applicable Regulations.

Clause 1-1 APPLICABLE REGULATIONS (Jul 13)(BPI 1.3.1)
Purchases made by the Bonneville Power Administration are subject to the policies and procedures outlined in the Bonneville Purchasing Instructions. The BPI is available without charge on the Internet at http://www.bpa.gov. Copies are available from the Head of the Contracting Activity - DGP, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon 97208. Subscriptions are not available.

(End of Clause)

PART 2 CONTRACTING AUTHORITY AND RESPONSIBILITIES

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2.1 HEAD OF THE CONTRACTING ACTIVITY (HCA).

INFORMATION: The Chief Executive Officer delegates contracting authority to the HCA for contracts other than land, power and power-savings, and transmission sales. The HCA performs the following major functions:

(a) Establishes and maintains purchasing policy and BPA-wide procedures through the Bonneville Purchasing Instructions (BPI).

(b) Delegates authority to execute and modify contracts and settle claims in connection therewith.

(c) Reviews purchasing operations to assure compliance with applicable policies and procedures, and provides advice on ways to improve the quality of business decisions.

(d) Any other authorities that have not been further redelegated.

2.2 CONTRACTING OFFICERS (CO).

2.2.1 Appointment.

POLICY: The HCA delegates authority to Contracting Officers by written Certificate of Appointment. These certificates are issued in accordance with BPI Appendix 2-A, Certification and Appointment as a BPA Contracting Officer. This is BPA's execution of its exemption from DOE Order 541.1, Appointment of Contracting Officers and Contracting Officer's Representatives, and DOE Order 361.1, Acquisition Career Management Program.

2.2.2 Authority.

POLICY: Except as provided in 2.3, only persons who are certified as having obtained specific training and experience may be delegated contracting authority by the HCA, and may enter into, administer and modify contracts for supplies and services, issue task or delivery orders, settle contract claims, and terminate contracts. The Certification program and procedures are described Appendix 2-A. Such persons are referred to as Contracting Officers (COs), and may enter into the following types of contractual commitments:

(a) New awards. These must be within the limits of the CO's delegated authority. The amount of any options, or ceiling amounts in indefinite delivery contracts, shall be considered a part of the original contract cost/price for the purposes of CO authority.

(b) Modifications. The monetary value of the modification must be within the limits of the CO's delegated authority.

(c) Delivery Orders/Task Orders. COs are authorized to execute delivery orders against indefinite delivery contracts (including Federal Supply Schedule contracts), without regard to dollar value of their delegated contracting authority, so long as the items or services ordered are specifically identified and priced in the contract. Orders for unpriced items must be within their delegated authority.

(d) Concession contracts. COs with unlimited service contracting authority may execute concession-type contracts.

(e) Furnish and Install Supply Authority. COs with other than construction authority are authorized to purchase requirements for installation of equipment which require no substantial structural changes to a facility.

(f) Design-Supply-Construct (Turnkey) Authority. COs with unlimited authority on other than construction purchases are authorized to purchase requirements that place the responsibility for total system performance on the equipment manufacturer.

(g) Commercial Utility Services. Except for written bi-lateral contracts, either COs with at least a Commercial service warrant or those issued a limited, written delegation by the HCA are authorized to order and administer commercial utility services, both regulated and unregulated, in an amount not to exceed the dollar limit of their delegation. Such commercial utility services may be ordered and administered in the same manner commonly used by the utility in the normal course of its business dealings with similar customers, except that whenever a written bi-lateral contract is used, such utility services shall be acquired only by COs with a Non-Commercial service warrant. (See 11.2)

2.2.3 Goals and Responsibilities.

(a) ***POLICY:*** COs are responsible for awarding contracts in a cost-effective manner, and for safeguarding the interests of BPA in its contractual relationships. In order to perform these responsibilities, COs are allowed wide latitude to exercise business judgment. When the contract requires a decision by the CO, advice and assistance from specialists or superiors may be considered; however, the final decision shall be based on the CO's own independent judgment.

(b) ***PROCEDURE:*** The CO shall:
(1) Establish an evaluation team tailored for the particular acquisition per BPI 12.4, if appropriate;
(2) Determine, prior to the issuance of the solicitation, whether award will be made on the basis of the lowest price technically acceptable offer or a tradeoff analysis;
(3) Ensure that proposals are evaluated based solely on the evaluation factors identified within the solicitation, per BPI 11.11.1;
(4) Select the source or sources that represent the best buy to BPA, per BPI 1.1(c).

2.2.4 Contracting Officer's Signature.

POLICY: In the absence of the principal CO responsible for a particular contract, other COs with equal or high level of authority may sign "for" the CO. The signing CO is considered to be an agent of the principal CO, and is responsible for compliance with all requirements. The principal CO's name remains on the contract for purposes of continuity of contact with the contractor. The CO normally signs the contract after it has been signed by the contractor. The CO shall ensure that the signer(s) have authority to bind the contractor.

2.2.5 Electronic Signatures and Records.

POLICY: COs are authorized to use electronic signatures and records and to accept electronic signatures and records from Contractors as evidence of the parties' consent to contract.

2.3 BPA EMPLOYEES WITHOUT CONTRACTING AUTHORITY.

2.3.1 Policy.

Except as provided in this subpart and BPI Part 27 , persons other than COs shall not contract for supplies and services on behalf of BPA. COs shall make all purchases that can be planned for in advance, except when a Purchase Card (P-Card) transaction is deemed more cost effective and executed in accordance with BPI Part 26.

2.3.2 Purchases Not Requiring HCA's Delegation of Authority.

2.3.2.1 Purchase Cards (P-Cards).

POLICY: Employees who have been issued a BPA Purchase Card may make purchases within the limits prescribed for such cards. The Purchase Card program is detailed in BPI Part 26 and in the Supply Chain Purchase Card Manual.

2.3.2.2 Cash or Convenience Checks.

POLICY: Employees may make purchases by means of convenience checks (third-party drafts) or cash (imprest funds) when authorized.

(a) A convenience check is a check written by a purchase card holder. It is used in lieu of the purchase card to complete a transaction with a payee/vendor who cannot or will not accept or process a P-Card transaction. Convenience checks are used infrequently at BPA and only by named personnel approved by the Chief Certifying Officer in Finance. See Part 26.

(b) BPA makes limited use of imprest funds. Other purchasing methods, such as purchase cards are the preferred method of purchase. Refer to the U.S. Department of Treasury Manual of Procedures and Instructions for Cashiers (Cashier's Manual), which can be read online at **www.fms.treas.gov/imprest/cashiers_manual.pdf.**

2.3.3 Purchases and Payment Processing through Invoice Certification/"PO None" Process

(a) ***POLICY:*** All purchases made under this section's authority, shall be made in accordance with the BPI. A purchase card is the preferred method for completing the purchase, if the total amount is within the card-holder's limits, and does not exceed the dollar limits identified for each type of authorized purchase.

(b) ***PROCEDURE:*** In instances where a purchase card cannot be used, the purchase shall be documented on BPA Form 2230.07e, Invoice Certification ("PO None"), and include the name and title of the person executing the transaction, and the category of PO None authority being used. The purchase categories include:

(1) Field Purchases meeting the definitions of "Emergency," "Urgent," or "Other" Purchases. See subpart 2.3.3.1.

(c) Restrictions, including dollar limits of authority for each category are detailed in section 2.3.3.1 and 2.3.3.2 as well as any additional information that must be included for approval. Purchases in excess of the limits identified in these sections must be made by Contracting Officers with appropriate Certificate of Appointment authorities. Persons with a Contracting Officer Certificate of Appointment may use PO None

within their delegated authority. Any purchases in excess of the limits identified and not in accordance with these BPI provisions will not be accepted for payment on a PO None.

(d) Personal property, as defined in the BPA Asset Management Instructions, Section 1 Personal Property Instructions, subparts 1.1 and 1.6, may be purchased using this authority. All personal property items purchased using a PO None shall be accurately recorded in the personal property tracking system immediately after receipt of the item(s).

2.3.3.1 Field Purchases

(a) ***INFORMATION:*** Field purchases may be made in response to emergency, urgent, or other circumstances. "Emergency" situations include unanticipated outages or when life or property is at risk, and a quick and decisive action is necessary to correct or mitigate the problem. "Urgent" situations include unforeseen events where a field project would be unduly delayed if materials or services aren't purchased immediately. Other circumstances for which the use of an invoice certification or PO None in the field is authorized are non-emergency, non-urgent situations where a purchase card is not accepted, and which is needed to complete routine jobs or projects.

(b) ***POLICY:*** Field purchases may be made using an invoice certification or PO None for "emergency" or "urgent" situations. The completed invoice certification shall include a description of the situation or event, including the potential consequences of a failure to procure the needed items or services.

(c) ***POLICY:*** Field purchases may be made using an invoice certification or PO None for other than emergency or urgent situations when a purchase card is not accepted and BPA stock does not contain materials that can meet the need in a timely manner. This authority is only permitted for non-recurring, non-repetitive purchases. The completed invoice certification shall include the reason for the procurement, the reason a purchase card was not used, and why the procurement was not made through Supply Chain Services.

(1) Dollar limits. Field purchases are authorized up to the following amounts for any one purchase:
   (A) Materials, Supplies, and Equipment (includes rentals without operator): $5,000;
   (B) Services (includes equipment rentals with operator): $2500.

(c) Only the positions listed in this paragraph, their designees, or persons serving in the duties of the positions on an acting basis, are authorized to make field purchases:

Senior O&M Manager
District Manager
Regional Resource Specialist
Planner/Scheduler
Cost Analyst
District Resource Specialist
Heavy Mobile Equipment Mechanic
Natural Resource Specialist
Facility Maintenance Worker
Facility Operations Specialists
Chief Substation Operator
Power System Control District Engineer
Substation maintenance Electrician I, II, and III
System Protection and Control District Engineer
Transmission Line maintenance Foreman I, II, and III
Supply Technician
Construction Foreman I, II, & III
Construction & Maintenance Services Assistant
General Craft Services Manager
Central Electrical Services Manager

2.3.3.2 Other Authorized Uses of Invoice Certification (PO None) Form

POLICY:

(a) **Commercial Utility Services.** Commercial Utility Services, as defined in BPI 11.2.1 and that do not require bilateral agreement, may be purchased by personnel who have been designated by their job function, and authorized by their management, to order such services.

(b) **Training Services.** The **Talent Development & Organizational Effectiveness** group may use an Invoice Certification to make payment for training to vendors that do not accept a purchase card. Arrangements to use an Invoice Certification must be made in advance of the training event. For transactions less than $1500, the CO in the Training and Organizational Development Office is authorized to approve the Invoice Certification. When the amount exceeds $1500, the Invoice Certification is forwarded to the Supervisory Contract Specialist in the Professional & Services Purchasing group for approval.

(c) **Library Materials and Subscriptions.** Library employees who are purchase card holders are authorized to submit an Invoice Certification for purchases up to $5000 for library materials or subscriptions where the vendor does not accept a purchase card.

(d) **Recognition Refreshments and BPA Logo Merchandise.**

(1) Payment for recognition purchases that cannot be made with a purchase card may be made using an Invoice Certification. The recognition purchases must be made in accordance with Personnel Letter 451-1. Managers must sign the Invoice Certification form. In general, Invoice Certification purchase authority is limited to refreshments and to BPA logo merchandise from the agency approved employee welfare programs association.

(2) Designated Human Capital Management personnel have additional authority to make other Recognition Program purchases using the Invoice Certification process up to $500 per individual item.

(3) Payment for purchases of gift cards may not be processed on an Invoice Certification

(e) **Memberships. Payment for memberships and dues must be in accordance with BPA Manual Chapter 110.**

(1) Corporate: Payment for corporate memberships may be made using an Invoice Certification. The Invoice Certification must be accompanied by a completed BPA Form 1130.01e.

(2) Individual: Payment for individual memberships and dues may be made using an Invoice Certification. The Invoice Certification must be accompanied by a completed BPA Form 1130.01e.

(f) **Government Bills of Lading (GBL).** The BPA Traffic Manager, or designee named in writing, may use the Invoice Certification process to submit GBLs for payment, for transport of goods according to tariff schedules, without ancillary loading and unloading services.

(g) **Other purchases up to $500 authorized by managers.** Managers may submit the Invoice Certification documentation for purchase of commercial goods and services not prohibited elsewhere in the BPI, BPA Manual, or other Federal documentation (e.g. alcohol, tobacco, firearms, travel, etc) up to $500. The purchases must be within the budget and fall under the line item categories specified in the manager's budget. Additional requirements and limitations on this authority are:

(1) For other good and services under the provisions of this subpart (g), managers shall submit BPA Form 2230.07e, Invoice Certification ("PO None").

(2) Invoice Certifications submitted for expenditures greater than $500 under this subpart (g) will not be accepted for payment.

(3) Purchases under this authority shall not be made for IT items (including but not limited to: cell phones, cell phone service, PDA's, smart phones, flash sticks, memory drives, printers, laptops, hard drive, computer software, copy machines, toner) and training.

(4) In accordance with the provisions of this subpart (g), managers may reimburse employees for official business expenditures. The employee shall submit BPA Form 2230.06e, Claim for Reimbursement for Expenditures on Official Business and include supporting receipts.
(5) A copy of all requests for payment for purchases under this subpart (g) must be sent to Supply Chain Operations – NSS.

2.4 RATIFICATION OF UNAUTHORIZED CONTRACT COMMITMENTS.

2.4.1 Policy.

Except as described in BPI 2.2 or 2.3, no BPA employee shall commit BPA funds or enter into a contract without a written delegation of authority (warrant) from the HCA. This policy includes both new commitments as well as modifications to existing contracts.

An unauthorized commitment is defined as follows: An agreement that is not binding solely because the BPA representative who made it lacked the authority to enter into that agreement on behalf of the BPA.

2.4.2 Procedures to Ratify Unauthorized Commitments.

POLICY:

(a) Requisitioner responsibilities. Actions to be taken upon discovery of an unauthorized commitment are described in Appendix 6-A, Requisitioners' Guide to Preaward Activities.

(b) Notification to CO. Any employee discovering an unauthorized commitment shall immediately advise the responsible CO, or the Sourcing Services office if the CO cannot be identified. The Supply Chain Services management will appoint a CO if this unauthorized obligation is a new action that is not associated with an existing award. The employee must also contact the appropriate staff in the affected program office to determine whether funds are available.

(c) Review of Unauthorized Commitment: The CO will review the circumstances of the unauthorized commitment and assess the risk to BPA, and shall consult with Risk Management or legal counsel to determine whether work should be stopped or the commitment suspended or terminated. If the value of the unauthorized commitment exceeds $50,000, the CO shall contact the HCA immediately to advise of pending action. The CO may require the Contractor to halt delivery or stop work if funds are not available for the unauthorized purchase, if the program office determines that the goods or services are not required to accomplish BPA mission and goals, or if it appears that BPA may be at risk if the Contractor continues work. If necessary, the CO shall direct the disposition of all products and deliverables as a result of the unauthorized commitment.

(d) Ratification Information. The employee who made the unauthorized commitment shall assist the CO, to include providing essential information concerning the transaction within 5 days of the commitment or discovery of the unauthorized commitment. The employee shall provide to the CO a written explanation of the actions that led to the unauthorized commitment. The individual's performance manager must concur via signature on the written explanation that the item(s) or service(s) were necessary and appropriate to meet BPA's mission and goals.

(e) Approvals.
(1) The CO may ratify the unauthorized commitment, based on the documentation as required in paragraph (d) above and in BPI Appendix 6-A, without further approvals where the purchase was for commercial goods and services, funds are available, and the unauthorized commitment does not exceed $50,000. All other transactions, including construction and other all non-commercial purchases, must be approved by the HCA prior to ratification. The CO shall prepare and present the information to the HCA for actions that exceed $50,000.
(2) If a pattern of unauthorized commitments by either the responsible employee or the organization is observed by COs or Supply Chain Services management, they may contact the HCA, Risk Management Officer or legal counsel who can provide advice and assistance. Any of the offices

involved in review and approval of the ratification may suggest to the program office appropriate management actions to avoid future unauthorized commitments.

(f) Monitoring of Ratifications. The HCA and Supply Chain Services management shall monitor all unauthorized commitments regardless of dollar amount. After a CO or the HCA ratifies an unauthorized commitment, the CO who prepares the award document(s) shall send a copy of the award face page of the ratified award and a copy of the documentation required in paragraph (d) above, to the performance manager of the person who made the unauthorized commitment, the Vice President of that organization, the CO's immediate supervisor, the Chief Supply Chain Officer, and the HCA. This information will be used to monitor compliance with this policy.

PART 3 STANDARDS OF CONDUCT AND BUSINESS PRACTICEES

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3.1 STANDARDS OF CONDUCT REGARDING PURCHASING AND ASSISTANCE.

3.1.1 General.

***POLICY**:* BPA purchasing (including financial assistance, see Bonneville Financial Assistance Instructions, subpart 1.3.1) policy shall be to conduct its purchasing activities in a manner that complies with the ethical standards of conduct for employees of the Executive Branch. Inasmuch as a fiduciary responsibility exists for BPA employees involved in the conduct of purchasing activities, such BPA employees shall avoid any conflict of interest or the appearance of such in the conduct of BPA purchasing activities. Employees' conduct must be such that they would not hesitate to make full public disclosure of their actions at any time. "Conflict of interest" includes, but is not limited to the following:

(a) Use of public office for private gain;
(b) Giving preferential treatment to any firm, person or organization for other than sound business reasons;
(c) Impeding BPA efficiency or economy;
(d) Lack of complete independence or impartiality;
(e) Making decisions on behalf of BPA outside official channels;
(f) Adversely affecting the public's confidence in the ability of BPA to conduct its affairs with integrity and in a fair and equitable manner; or
(g) Accepting gratuities or other things of value or special favors.

3.1.2 Conduct of Purchasing and Assistance Activities.

POLICY:

(a) BPA purchases (including financial assistance) shall be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. The general rule is to maintain the integrity of purchasing practices, strictly avoiding any conflict of interest or even the appearance of a conflict of interest in BPA-contractor relationships. This subpart 3.1 and BPI Appendix 3-A provide BPA-wide policy for the conduct of every BPA purchase of supplies or services (including construction) and financial assistance. In conducting such BPA purchases and financial assistance--

(1) Employees and former employees of BPA who participate personally and substantially, as defined in BPI Appendix 3-A, Section 2, shall comply with the standards of ethical conduct of 5 CFR Part 2635, as well as those specific to DOE included in 5 CFR Part 3301 and 10 CFR Part 1010 and 48 CFR Subpart 903.1, as supplemented by this subpart 3.1 and BPI Appendix 3-A;
(2) All other persons, including competing contractors, shall not knowingly engage in prohibited conduct as defined by this subpart 3.1 and BPI Appendix 3-A.

(b) During the conduct of any BPA purchase (including financial assistance), no BPA employee who participates personally and substantially during the conduct of a BPA purchase shall knowingly:

(1) Solicit or accept, directly or indirectly, any promise of future employment or business opportunity from, or engage, directly or indirectly, in any discussion of future employment or business opportunity with a competing contractor, except as provided in BPI 3.1.4.
(2) Ask for, demand, exact, solicit, seek, accept, receive, or agree to receive, directly or indirectly, any compensation, gratuity, or other thing of value from any competing contractor for such purchase; or
(3) Disclose any contractor proposal information or source selection information regarding such purchase directly or indirectly to any person other than a person authorized by the CO to receive such information.

(c) During the conduct of any BPA purchase (including financial assistance), any person other than those authorized by the CO to receive such information shall not, other than as provided by law, knowingly obtain contractor proposal information or source selection information before the award of a BPA contract to which the purchase information relates.

3.1.3 Annual Certification by BPA Employees.
***POLICY*:**

(a) In coordination with BPA General Counsel, the HCA relies upon the annual certification by all BPA employees regarding ethical standards of conduct for employees of the Executive Branch (5 CFR Part 2635, as well as those specific to DOE included in 5 CFR Part 3301 and 10 CFR Part 1010 and 48 CFR Subpart 903.1, as supplemented by this subpart 3.1 and BPI Appendix 3-A) as the basis for BPA employee certification of standards of conduct for purchasing and financial assistance activities of BPA. Therefore, the HCA will no longer separately maintain annual certifications for standards of conduct regarding purchasing and assistance, relying instead upon the annual ethics briefing and certifications maintained by BPA General Counsel.

(b) The standards of conduct regarding purchasing and assistance specifically applies to the following BPA employees:

(1) All GS-1101, 1102, 1105, and GS-1106 series employees;
(2) All employees delegated Contracting Officer authority who are not included in category (1) above;
(3) All COTRs and Field Inspectors; and
(4) All employees who "participate personally and substantially in the conduct of a BPA purchase," as defined in BPI Appendix 3-A, Section 2.

3.1.4 Disqualification.
PROCEDURE:

(a) A BPA employee participating personally and substantially during the conduct of a BPA purchase (including financial assistance) who wishes to discuss future employment or business opportunities with a competing contractor during the conduct of a purchase shall submit to the HCA, prior to initiating or engaging in such discussions, a written proposal of disqualification from further participation in the purchase which relates to that competing contractor. The proposal shall:

(1) Identify the purchase involved;
(2) Describe the nature of the employee's participation in the purchase and specify the approximate dates or time period of participation; and
(3) Identify the competing contractor and describe its interest in the purchase.

(b) If the HCA determines that the employee's further participation is not essential to the conduct of the purchase and that disqualification will not jeopardize the integrity of the purchasing process, the HCA may grant written approval of the disqualification proposal.

3.1.5 Processing Violations or Possible Violations.
PROCEDURE:

(a) If the CO receives or obtains information of a violation of BPI 3.1, the CO shall determine whether the reported violation has any impact on the pending award or selection of the source.

(1) If the CO concludes that there is no impact on the purchase, the CO shall discuss that conclusion with the First Level performance manager. With the concurrence of that individual, the CO shall, without further approval, proceed with the purchase.
(2) If the First Level performance manager does not agree with that conclusion, he or she shall advise the CO to withhold award and shall promptly forward the information and documentation to the HCA.
(3) If the CO determines that the violation, or possible violation, impacts the purchase, the CO shall promptly forward the information to the HCA.

(b) The HCA receiving any information describing a violation of BPI 3.1 shall review all information available and take appropriate action. If the HCA determines that award is justified by urgent and compelling circumstances, or is otherwise in the interests of BPA, the contracting officer may be authorized to award the contract.

3.1.6 Questions Regarding Standards of Conduct.
***PROCEDURE*:** Other than the HCA procedures in BPI subparts 3.1.4 and 3.1.5, should any BPA employee, in his or her judgment, be confronted with any situation where a violation of ethical standards of conduct and business practices is an issue, such person shall review the standards of conduct and seek the advice of the Agency Ethics Official, as necessary.

3.1.6.1 Clause Usage Prescriptions.
PROCEDURE: COs shall include Clause 3-1 Purchasing Standards of Conduct, in all solicitations expected to exceed $100,000. Clause 3-1 shall not be included in solicitations for the acquisition of commercial items and services.

3.2 STANDARDS OF CONDUCT REGARDING INDEPENDENT FUNCTIONING & TRANSMISSION INFORMATION.
3.2.1 General.
INFORMATION:

(a) The Standards of Conduct (SOC) promulgated by the Federal Energy Regulatory Commission through Order No. 717 apply to public utilities as defined by Section 201(e) of the Federal Power Act. BPA is not a public utility but has elected to comply with these rules to the extent possible consistent with its statutory responsibilities.

(b) One of the tenets of the SOC is the Independent Functioning requirement. The purpose of Independent Functioning is to prevent the marketing function of a Transmission Provider from gaining a competitive advantage over nonaffiliated customers or potential customers of the Transmission Provider. The marketing function within BPA now resides with employees involved in the sale of energy or capacity. They are required to have limited interaction with the personnel within Transmission Services that operate the transmission system on a day-to-day basis.

3.2.2 Policy.
It is BPA's policy that employees and contractors engaged in all phases of purchasing and contract administration comply with SOC as described above.

3.2.3 Procedure.
Contracting Officers shall contact the SOC Compliance Officer at SOC@bpa.gov to address any concerns or questions regarding SOC. Requisitioners, COTRs and Field Inspectors shall contact both the CO and the SOC Compliance Officer to address and resolve SOC issues.

3.3 RESERVED.
3.4 ORGANIZATIONAL CONFLICTS OF INTEREST.
3.4.1 Policy.
(a) BPA will avoid situations which place an offeror in a position where the offeror's judgment may be biased. Such situations may occur due to any past, present, or currently planned interest, financial or otherwise, that the offeror may have which relates to the work to be performed under the proposed contract, or where the offeror's performance of such work may provide it with an unfair competitive advantage.

(b) Organizational conflicts of interest (OCIs) shall be identified, prior to solicitation if possible, and be adequately avoided or mitigated. No award shall be made until the potential OCIs have been evaluated by the CO.

(c) The award of a contract for the design of a particular project and the award of a contract for related, follow-on implementation work to the same individual, firm, parent firm, or its subsidiaries is prohibited, except with the approval of the HCA. There is no prohibition against including both engineering design and construction on a single project in a single contract.

3.4.2 Disclosure of OCI.
PROCEDURES:

(a) The offeror or contractor shall provide information which describes in a concise manner all relevant facts concerning any past, present or currently planned interest (financial, contractual, organizational, or otherwise) relating to the work to be performed and bearing on whether the offeror or contractor has a possible organizational conflict of interest. The offeror or contractor may also provide relevant facts that show how its organizational structure and/or management systems limit its knowledge of possible organizational conflicts of interest relating to other divisions or sections of the organization, and how that structure or system would avoid or mitigate such organizational conflicts.

(b) In the absence of any relevant interests referred to above, the offeror or contractor shall indicate to the CO that to its best knowledge and belief no such facts exist relevant to possible OCIs.

(c) BPA will consider the information obtained and may seek additional relevant information, if needed. All such information, and any other relevant information known to BPA, will be used to determine whether an award to the offeror may create an organizational conflict of interest. If such a conflict of interest is found to exist, BPA may (1) impose appropriate conditions which avoid such conflict, (2) disqualify the offeror, or (3) determine that it is otherwise in the best interest of BPA to contract with the offeror by including appropriate conditions mitigating such conflict in the contract awarded.

(d) COs shall obtain information relative to organizational conflicts of interest for the following types of contracts: (1) evaluation services or activities; (2) technical consulting and management support services and professional services; (3) research and development; or (4) other contractual situations where a contract may result in an unfair competitive advantage or potential biased analysis or recommendation. When an unsolicited proposal is accepted, the CO shall determine OCI before or during the negotiation process.

(e) COs shall attempt to determine whether such conflicts exist prior to the solicitation of offers. Whenever possible, such information should be verified during negotiation.

3.4.2.1 Clause Usage Prescriptions.
PROCEDURE: COs shall include Clause 3-2 Organizational Conflicts of Interest in solicitations and contracts exceeding $100,000 for 1) evaluation services or activities; 2) technical consulting and management support services and professional services; 3) research and development; or 4) other contractual situations where a contract may result in an unfair competitive advantage or potential biased analysis or recommendation. Clause 3-2 shall not be included in IGCs with Federal agencies. For commercial acquisitions, Clause 3-2 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-20.

3.4.3 Remedies for Nondisclosure.
INFORMATION: The refusal to provide adequate information may result in disqualification for award. The nondisclosure or misrepresentation of any relevant interest may also result in the disqualification of the offeror for award. If such nondisclosure or misrepresentation is discovered after award, the resulting contract may be terminated for default. The contractor may also be disqualified from subsequent BPA contracts, and be subject to such other remedial action as may be permitted or provided by law or in the resulting contract.

3.4.4 Evaluation, Findings and Contract Award.
PROCEDURES:

(a) In all cases of potential organizational conflicts of interest, COs shall obtain approval prior to award of contracts. The First Level performance manager is the approving official if the OCI is mitigated; otherwise, the HCA must approve the award.

(b) The CO shall evaluate all relevant information pertaining to OCI for a specific contract. Upon a finding that a conflict exists, the CO may:

(1) Disqualify the offeror from award; or

(2) Avoid such conflicts by including conditions in the resulting contract; or

(3) Award the contract, but mitigate the conflict with an appropriate clause in the contract. This alternative may be used only after a written finding that the conflict cannot be avoided and that award of the contract to the offeror is in the best interests of BPA. Such a finding may be justified in situations such as where public emergency requires the award or where the work or services cannot otherwise be obtained.

(c) The CO shall document an OCI finding in the as identified in BPI 12.8.2.

3.4.5 Action In Lieu of Termination.

***PROCEDURE*:** If, after award, a possible OCI is identified by the contractor but the CO determines that it would not be in the best interests of BPA to terminate the contract, the CO shall take every reasonable action to avoid or mitigate the effects of the conflict.

3.5 LIMITATIONS ON PAYMENTS TO INFLUENCE TRANSACTIONS.

3.5.1 Prohibitions.

POLICY:

(a) Section 1352 of title 31, United States Code, among other things, prohibits a recipient of a Federal contract from using appropriated funds to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract or the modification of any Federal contract.

(b) The Act also requires offerors to furnish a declaration consisting of both a certification and a disclosure. These requirements are contained in Clause 3-3, Certification, Disclosure and Limitation Regarding Payments to Influence Certain Federal Transactions.

(1) By signing its offer, an offeror certifies that no appropriated funds have been paid or will be paid in violation of the prohibitions in 31 U.S.C. § 1352.

(2) The disclosure shall identify if any funds other than Federal appropriated funds (including profit or fee received under a covered Federal action) have been paid, or will be paid, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a Federal contract.

(c) The prohibitions of the Act do not apply under the following conditions;

(1) Agency and legislative liaison by own employees.

(A) The prohibition on the use of appropriated funds, in paragraph (a) of this section, does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(B) For purposes of subdivision (c)(1)(A) of this section, providing any information specifically requested by an agency or Congress is permitted at any time.

(C) The following agency and legislative liaison activities are permitted at any time where they are not related to a specific solicitation for any covered Federal action:

(i) Discussing with an agency the qualities and characteristics (including individual demonstrations) of the person's products or services, conditions or terms of sale, and service capabilities;

(ii) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(D) The following agency and legislative liaison activities are permitted where they are prior to formal solicitation of any covered Federal action:

(i) Providing any information, not specifically requested, about a covered Federal action;

(ii) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(iii) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95-507, and other subsequent amendments.

(E) Only those activities expressly authorized by subparagraph (c)(1) of this section are permitted under this section.

(2) Professional and technical services.

(A) The prohibition on the use of appropriated funds, in paragraph (a) of this section, does not apply in the case of --

(i) payment of reasonable compensation made to an officer or employee of a person requesting or receiving a covered Federal action if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any proposal or application for that Federal action or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action;

(ii) Any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any proposal or application for that Federal action, or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal action. Persons, other than officers or employees of a person requesting or receiving a covered Federal action, include consultants and trade associations.

(B) For purposes of subdivision (c)(2)(A) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications, with the intent to influence, made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission, or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services, but not directly in the preparation, submission or negotiation of a covered Federal action.

(C) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation and any other requirements in the actual award documents.

(D) Only those services expressly authorized by subdivision (c)(2)(A)(i) and (ii) of this section are permitted under this section.

(E) The reporting requirements of 3.5.2(a) shall not apply with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

3.5.2 Certifications and Disclosures.

PROCEDURE:

(a) By signing its offer, any contractor who requests or receives a Federal contract exceeding $150,000 certifies that it shall submit with its offer the disclosures required by Clause 3-3 Certification, Disclosure and Limitation Regarding Payments to Influence Certain Federal Transactions. Disclosures under this section shall be submitted to the CO using OMB standard form LLL, Disclosure of Lobbying Activities.

(b) The contractor shall file a disclosure form at the end of each calendar quarter in which there occurs any event that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraph (a) of this section. An event that materially affects the accuracy of the information reported includes--

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing, or attempting to influence, a covered Federal action; or

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(c) The contractor shall require the certification, and if required, a disclosure form, by any person who requests or receives any subcontract exceeding $150,000 under the Federal contract.

(d) All subcontractor disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the prime contractor. The prime contractor shall submit all disclosure forms to the CO at the end of the calendar quarter in which the disclosure form is submitted by the subcontractor. Each subcontractor certification shall be retained in the subcontract file of the awarding contractor.

(e) Certifications are not required for modifications, extensions, amendments, continuations, or renewals made to awards that were made prior to February 9, 1990.

3.5.3 BPA Procedure.
The CO shall obtain certifications and disclosures prior to the award or modification of any contract exceeding $150,000.

3.5.4 Processing Suspected Violations.
PROCEDURE: Suspected violations of the requirements of the Act shall be referred to the HCA.

3.5.5 BPA Procedures.
(a) Obtaining disclosures before award. COs shall obtain any disclosure form as required by Clause 3-3 Certification, and Disclosure and Limitation Regarding Payments to Influence Certain Federal Transactions, from persons receiving contracts, and IGCs to other than Federal government agencies, which exceed $150,000, unless the disclosure was obtained as a part of a solicitation process for the contract. This disclosure form should be obtained before award, but may be obtained after award if necessary.

(b) Obtaining disclosures upon completion of modifications. COs shall obtain any disclosure form, if required by Clause 3-3 Certification, Disclosure and Limitations Regarding Payments to Influence Certain Federal Transactions, from persons receiving extensions, continuations, renewals, amendments, or modifications of any contract and IGCs to other than Federal government agencies which exceed $150,000, or which causes the total award to exceed $150,000. The exercise of a prepriced option is exempted from this requirement. This disclosure form should be obtained before the modification is signed by the CO.

(c) Disclosure forms. The required disclosure form is, Standard Form (SF) LLL, Disclosure of Lobbying Activities, Instructions for completion of SF-LLL, and SF-LLL-A, Continuation Sheet. COs shall provide copies of this exhibit to requesters when necessary. COs should order SF-LLL and SF-LLL-A through regular ordering procedures. Electronic copies of these forms are available on the GSA internet website.

(d) Disposition of disclosure forms. COs shall retain a copy of any disclosure forms received in the contract file, and will forward the originals to the HCA who will be responsible for forwarding the original forms to the Department for the semiannual compilation of data.

3.5.5.1 Clause Usage Prescriptions.

PROCEDURE: COs shall include Clause 3-3 Certification, Disclosure and Limitation Regarding Payments to Influence Certain Federal Transactions in solicitations and contracts, including IGCs, with other than Federal agencies, which are expected to exceed $150,000. For commercial acquisitions, Clause 3-3 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-20.

3.6 DRUG-FREE WORKPLACE.

3.6.1 Policy.

(a) No individual shall be awarded a contract unless he/she agrees as a condition of the contract that he/she will maintain a drug-free workplace.

(b) No firm (any contractor other than an individual) shall be considered for a contract that equals or exceeds $100,000 unless it agrees to maintain a drug-free workplace.

(c) The CO may rely on the name of the contractor and the CO's personal knowledge of the contractor to determine whether the organization is a firm or an individual.

3.6.2 Applicability.

INFORMATION: This subpart applies to all contracts and intergovernmental contracts, except --

(a) Transactions executed prior to March 18, 1989, including modifications, task orders or extensions to such transactions;

(b) Contracts valued below $150,000; however, the requirements of this subpart shall apply to contracts of any value if the contract is awarded to an individual;

(c) Contracts or those parts of contracts that are to be performed outside of the United States, its territories, and its possessions.

(d) Intergovernmental contracts with Federal agencies or Tribes.

(e) Solicitations and contracts for the acquisition of commercial items and services.

(f) Subcontracts at any tier for the acquisition of commercial items or commercial components at any tier.

3.6.3 Penalties.

PROCEDURE:

(a) After determining in writing that adequate evidence to suspect any of the causes at paragraph (c) of this section exist, the CO may suspend contract payments. The matter will then be referred to the HCA for review.

(b) After determining in writing that any of the causes at paragraph (c) of this section exists, and review by the HCA, the CO may terminate the contract for default.

(c) The specific causes for suspension of contract payments, termination of a contract for default, or suspension and debarment are--

(1) The offeror has failed to comply with the requirements of Clause 3-6 Drug-Free Workplace; or

(2) That such a number of contractor employees have been convicted of violations of criminal drug statutes occurring in the workplace to indicate that the contractor has failed to make a good faith effort to provide a drug-free workplace.

(d) A determination under this subpart to suspend contract payments, terminate a contract for default, or debar or suspend a contractor may be waived by the HCA for a particular contract, only if such waiver is

necessary to prevent a severe disruption of BPA's operations to the detriment of the Federal Government or the general public.

3.6.3.1 Clause Usage Prescriptions.
PROCEDURE: COs shall insert Clause 3-6 Drug-Free Workplace, in solicitations and contracts of any dollar value if the contract is expected to be awarded to an individual and in other solicitations and contracts expected to equal or exceed $150,000. Clause 3-6 shall not be included in solicitations and contracts for commercial items and commercial services. Clause 3-6 shall not be included in IGCs with other Federal agencies or with Tribes, or in contracts performed outside the United States, its territories, and its possessions.

3.7 CONTRACTOR COMPLIANCE WITH BPA POLICIES.

3.7.1 General.
(a) ***POLICY:*** BPA policies addressing personal behaviors apply to all BPA employees and to BPA contractors working or visiting on site. COs are responsible for assuring that BPA contractors are informed of these policies and that contractor managers are required to enforce these policies during all work performed at BPA.

(b) ***INFORMATION:*** The BPA work environment includes areas in and around BPA buildings, facilities, fitness centers, vehicles, food service areas and break locations, and any other areas or conveyances where BPA employees work or where work-related activities occur, including official travel.

(c) ***PROCEDURE:*** Contractor personnel should be given copies and directed to provide, to employees and subcontractors, published information regarding BPA's policies and available resources for dealing with behavior issues in the workplace. The CO may take remedial action to enforce these policies. If the inappropriate conduct does not cease, the CO may suspend the contract or terminate it for default.

3.7.1.1 Clause Usage Prescriptions.
PROCEDURE:

(a) COs shall include Clause 3-4 Contractor Policy to Ban Text Messaging While Driving, in all solicitations and contracts including Intergovernmental Contracts (IGCs). Clause 3-4 shall not be included in IGCs with federal agencies. For commercial acquisitions, Clause 3-4 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-20.

(b) COs shall include Clause 3-8 Contractor Compliance with BPA Policies, in solicitations and contracts requiring the contractor to perform work on BPA premises.

3.8 RESTRICTION ON COMMERCIAL ADVERTISING.
3.8.1 General.
POLICY: It is BPA's policy to restrict contractors from referring to BPA contracts in commercial advertising in a manner that states or implies that BPA approves or endorses the product or service, or considers it superior to other products or services. The intent of this policy is to prevent the appearance of BPA preference toward any product or service.

3.8.1.1 Clause Usage Prescriptions.
PROCEDURE: COs shall include Clause 3-9 Restriction on Commercial Advertising, in all solicitations and contracts for information technology hardware, software or services, or where a non-disclosure agreement has been included (see BPI 11.4.3), or when the requisitioning office deems necessary to protect BPA's interests.

3.50 TEXT OF CLAUSES.
The following clauses are referenced in BPI Part 3:

Clause 3-1 PURCHASING STANDARDS OF CONDUCT 11
Clause 3-2 ORGANIZATIONAL CONFLICTS OF INTEREST 11
Clause 3-3 CERTIFICATION, DISCLOSURE, AND LIMITATION REGARDING PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS 12
Clause 3-4 CONTRACTOR POLICY TO BAN TEXT MESSAGING WHILE DRIVING 14
Clause 3-5 RESERVED. 14
Clause 3-6 DRUG-FREE WORKPLACE 14
Clause 3-7 RESERVED. 15
Clause 3-8 CONTRACTOR COMPLIANCE WITH BPA POLICIES 16
Clause 3-9 RESTRICTION ON COMMERCIAL ADVERTISING 16

Clause 3-1 PURCHASING STANDARDS OF CONDUCT (Jul 13)(BPI 3.1.6.1)

(a) No person, other than as provided by law or authorized by the CO, shall knowingly obtain contractor proposal information or source selection information before award of a BPA purchase to which the information relates.

(b) "Competing contractor," as used in this clause, means any entity that is, or is likely to become, a competitor for or a recipient of a contract or subcontract under a BPA purchase, and includes any other person acting on behalf of such an entity.

(c) During the conduct of any BPA purchase of property or services, no competing contractor or any officer, employee, representative, agent, or consultant of any competing contractor shall knowingly:

(1) Make, directly or indirectly, any offer or promise of future employment or business opportunity to any BPA employee participating personally and substantially during the conduct of a BPA purchase, except as provided in BPI 3.1.4;

(2) Offer, give, or promise to offer or give, directly or indirectly any money, gratuity, or other thing of value to any BPA employee participating personally and substantially during the conduct of a BPA purchase; or

(3) Solicit or obtain, directly or indirectly, from any BPA officer or employee, prior to the award of a contract any contractor proposal information or source selection information regarding such purchase.

(End of clause)

Clause 3-2 ORGANIZATIONAL CONFLICTS OF INTEREST (Jul 13)(BPI 3.4.2.1)

(a) The offeror or contractor warrants that, to the best of its knowledge and belief, and except as otherwise disclosed, there are no relevant facts which could give rise to organizational conflicts of interest, as defined in BPI 3.4.1, and that the offeror or contractor has disclosed all relevant information to the Contracting Officer.

(b) The offeror or contractor agrees that, if after award, an organizational conflict of interest with respect to this contract is discovered, an immediate and full disclosure in writing shall be made to the Contracting Officer which shall include a description of the action which the contractor has taken, or proposes to take, to avoid or mitigate such conflicts.

(c) In the event that the contractor was aware of an organizational conflict of interest prior to the award of this contract and did not disclose the conflict to the Contracting Officer, BPA may terminate the contract for default.

(d) The provisions of this clause shall be included in all subcontracts for work to be performed in aid of the services provided by the prime contractor, and the terms "contract," "contractor," "Contracting Officer" modified appropriately.

(End of clause)

Clause 3-3 CERTIFICATION, DISCLOSURE, AND LIMITATION REGARDING PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS (Jul 13)(BPI 3.5.5.1)

(a) As used in this clause:
"Covered Federal action" means
(1) The awarding of any Federal contract.
(2) The extension, continuation, renewal, amendment, or modification of any Federal contract.

"Indian tribe" and "tribal organization" have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450B) and includes Alaskan Natives.

"Influencing or attempting to influence" means making, with the intent to influence, any communication to or appearance before an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

"Local government" means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, includes a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

"Person" means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

"Reasonable compensation" means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

"Reasonable payment" means, with respect to professional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

"Recipient" includes all contractors and subcontractors. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

"Regularly employed" means, with respect to an officer or employee of a person requesting or receiving a Federal contract, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

"State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

(b) The offeror, by signing its offer, hereby certifies to the best of his or her knowledge and belief that:
(1) No Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on his or her behalf in connection with the awarding of any Federal contract or the extension, continuation, renewal, amendment, or modification of any Federal contract.
(2) If any funds other than Federal appropriated funds (including profit or fee received under a covered Federal transaction) have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress on his or her behalf in connection with this solicitation, the offeror shall complete and submit, with its offer, Standard Form-LLL, Disclosure of Lobbying Activities, to the Contracting Officer.
(3) He or she will include the language of this certification in all subcontract awards at any tier and that all sub-recipients of subcontract awards in excess of $150,000 shall certify and disclose accordingly.

(c) Submission of this certification and disclosure is a prerequisite for making or entering into this contract imposed by section 1352, title 31, U.S. Code. Any person who makes an expenditure prohibited under this provision or who fails to file or amend the disclosure form to be filed or amended by this provision, shall be subject to a civil penalty of not less than $l0,000 and not more than $100,000 for each such failure.

(d) A contractor who requests or receives from an agency a Federal contract shall file with that agency a disclosure form, OMB standard form LLL, Disclosure of Lobbying Activities, if such person has made or has agreed to make any payment using non appropriated funds (to include profits from any covered Federal action), which would be prohibited under this clause if paid for with appropriated funds.

(e) The contractor shall file a disclosure form at the end of each calendar quarter in which there occurs any event that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraph (b) of this clause. An event that materially affects the accuracy of the information reported includes--
(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or
(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or
(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(f) The contractor shall require the submittal of a certification, and if required, a disclosure form, by any person who requests or receives any subcontract exceeding $150,000 under the Federal contract.

(g) All subcontractor disclosure forms (but not certifications), shall be forwarded from tier to tier until received by the prime contractor. The prime contractor shall submit all disclosure forms to the Contracting Officer at the end of the calendar quarter in which the disclosure form is submitted by the subcontractor. Each subcontractor certification shall be retained in the subcontract file of the awarding contractor.

(h) Any person who makes an expenditure prohibited under this clause or who fails to file or amend the disclosure form to be filed or amended by this clause shall be subject to a civil penalty as provided by 31 U. S. Code 1352. An imposition of a civil penalty does not prevent the Government from seeking any other remedy that may be applicable.

(End of clause)

Clause 3-4 CONTRACTOR POLICY TO BAN TEXT MESSAGING WHILE DRIVING (Jul 13) (BPI 3.7.1.1)

(a) Definitions. As used in this clause--
"Driving"—(1) Means operating a motor vehicle on an active roadway with the motor running, including while temporarily stationary because of traffic, a traffic light, stop sign, or otherwise. (2) Does not include operating a motor vehicle with or without the motor running when one has pulled over to the side of, or off, an active roadway and has halted in a location where one can safely remain stationary.
"Text messaging" means reading from or entering data into any handheld or other electronic device, including for the purpose of short message service texting, e-mailing, instant messaging, obtaining navigational information, or engaging in any other form of electronic data retrieval or electronic data communication. The term does not include glancing at or listening to a navigational device that is secured in a commercially designed holder affixed to the vehicle, provided that the destination and route are programmed into the device either before driving or while stopped in a location off the roadway where it is safe and legal to park.

(b) This clause implements Executive Order 13513, Federal Leadership on Reducing Text Messaging while driving, dated October 1, 2009.

(c) The Contractor should adopt and enforce policies that ban text messaging while driving —(1) Company-owned or -rented vehicles or Government-owned vehicles; or (2) Privately-owned vehicles when on official Government business or when performing any work for or on behalf of the Government.

(d) Subcontracts. The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts that exceed $10,000.

(End of Clause)

Clause 3-5 RESERVED.

Clause 3-6 DRUG-FREE WORKPLACE (Jul 13)(BPI 3.6.3.1)

(a) The contractor agrees that with respect to all employees to be employed under this contract it will provide a drug-free workplace as described in this clause.

(b) Definitions. As used in this clause "Controlled substance" means a controlled substance in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. § 812), as from time to time amended, and as further defined in regulation at 21 CFR 1308.11-1308.15, as amended.

"Conviction" means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

"Criminal drug statute" means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, possession or use of any controlled substance.

"Drug-free workplace" means the site(s) for the performance of work done by the contractor in connection with a specific contract at which employees of the contractor are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

"Employee" means an employee of a contractor directly engaged in the performance of work under a Government contract. "Directly engaged" is defined to include all direct cost employees and any other contractor employees who have other than a minimal impact or involvement in contract performance.

"Individual" means an offeror/contractor that has no more than one employee including the offeror/contractor.

(c) The Contractor, if other than an individual, shall -- within 30 calendar days after award (unless a longer period is agreed to in writing for contracts of 30 calendar days or more performance duration); or as soon as possible for contracts of less than 30 calendar days performance duration--

(1) Publish a statement notifying its employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the contractor's workplace and specifying the actions that will be taken against employees for violations of such prohibition;

(2) Establish an on-going drug-free awareness program to inform such employees about--

(A) The dangers of drug abuse in the workplace;

(B) The contractor's policy of maintaining a drug-free workplace;

(C) Any available drug counseling, rehabilitation, and employee assistance programs; and

(D) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace.

(3) Provide all employees engaged in performance of the contract with a copy of the statement required by subparagraph (c)(1) of this clause;

(4) Notify such employees in writing in the statement required by subparagraph (c)(1) of this clause that, as a condition of continued employment on this contract, the employee will--

(A) Abide by the terms of the statement; and

(B) Notify the employer in writing of the employee's conviction under a criminal drug statute for a violation occurring in the workplace no later than five (5) days after such conviction.

(5) Notify the Contracting Officer in writing within ten (10) days after receiving notice under subdivision (c)(4)(B) of this clause, from an employee, or otherwise receiving actual notice of such conviction. The notice shall include the position title of the employee;

(6) Within 30 days after receiving notice under subparagraph (c)(4)(B) of this clause of a conviction, take one of the following actions with respect to any employee who is convicted of a drug abuse violation occurring in the workplace:

(A) Taking appropriate personnel action against such employee, up to and including termination; and/or

(B) Require such employee to satisfactorily participate in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(7) Make a good faith effort to maintain a drug-free workplace through implementation of subparagraphs (c)(1) through (c)(6) of this clause.

(d) In addition to other remedies available to the Government, the Contractor's failure to comply with the requirements of paragraph (c) of this clause may, pursuant to BPI 3.6.3 render the contractor subject to suspension of contract payments, termination of the contract for default, and suspension or debarment.

(e) The requirements of this clause shall not apply to:

(1) Solicitations and contracts for the acquisition of commercial items and services.

(2) Subcontracts at any tier for the acquisition of commercial items or commercial components at any tier.

(End of clause)

Clause 3-7 RESERVED.

Clause 3-8 CONTRACTOR COMPLIANCE WITH BPA POLICIES (Oct 13)(BPI 3.7.1.1)

(a) The contractor shall comply with all BPA policies affecting the BPA workplace environment. Examples of specific policies are:

(1) Harassment-free workplace (BPA Personnel Letter 752-03),
(2) Non-smoking workplace (BPAM 165),
(3) Use of Alcoholic Beverages, Narcotics, or Illegal Drug Substances on BPA Property or When in Duty Station (BPAM 400/792A),
(4) Firearms and other weapons (BPAM 1086),
(5) Standards of conduct regarding transmission information (BPI 3.2),
(6) Dissemination of Critical Information (BPA Security Standards Manual, Chapter 300-2),
(7) Cyber Security Program (BPAM 1115),
(8) Grid Operations Information Security Program (GOISSP) Policy Manual
(9) Business Use of BPA Technology Services (BPAM Chapter 1110),
(10) Prohibition on soliciting or receiving donations for a political campaign while on federal property (18 U.S.C. § 607),
(11) Guidance on Violence and Threatening Behavior in the Workplace (BPA Personnel Letter 752-2),
(12) Inspection of persons, personal property and vehicles (41 CFR § 102-74.370),
(13) Preservation of property (41 CFR § 102-74.380),
(14) Compliance with Signs and Directions (41 CFR § 102-74.385),
(15) Disturbances (41 CFR § 102-74.390),
(16) Gambling Prohibited (41 CFR § 102-74.395),
(17) Soliciting, Vending and Debt Collection Prohibited (41 CFR § 102-74.410),
(18) Posting and Distributing Materials (41 CFR § 102-74.415)
(19) Photographs for News, Advertising or Commercial Purposes (41 CFR § 102-74.420), and
(20) Dogs and Other Animals Prohibited (41 CFR § 102-74.425)

(b) The contractor shall obtain from the CO information describing the policy requirements. A contractor who fails to enforce workplace policies is subject to suspension or default termination of the contract.

(End of clause)

Clause 3-9 RESTRICTION ON COMMERCIAL ADVERTISING (Oct 05)(BPI 3.8.1.1)

The Contractor agrees that without the Bonneville Power Administration's (BPA) prior written consent, the Contractor shall not use the names, visual representations, service marks and/or trademarks of the BPA or any of its affiliated entities, or reveal the terms and conditions, specifications, or statement of work, in any manner, including, but not limited to, in any advertising, publicity release or sales presentation. The Contractor will not state or imply that the BPA endorses a product, project or commercial line of endeavor.

(End of clause)

PART 4 ADMINISTRATIVE MATTERS

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4.1 CONTRACT REPORTING.

4.1.1 Purchasing Data.

POLICY: The Supply Chain Services organization is responsible for collecting and maintaining an on-going comprehensive record of purchasing data for all purchasing activities. The data shall provide, as a minimum:

(a) A basis for responding and reporting to the Federal government and the public,

(b) A means of measuring and assessing the impact of BPA purchasing preference program activities, and

(c) Data for HCA policy oversight, management decisions, and operational purchasing management performance measurement and control purposes.

4.1.2 Taxpayer Identification Number.

(a) ***POLICY:*** Disbursement Operations must provide to Treasury the Taxpayer Identification Number (TIN) of all contractors (or the social security number for individuals). A TIN is required as a condition of all disbursements, except:

(1) Payments to organizations noted in 4.1.2(c); and
(2) Payments or purchase transactions made using imprest fund, third-party draft, or credit card (Purchase Card).

(b) ***INFORMATION:*** A TIN is required for payment to a:

(1) United States business or individual operating within the United States or in a foreign country,
(2) Foreign business engaged in business or trade with an agent capable of receiving payment within the United States, and
(3) Tribe, State or Local governmental agency that has a TIN for IRS reporting purposes.

(c) ***INFORMATION:*** A TIN is not required for payment to a:
(1) Federal agency,
(2) Foreign government, or
(3) Foreign business not engaged in business or trade or without an agent capable of receiving payment within the United States.

(d) ***INFORMATION:*** The TIN for BPA is 93-0334712.

4.1.2.1 Clause Use Prescriptions.
(a) ***PROCEDURES:*** The CO shall obtain the contractor's Taxpayer Identification Number (TIN). The CO shall include a clause similar to 4-1, Taxpayer Identification Number, in all solicitations, unless the contractor's TIN was previously obtained and made available to Disbursement Operations.

(b) ***INFORMATION:*** Contractor information provided by Clause 11-1, Type of Business Organization, may be necessary to determine if contractor will be required to obtain and provide a TIN as a condition of payment. (See 11.10.2.1 and 22.6)

4.2 CONTRACT FILES.

4.2.1 Responsibilities.
POLICY:

(a) General Responsibilities: Contract files shall contain sufficient documentation to support the actions taken. The level of required documentation to explain purchase decisions is that necessary to explain the business decision to an independent third party with no knowledge of the item/service being procured.

(b) CO Responsibilities: The CO shall maintain the official file (except for payment records maintained by Disbursement Operations) per BPI 12.8.2, which may contain paper and "paperless purchasing" documents and records in electronic form in accordance with BPI 7.2.4, an original signature copy--except as otherwise provided by BPI 7.2.4--of the contract, all relevant pre-award and post-award documentation, including all modifications, and all other documents needed to support payments made under the contract. It shall also contain all post-award documentation not otherwise included in the COTR or Payment files. COs shall also protect Critical Information (CI), per BPI 11.4.3 and comply with any additional procedures issued by Supply Chain Services.

(c) COTR Responsibilities: The COTR shall maintain a working contract file, which documents technical contract administration activities.

4.2.2 Close-out of Contracts.
POLICY:

(a) Close-out of contracts shall normally begin within 3 months of physical contract completion, and be completed within 12 months.

(b) If possible, the following documentation should be obtained prior to closing a contract:
(1) Proof that all deliverables were received, accepted, and final payment made;
(2) Close-out property certificates (if applicable);
(3) Release of claims (if applicable);
(4) Patent rights materials (if applicable); and
(5) Close-out audits (if applicable).

(c) Final Audit.
(1) The CO is responsible for determining whether or not to request a final closeout audit on cost reimbursement, time and materials, or labor-hour type contracts. Audits are not normally obtained for fixed-price type contracts.

(2) The CO should decide whether one or more of the following conditions are present before requesting a closeout audit. (There may be other factors or special circumstances that would also be valid reasons for requesting an audit). In addition, COs should consider requesting preliminary audits early in contract performance in order to prevent surprises or irregularities after contract activities have been concluded and resolution of payment problems may be more difficult.

(A) The contract value exceeds $1,000,000.
(B) There are outstanding property issues to be settled.
(C) The contractor is completing its first government cost-type contract.
(D) A consulting firm is working under a cost-type contract.
(E) The Contractor's accounting system was not initially approved.
(F) No pre-award audit or pre-award cost/price analysis was performed.
(G) The contract was awarded with a pre-award audit and/or cost/price analysis, which revealed significant accounting system problems and/or questioned significant items of cost.
(H) Accounting or administrative problems were encountered during contract performance.
(I) There are no reports available which document incurred costs, or indirect rate audits.

4.2.3 Disposal of Files.

POLICY:

(a) Files shall be maintained on-site until closed.

(b) Following contract closure, files shall be retained, sent to storage sites, and disposed of in accordance with the Information Governance and Lifecycle Management policy as set forth in the BPAM . However, selected files may be retained on site longer if the CO deems it necessary.

4.3 REVIEW OF PURCHASING ACTIONS FOR LEGAL SUFFICIENCY.

(a) ***POLICY:*** The following types of purchasing actions shall be reviewed by the General Counsel for legal sufficiency prior to the establishment of a binding commitment:

(1) Final decisions under the "Disputes" clause.
(2) Terminations.
(3) Responses to protests filed outside BPA.
(4) Purchasing actions that contemplate the use of non-BPI contract clauses for Warranty, Insurance, Rights in Data, Disputes or Indemnification. Infringement indemnification clauses do not require OGC review for COTS IT procurements if BPA's indemnification is capped at an amount not to exceed the license fee or support/maintenance fee.
(5) Purchasing actions for Research and Development (including Fish and Wildlife R&D contracts).
(6) Purchasing actions for the purchase of Information Technology (IT) products or services that do not qualify as commercial or commercial off-the-shelf (COTS) products or services. Purchasing actions for commercial software that is significantly modified for BPA use, or is custom developed for BPA shall be reviewed by OGC.
(7) All purchasing actions that are likely to provoke unusual public interest, are highly critical to BPA's mission, or that are unique or of an unusual nature.

(b) ***PROCEDURES:*** The request for review should be made in writing to General Counsel, but may be oral where there is an exigency. The CO shall document relevant discussions in the official file. The request shall conclude with a signature line reading, "Subject purchase action is legally sufficient as per General Counsel Review." Request may be transmitted in paper or electronically.

4.4 RESERVED.

4.5 RESERVED.

4.6 RESERVED.

4.7 MONITOR/AUDIT/REPORT.

(a) ***POLICY:*** The HCA shall oversee all pre-award and post-award phases of BPA's purchasing and financial assistance programs. Oversight is accomplished by the HCA and staff to assure compliance with BPI policies, and to assist operational management and staff in improving the efficiency and effectiveness of internal procedures and external documents.

(b) ***INFORMATION:*** Under the authority delegated by the Administrator the HCA is responsible for exercising BPA's authorities concerning purchasing and personal property as derived from the Bonneville Project Act (see Chapter 04, Authorities and Functions, BPAM Chapters 20 and 21). The HCA fulfills this responsibility in part through the Monitoring, Auditing, and Reporting Systems component of the Governance Risk Compliance (GRC) Program, which in turn supports a culture of ethics throughout the agency. This component covers all activities performed "to ensure conformance with established law, regulations, policies, procedures and good business practices" (BPAM 2.6, paragraph D) of the organization. The primary activities consist of monitoring and auditing. Both activities rely in part on systems that will provide accurate, timely and valid information, data, and metrics on program activities.

(c) ***PROCEDURE:*** The HCA shall conduct monitor/audit/report activities as deemed necessary by an annual Risk Assessment conducted by the HCA.

4.8 NUMBERING OF BUSINESS INSTRUMENTS.

POLICY: BPA has an established, automated numbering system for purchasing and assistance instruments using the numbering schema of its Enterprise Resource Planning (ERP) system. Instruments to be numbered using this system include purchase orders, contracts, financial assistance instruments, and intergovernmental contracts. This is the BPA implementation of its exemption from DOE Order 540.2.

4.9 POLICY REGARDING CLAUSE USAGE.

(a) ***INFORMATION:*** Clause Numbering System: Clauses covering the subject matter discussed in each BPI Part are included at the end of the appropriate part. The number in front of the hyphen in the clause number corresponds to the number of the BPI subject part in which the clause is described. After the hyphen, the clause number is completed by a sequential number assigned within each part of the BPI.

(b) ***POLICY:*** Use and Modification of BPI Clauses: The instructions for use of each clause are set forth in the BPI text where the subject matter receives its primary treatment. Some clauses are required (as indicated by the words "shall include Clause x-xx") and shall not be modified without prior written approval of the HCA unless the change is purely editorial and has no substantive impact on the legal effect of the clause. Other clauses are optional (as indicated by the phrase "may include"). Required and optional clauses shall not be modified to change their legal meaning without HCA approval unless the clause instructions permit such (as indicated by the phrase "shall/may include a clause similar to Clause x-xx.). When a clause (either required or optional) provided by the BPI is modified, the letter "M" shall be inserted at the end of the clause number, and the BPI date shall be replaced with the current date. The "M" designation and date change are not required if the clause is modified only to complete the CO FILL IN portion of a clause.

(c) ***POLICY:*** Requirements for use. All BPI clauses are prescribed for use for specified types of solicitations and/or contracts. They may be used for other types of solicitations and contracts if the CO deems it useful.

(d) ***POLICY:*** Operational Clauses. The purchasing organizations may determine that certain standardized clauses, which are not contained within the BPI, are necessary for consistent contract administration and purchasing operations. Following the same format described in 4.9(a) above, these clauses shall start with the BPI part number of the relevant topic preceding the hyphen, and shall be numbered 50 through 99 after the hyphen.

(e) ***POLICY:*** CO-created Clauses: When the CO creates a clause or clauses not based on a required or optional clause provided by the BPI, nor the standardized operational clauses written by the purchasing groups, the CO shall number the clause with the BPI part number closest to the subject matter of the new clause, followed by a sequential number beginning with "100". For example, a new CO-created clause on a contract administration issue would be numbered 14-100.

4.10 INCORPORATING CLAUSES.
(a) ***INFORMATION:*** The BPI is published and made available to the public electronically via the Internet. Effective October 1, 2005, the online BPI will be archived for version control. The BPI may be viewed at the Doing Business pages at www.bpa.gov, or at http://www.bpa.gov/Doing%20Business/purchase/Pages/default.aspx.

(b) ***POLICY:*** Effective October 1, 2005, clauses should be incorporated by reference into solicitations and contracts whenever practicable and permitted by law, rather than generated in full text.

(c) ***PROCEDURE:*** The Contracting Officer shall, upon request, provide to the Offeror/Contractor the full text of any clause incorporated by reference. Additionally, the full text of clauses which may be incorporated by reference shall be available on the BPA website for contractor reference under the “Doing Business with BPA” link.

4.11 FORMS.
INFORMATION: A number of forms are referred to in the BPI. COs may use either BPA Enterprise Resource Planning (ERP) system generated forms, or BPA electronic purchasing and assistance forms for which the purchasing operations organization is the business owner and where the IT organization maintains the electronic versions.

4.50 TEXT OF CLAUSES.
The following clause is referenced in BPI Part 4:

4-1 Taxpayer Identification Number
4-2 Reserved.

Clause 4-1 TAXPAYER IDENTIFICATION NUMBER (Dec 98)(BPI 4.1.2.1)

NOTE: (1) Taxpayer Identification Number (TIN) reporting does not apply to a Federal agency, a foreign government or a foreign business not engaged in business or trade or without an agent capable of receiving payment within the United States

(2) The TIN for BPA is 93-0334712.

All offerors, other than noted above, are required to submit its Taxpayer Identification Number requested below in order to comply with the Department of Treasury payment processing requirements of 31 U.S.C. 3332 and 7701, and the reporting requirements of 26 U.S.C. 6041, 6041A, and 6050M and implementing regulations issued by the Internal Revenue Service. If the resulting contract is subject to those requirements, the failure or refusal by the offeror to furnish the information may result in a suspension of payment and a thirty-one (31) percent reduction of payments otherwise due under the contract.

Taxpayer Identification Number _____.

(End of clause)

Clause 4-2 Reserved.

PART 5 PRIVACY ACT AND FREEDOM OF INFORMATION ACT

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Clause 5-1 PRIVACY ACT 5

5.1 PROTECTION OF INDIVIDUAL PRIVACY.

5.1.1 General.

INFORMATION:

(a) The Privacy Act provides safeguards for individual privacy when BPA contracts for the design, development, or operation of a system of records on individuals on behalf of BPA to accomplish a program function. The Act requires that the contractor follow all of the rules on privacy that applies to BPA.

(b) A BPA employee may be criminally and/or civilly liable for violations of the Act. When the contract provides for operation of a system of records on individuals, contractors and their employees are considered agents of the BPA for purposes of the criminal penalties of the Act.

5.1.1.1 Clause Usage Prescriptions.

PROCEDURE: The CO shall insert Clause 5-1, Privacy Act, in solicitations and contracts and non-Federal IGCs for professional and research and development services, when the proposed contract will involve the design, development, or operation of a system of records on individuals to accomplish a BPA function.

5.2 FREEDOM OF INFORMATION ACT.

(a) ***POLICY:*** BPA shall provide the public prompt access to its records, compliant with the letter and spirit of the Freedom of Information Act (FOIA). Employees may furnish to the public, informally and without compliance with the procedures in this section, information and records of types, which they customarily furnish to the public in the regular performance of their duties. Other information shall be made available to the public, unless the FOIA authorizes nondisclosure, and disclosure would not be in the public interest. Disclosure of information subject to the fourth exemption of the FOIA (trade secrets and commercial or financial information privileged or confidential) is normally contrary to the public interest.

(b) ***INFORMATION:*** This subpart describes policies and procedures for responding to requests filed under the Freedom of Information Act (FOIA), 5 U.S.C. 552. These procedures focus on situations likely to arise in a purchasing context. For complete FOIA regulations and procedures, see 10 C.F.R. 1004, as amended, and consult with the BPA Freedom of Information (FOI) Act Officer.

(c) ***INFORMATION:*** COs may receive requests for records that may be exempt from mandatory public disclosure. The exemptions most often applicable are those relating to trade secrets and confidential commercial or financial information (Exemption 4), inter-agency or intra-agency memoranda (Exemption 5), or personal and medical information pertaining to an individual (Exemption 6). Since

these requests often involve complex issues requiring an in-depth knowledge of a complex body of court rulings and policy guidelines, COs are cautioned to comply with the implementing regulations and to obtain necessary guidance from the BPA FOI Act Officer.

5.2.1 Receipt of a Request.
PROCEDURES:

(a) A FOIA request should be made in writing and addressed to the FOI Officer. Requests are deemed to be received only upon actual receipt by the FOI Officer. A CO who receives a FOIA request directly from the requester shall:

(1) Make a copy of the request;

(2) Immediately contact the FOI Officer and send the original request to be logged in by the FOI Officer (do not write the requester); and

(3) Begin to research the response if appropriate.

(b) The FOI Officer will:

(1) Determine who will be the Authorizing (or Denying) Official. The Authorizing (or Denying) Official is the BPA employee who either has custody or is responsible for records requested under the FOIA. For requests involving solicitations, contracts and related documents, this shall be the cognizant CO.

(2) Write to the requester and acknowledge receipt of the request. This acknowledgment letter, signed by the FOI Officer, informs the requester of the official date of receipt, the due date for our response (20 working days from the date of receipt), and the name of the primary Authorizing Official.

(3) Send a copy of the request, a copy of the acknowledgment letter, and detailed instructions to the Authorizing Official who will complete a response within 20 working days after the date of receipt of the request.

(c) The Authorizing Official shall then determine whether or not BPA has the requested information and, if so,

(1) Identify and review the requested documents.
(2) Determine whether the information can be released.
(3) Notify the originator of the requested data to solicit comments regarding its release. If the originator objects to the release of data, the Authorizing Official, in consultation with General Counsel, must determine whether or not to accept the recommendation of the originator to deny release, in whole or in part, as per 5.2.3 and 5.24.
(4) If the data can be released (request granted in whole), the Authorizing Official shall within 20 working days (see 5.2.7):
  (A) Prepare a letter to grant the request in accordance with 5.2.2;
  (B) Consult with General Counsel and/or the FOI Officer, as necessary;
  (C) Sign and mail the cleared response to the requestor, and send a copy to the FOI Officer.
(5) If the data can not be granted in whole (granted or denied in part or denied in whole), the Authorizing Official shall within 20 working days (see 5.2.7):
  (A) Prepare a draft letter to the requester for the FOI Officer's signature, either granting or denying the request in part or denying in whole (see 5.2.3 and 5.24);
  (B) Consult with General Counsel and/or the FOI Officer on draft response;
  (C) Send the response letter to the FOI Officer for his signature.

5.2.2 Granting the Request.

PROCEDURE: If the requested information is available and is not exempt from public disclosure, the written response shall grant the request and either attach the documents or state when and how the documents will be made available. Fees may be charged if the cost to BPA in supplying the information exceeds $15.00. These fees may be waived if the FOI Officer determines that it is in the public interest to do so. The Authorizing Official shall consult with the FOI Officer if fees are anticipated. If fees are applicable, the information cannot be released until all charges are paid in full. The FOI Officer will assess any such fees. Financial Services will collect any such fees.

5.2.3 Denying the Request.
PROCEDURE: If the material is exempt from mandatory public disclosure, and it is in the public interest to withhold it, the written response shall deny the request. The response must include the reason for denial, the specific exemption under the FOIA, an explanation of how the exemption applies to the particular record withheld, a statement addressing the issue of whether there is any segregable nonexempt material in the document, and a statement explaining why a discretionary release is contrary to the public interest.

(a) Exemptions. Of the nine exemptions authorizing the withholding of a record, two are most likely to apply to information received during the BPA purchasing process:

(1) FOIA Exemption 4: Trade secrets and commercial or financial information obtained from a person and privileged or confidential (5 U.S.C. 552(b)(4)). In the purchasing process such information usually comes into BPA's possession in response to a request for proposal or similar document. A private business submitting confidential or privileged information to BPA may claim an exemption from mandatory public disclosure for all or part of it. If BPA receives an FOI request for such information, the submitter must be notified and allowed to participate in the decision-making process. However, the Authorizing Official shall be responsible for making an independent, final determination of whether or not to disclose. If the decision is to release the information, the submitter must be notified not less than seven days before the intended public disclosure. The Authorizing Official will consider the following criteria in determining whether information can be withheld under Exemption 4:

(A) Whether the information has been held in confidence by the person to whom it pertains;
(B) Whether the information is of a type customarily held in confidence by the person to whom it pertains and whether there is a reasonable basis therefore;
(C) Whether the information was transmitted to and received by BPA in confidence;
(D) Whether the information is available in public sources;
(E) Whether disclosure of the information is likely to impair BPA's ability to obtain necessary information in the future; or
(F) Whether disclosure of the information is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.

(2) FOIA Exemption 5: Inter-agency or intra-agency memoranda or letters which would not be available by law to a party; other than an agency in litigation with the agency (5 U.S.C. 552(b)(5)). Exemption 5 includes the deliberative process privilege, which protects recommendations or opinions generated before the decision-making process is concluded, and the attorney-client privilege and attorney work product.

(b) How the exemption applies. The response must include a reasonable specific justification relating the exemption to the particular information being requested. Specific facts supporting the conclusions reached are required, not generalized restatements of BPA regulations and procedures.

(c) Segregation of exempt material. If only portions of a document are exempt from mandatory disclosure, the exempt portions must be deleted, if practicable and the remainder of the document released.

(d) The response denying a request must also include the name and title of the Denying Official and the following statement explaining procedures for appealing the denial:

You may appeal this denial of your request pursuant to 5 U.S.C. 552(1)(6)(A)(1) and 10 C.F.R. 1004.8. Such appeal must be in writing and made within 30 days of receipt of this letter to the Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue, S.W., Washington D.C. 20585, and both the appeal letter and envelope shall be clearly marked "Freedom of Information Appeal." If you appeal and are still denied the material you request, you may appeal within the Federal Court District in which you reside, or have your principal place of business or in which the Bonneville Power Administration's records are located, or in the District of Columbia.

(e) After drafting the denial response in consultation with General Counsel according to the guidelines above, send the original to the FOI Officer for signature. The FOI Officer shall sign the response and send it by certified or registered mail, return receipt requested. A signed copy of the response is kept in the FOI Officer's official files.

5.2.4 Grant the Request in Part and Deny It in Part.
PROCEDURE: Segregate the exempt from the nonexempt documents or portions thereof and follow the procedures above.

5.2.5 Records Cannot Be Located or Do Not Exist.
PROCEDURE:

(a) There is no obligation to compile or create a record solely for the purpose of satisfying a request. If a requested record is known to have been destroyed or otherwise disposed of, or if no such record is known to exist, the requester shall be appropriately notified according to the denial procedures above. Concurrence of General Counsel is not required in these instances; however, when a request is denied because the record does not exist, consultation should be held with either the FOI Officer and General Counsel to assure that the records do not exist elsewhere within BPA.

(b) There is, similarly, no obligation to honor a request for records not yet in existence, even where such documents may be expected to come into existence at a later time. The requester may be notified when the document may be available as part of the denial response.

5.2.6 Additional Information is Required to Clarify Request.
PROCEDURE: The Authorizing Official will contact the requestor if additional information is needed to clarify the request. If the request is too vague or all-encompassing to allow a response, the Authorizing Official will work with the FOI Officer, as necessary, to clarify the request. If that is insufficient, a written response must be prepared, specifying the reasons for the inadequacy of the request and extend to the requester an opportunity to confer with the Authorizing Official or other knowledgeable BPA personnel to reformulate the request. This response must be cleared by General Counsel and signed by the FOI Officer.

5.2.7 Time Limits and Extensions.
PROCEDURES:

(a) Ordinarily, the Authorizing Official has 20 working days after receipt to respond to a FOI request. If an initial determination cannot be made within that time, notify the FOI Officer. The Authorizing Official will negotiate an extension with the requester. Any such extension shall be confirmed in writing, specify the total time agreed upon, and be signed by the FOI Officer.

(b) If an agreement with the requester cannot be reached, the Authorizing Official may take an extension not to exceed 10 working days. This extension requires:

(1) Unusual circumstances, (i.e. records located at field facilities, a voluminous amount of separate and distinct records, or the need to consult with another agency;)

(2) A written notification of the extension to the requester giving the reason and the date for the determination;
(3) Clearance of the letter by General Counsel, a copy to the FOI Officer.

5.50 TEXT OF CLAUSES.
The following clause is referred to in BPI Part 5:

5-1 Privacy Act

Clause 5-1 PRIVACY ACT (Oct 93)(BPI 5.1.1.1)
(a) The Contractor shall be required to design, develop, or operate a system of records on individuals, to accomplish an agency function subject to the Privacy Act of 1974, Public Law 93-579, December 31, 1974 (5 U.S.C. 552a) and applicable DOE regulations.

(b) The Contractor agrees to:

(1) Comply with the Privacy Act of 1974 (the Act) and the agency rules and regulations issued under the Act in the design, development, or operation of any system of records on individuals.

(2) Include this clause in all subcontracts awarded under this contract which require the design, development, or operation of such a system of records.

(c) In the event of violations of the Act, a civil action may be brought against BPA if the violation concerns the design, development, or operation of a system of records on individuals to accomplish a BPA function, and criminal penalties may be imposed upon the employees of BPA when the violation concerns the operation of a system of records on individuals to accomplish a BPA function. For purposes of the Act, when the contract is for the operation of a system of records on individuals to accomplish an agency function, the Contractor and any employee of the Contractor are considered to be employees of BPA.

(End of clause)

PART 6 PLANNING, STRATEGY, AND REQUISITIONING

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6.1 REQUISITIONER-CONTRACTING OFFICER PARTNERSHIP.
INFORMATION:

(a) The success of a purchase transaction depends upon a close working relationship between the requisitioner, the purchasing staff, and affected technical personnel. The purpose of that relationship is to obtain the best buy for BPA's ultimate customer, the ratepayer.

(b) This Part, and indeed the entire BPI philosophy, is founded on the assumption that the purchasing staff and the requisitioner form a close-knit team which will work closely together, sharing the information and effort needed to plan, develop and implement the best possible strategy for the transaction. When necessary, the team will also share the responsibility and effort for evaluation and negotiation of the purchase. In order to complete a transaction smoothly, certain actions in this part (and throughout the BPI) are assigned to one party or organization. However, it is clearly the intent of the BPI to remove barriers to cooperation and progress, and to encourage the parties involved to work as partners in the transaction.

6.2 RESERVED.

6.3 DETERMINING REQUIREMENTS.
POLICY: It is the requisitioner's responsibility to determine and specify requirements for the goods and services necessary to carry out BPA's programs.

6.4 COMMUNICATION OF REQUISITIONER'S NEEDS.
INFORMATION: Purchase descriptions are used to communicate the requisitioner's needs to the CO and potential suppliers. Such descriptions must be clear and complete to assure efficient communication. Requisitioners are encouraged to contact COs for assistance in obtaining market or technical information, and for assistance in preparing specifications or statements of work.

6.4.1 Use of Commercial Item Descriptions.
POLICY: Commercial item descriptions should be used whenever such descriptions will specify a suitable product or service. However, if commercial item descriptions are not adequate, they should not be used. The use of commercial item descriptions will generally result in shorter processing and delivery lead times than will the use of detailed design or performance specifications. Commercial item descriptions include industry standards, manufacturer's standards, standard grades, and brand name items. The use of additional BPA specifications or testing requirements is generally not appropriate with such descriptions. See BPI 28.1.2.

6.4.1.1 Clause Usage Prescriptions.
PROCEDURE: If using brand-name descriptions, and alternatives to the brand name specified would be acceptable, the CO may include a clause similar to 6-1 Alternative to Brand Name Requirement, in solicitations. If alternate products are not acceptable, the solicitation shall state this requirement. Clause 6-1 shall not be included in solicitations for the acquisition of noncommercial items and services.

6.4.2 Specifications.
(a) ***POLICY:*** BPA shall specify its needs in a form that permits competition and innovation and avoids restrictive features that would limit acceptable offers to one offerors' product unless the features are essential to satisfy the program's needs. In so doing, BPA will use performance (functional) specifications to the maximum extent practicable when commercial item descriptions cannot be used.

(b) ***INFORMATION:*** A specification is a description of the technical requirements for a material or product that includes the criteria for determining whether these requirements are met.

6.4.3 Statements of Work
INFORMATION: A statement of work is used in service contracts and describes the objectives, purpose, and, to the extent they are available, the detailed requirements for the work to be accomplished. It may also specify the desired approach to the performance of the work and include a means of determining

that the work has been performed. The degree of specificity in the statement of work will depend upon the type and size of the project. See Appendix 6A for the format of a statement of work.

6.4.4 Liquidated Damages.
INFORMATION: If liquidated damages are to be included in a contract, the CO will request the requisitioner to provide support for determining the amount of damages. See Part 24.

6.4.5 Estimate of Contract Costs.
INFORMATION: The Bonneville Enterprise System electronic requisition module requires requisitioners provide an estimate of costs for all transactions. Instructions for preparing these estimates are provided in Appendix 6-A.

6.4.6 Supplier Development.
INFORMATION: Requisitioners may find it advisable to request that the CO award multiple orders for certain goods or services in order to assist, develop, or evaluate potential second sources, to help develop a small supplier's capability, or for other reasons. This could be accomplished by awarding the majority of a requirement to a known successful supplier, and a smaller portion to another contractor. If this appears to be desirable, the requisitioner and CO should jointly develop an appropriate purchasing strategy.

6.4.7 Identifying Systems of Records to Be Maintained.
PROCEDURE: The requisitioner shall determine whether a contract will involve the design, development or operation of a system of records as defined in the Privacy Act (See 5.1). If so, the requisitioner shall insure that the work statement specifically identifies the system of records on individuals and the design, development, or operation work to be performed. The work statement should identify the BPA/Departmental rules and regulations implementing the Privacy Act.

6.4.8 Identifying Safety and Work Practice Hazards.
PROCEDURE: The requisitioner shall assess whether safety or work practice hazards may be present or likely to occur during performance of the contract. The requisitioner shall provide the CO with a description of those safety or work practice hazards identified. This information can be included in the proposed contract Statement of Work or specifications or provided to the CO in a separate document. The CO shall incorporate this safety and work practice hazards information in the contract. The contractor shall be required to develop a safety plan, and, if necessary, a site-specific safety plan to mitigate such safety and work practice hazards. Refer to BPI 15.2 for additional safety requirements.

6.5 SUBMISSION OF REQUISITIONS.
POLICY:

(a) Electronic Material Requests, Purchase Requisitions, Contract Requisitions, and Contract Change Requests are the official methods for identifying a procurement requirement and certifying that sufficient funds are available in the program office's budget.

(b) Upon receipt of a request or requisition the CO shall promptly contact the requisitioner to acknowledge receipt and confirm any requirements, if necessary, including the required delivery timeframe. In the event of a material change to the requirements the CO may require the requisitioner to revise the original request or requisition and obtain approval for the revisions. The CO may make changes to the requirements based upon verbal approval of the requisitioner unless the changes, when combined with any previously accepted revisions, increase the dollar amount of the original request or requisition by $500 or 25 percent using the method that results in the greater value. Approval of revisions in excess of $500 or 25 percent of the original amount shall be obtained by revising and re-approving the request or requisition.

(c) The requisitioner is responsible for ensuring that any required management approvals are obtained prior to award. The requistioner must obtain environmental clearances or permits and right of way authorizations before the CO is allowed to issue the notice to proceed. In some cases the notice to

proceed may only cover specific portions of the work in those instances where the environmental and right of way clearances have only been obtained for specific portions of the work. The authorization of the electronic requisition constitutes a certification that all required management approvals have been obtained. The requisitioner shall identify any approvals that have not been obtained in the requisition or request. The requisitioner shall identify any Critical and Sensitive Information contained the specifications, drawings, or statement of work.

(d) The CO shall make a reasonable effort to ensure that the requisitioner is aware of any special approvals that may be applicable to a particular procurement. The CO shall not award contracts without the requisitioner's assurance that the required approvals have been obtained. The CO need not obtain copies of the approvals for the contract file, unless the CO determines that the complexity or unique circumstances of the procurement warrant documentation of the approvals.

6.6 PROCUREMENTS REQUIRING ADDITIONAL APPROVALS.

Goods or Services	Approving Official	Policy Ref
Administrative telecommunications services and equipment	IT Network Services Telecom	BPAM 607
Airplane or helicopter equipment and services	Transmission Aircraft Services	BPAM 190
Appliances (microwaves, refrigerator, etc.)	Workplace Services Facility Operations	BPAM 1031
Audio-visual equipment	Workplace Services Operations and Planning	BPAM 600
Audio-visual design and production	Public Affairs	
Audit services	Internal Audit	BPAM 02
Digital cameras	IT Program Management	BPAM 1109
Ergonomic Assessments	HCM Talent Sustainment	BPAM 1037, BPAM 183
Hazardous Waste Disposal	Pollution Prevention and Abatement	BPAM 903
Herbicides, Pesticides	Pollution Prevention and Abatement	BPAM 903
Interior space planning and design services	Workplace Services Space Management	BPAM 1037
IT equipment, supplies, and services	IT Program Management	BPAM 1109
Motor Vehicle and Heavy Equipment modifications, add-on equipment, repairs	Fleet Management, Mobile Equipment Maintenance	
Memberships, Corporate and Individual	Finance Disbursement Operations	HCM PL 410-04
Office & executive furniture, filling systems	Workplace Services Space Management	
Office equipment, NON-IT	Workplace Services Operations and Planning	BPAM 600
Operational telecommunications equipment, PSC test equipment, radios	Transmission Engineering and Technical Services	BPAM 608
Personal Use Items	Chief Certifying Officer	BPI 6.9
Printers, Copiers, Scanners	IT Program Management	BPAM 1109
Printing services	Workplace Services Printing & Mail Services	BPAM 1013
Products containing hazardous waste	Pollution Prevention and Abatement	BPAM 903
Professional Licenses and Certifications	Human Capital Management	HCM PL 410-03
Publication design	Public Affairs	
Real property leases	Transmission Real Property Services	BPAM 8

Records systems on individuals	Privacy Act Officer	BPAM 2, BPI 5
Rental of motor vehicles and heavy equipment	Fleet Management, Equipment and Tool Loan Pool	
Sponsoring and participating in public events	Public Affairs	BPAM 155
Transmission field test equipment	Transmission Asset Manager	BPAM 8

6.7 PREFERENCE FOR COMMERCIAL PRODUCTS OR SERVICES.

POLICY: BPA shall acquire commercial products and services and use commercial distribution systems whenever these products, services, or distribution systems fully satisfy BPA's needs. See BPI Part 28, Acquisition of Commercial Items and Services.

6.8 REQUIRED SOURCES.

INFORMATION: This subpart lists a number of commodities and services, the purchasing of which is affected by special provision of law, delegation of authority, regulation, BPA policy, or procedure peculiar to the item. In addition, Appendix 6-A describes other controls on the purchase of specific items or services. Program offices are responsible for obtaining the necessary approvals before submitting the Requisition to the CO.

6.8.1 Blind-made Products and Services.

POLICY: BPA chooses to acquire products and services offered for sale by workshops of the blind or other severely handicapped persons from such workshops, unless clearances are obtained from the Committee for Purchase of Products and Services of the Blind and Other Severely Handicapped. The products and services are listed in the Committee's Procurement List. If the products or services are also available from Federal Prison Industries, Inc., they must be obtained from FPI, if available. Often GSA stocks these products.

6.8.2 Federal Information Processing (Information Technology) Resources.

(a) ***INFORMATION:*** Definition. Federal Information Processing (FIP) resources are defined in OMB Circular No. A-130. Another common descriptor is Information Technology (IT). In summary, the term includes the hardware, software, support services and telecommunications operated by BPA or a contractor of BPA, or other organization that processes information on behalf of BPA to accomplish a BPA function, regardless of the technology involved. The BPA Office of the Chief Information Officer (CIO) was established in accordance with the Clinger/Cohen Act of 1996 (also known as the Information Technology Management Reform Act), which defines the roles and responsibilities of the CIO with respect to all agency IT management.

(b) ***POLICY:*** BPA generally follows the guidance of OMB Circular No. A-130, and the Clinger/Cohen Act, for management of all elements and activities of information technology. The purchase of IT resources shall be made by those with delegated authority and in accordance with policies of the HCA/OPMO.

(c) ***PROCEDURE:*** Review of information technology (IT) purchases. The Chief Information Officer (CIO) or designee shall review and approve plans (not requisitions for individual transactions) for all information technology purchases, including all control system FIP resources used to control or monitor BPA's transmission system, or used to develop the systems to control or monitor the BPA transmission grid.

(d) ***PROCEDURE:*** Forwarding of Requisitions. All requisitions for IT resource purchases, including those for control system IT resources, shall be sent directly to the Contracting Officer supporting the requisitioner.

(e) ***INFORMATION:*** The CIO has responsibility for determining the agency’s information technology system integrity, security, and compatibility. To maintain appropriate system integrity and security, information regarding BPA’s current IT system architecture, platforms, operating systems, and specific software applications will only be disclosed on a need to know basis, both within and outside on BPA, per the BPA Program Cyber Security Plan issued by the Office of the Chief Information Officer.

Requisitioners are required to comply with all CIO cyber security policies regarding disclosure of information during contacts with vendors or other public and private entities, and are required to prepare purchase descriptions and statements of work that reflect current CIO policy (e.g., discussion or descriptions of internal IT architecture, systems, and operations, total date-time compliance).

(f) ***PROCEDURE:*** Contracting Officers and their designees shall not disclose to any outside source, including IT businesses, corporate survey firms, consultants, publications, potential suppliers, or current contractors, any information pertaining to BPA IT system architecture, platforms, operating systems, specific software applications, hardware, or any portion of the general BPA IT environment, except as authorized by the requisitioner acting under the CIO's policy guidance, and then only as necessary to acquire goods and services required to satisfy the IT need.

6.8.3 Purchase of Printing and Related Supplies.
(a) ***INFORMATION:*** "Government printing" means printing, binding, and blank bookwork for the use of an executive department, independent agency, or establishment of the Government. "Related supplies," as used in this subpart, means supplies that are used and equipment that is usable in printing and binding operations. The purchase of preprinted documents is not considered printing services, and is not subject to this section.

(b) ***INFORMATION:*** The policies limiting purchase of Government printing and related supplies is required by 44 U.S.C. 501, 502, 504, and 1121; and the Government Printing and Binding Regulations, published by the Joint Committee on Printing (JCP), Congress of the United States.

(c) ***POLICY:*** Requisitioners shall obtain approval from the BPA Printing Officer before purchasing in any manner, whether directly or through purchases of other supplies or services, for printing and related items. Examples of printing requiring this approval include composition, plate making, presswork, binding, silk-screening of specialty advertising items, and micrographics (when used as a substitute for printing).

6.8.3.1 Clause Usage Prescriptions.
POLICY: The CO shall include Clause 6-2 Printing, in solicitations and contracts where it is probable that printing may be required as a part of the effort. If there is a question as to whether or not printing will be required, the clause should be included.

6.8.4 Steel Storage Shelving.
POLICY: Steel storage shelving is a mandatory Federal Prison Industries product. BPA COs may place orders only with GSA or FPI as appropriate.

6.9 PURCHASE OF PERSONAL USE ITEMS.
6.9.1 General.
(a) ***POLICY:*** In the absence of specific statutory authority, BPA funds may not be used to acquire items that are solely of benefit to individual BPA employees. An expenditure made primarily for the benefit of BPA is permissible, however, even if the object of the expenditure is for the personal use of employees (e.g., microwave ovens, safety, employee recognition, and other approved incentive award program items). See BPA Personnel Letter 451-1 and BPAM 440/451A regarding policy and procedures for purchase of employee recognition and incentive items.

(b) ***INFORMATION:*** Generally, "improper items" are those items which could be construed as being solely for the personal use or benefit of specific employees, and not constituting expenses that are necessary, proper, or incident to the proper execution of BPA's programs and mission. Examples of potentially improper items include entertainment and recreational expenses, food for BPA employees, food and beverage preparation equipment, gifts, lobbying and related matters, personal/special use clothing, personal expenses and furnishings, etc.

6.9.2 Special Circumstances.
INFORMATION: Special equipment may be made available under the Rehabilitation Act of 1973 [29 U.S.C. § 701 et seq.] if the employee is found to be "handicapped" (within the meaning of the statute and its implementing regulations) and the particular purchase will enable the qualified handicapped employee to perform official duties. See Comp. Gen. December B-213666 [26 July 1984].

Such items in addition to the items described in BPI 6.9.1 are subject to the procedures described below.

6.9.3 Procedures.
PROCEDURES: When potentially improper items, or items which may be construed as being for the personal benefit of individual employees are required for BPA's program purposes, the following procedures will apply. These procedures are required each time such an item is acquired.
(a) If the requisitioner (Program Office) is not sure whether the proposed purchase would be deemed improper, the requisitioner should contact the Chief Certifying Officer for guidance. If the Chief Certifying Officer determines that the item is an acceptable item, he/she will forward a signed statement to that effect, which is to be attached to the procurement request.

(b) Items that are determined to be potentially improper will be processed as follows:
(1) Requisitioners (Program Office) will document the need for items that are determined to be potentially improper in a memorandum to the Chief Certifying Officer. The memorandum will describe the item(s) being requisitioned, the quantity to be requisitioned, and the estimated total cost of the proposed purchase. It will also describe how the item is to be used in the program, and how it will be distributed. If the item is intended to benefit a specific employee, an explanation of why BPA should pay for the item shall be provided. The requesting person's second level performance manager should sign this memo. A concurrence line for the signature of the Chief Certifying Officer shall be provided.
(2) The Chief Certifying Officer will review the memorandum, and determine if payment can be made. If payment can be made, the memorandum will be approved and returned to the requester. If the initial review indicates that payment cannot be made, the Chief Certifying Officer will convene a meeting with the requisitioner and a representative from the General Counsel. The Chief Certifying Officer will approve or decline payment based on available legal and policy guidance.

(c) The approved memorandum will be attached to the Purchase Request when it is sent to the CO for action. If the CO receives a Purchase Request for an item as described in this part without the memorandum indicating that payment will be made, the Purchase Request shall be returned to the requisitioner with a memorandum stating that the procedures described in this subpart must be followed.

(d) When the purchase is executed, the CO will write the contract number on the approved memorandum, retain a copy for the official file, and send the original to Disbursement Operations with the contract/purchase order attached.

6.10 PRODUCT/CONTRACTOR INFORMATION.
(a) ***INFORMATION:*** The requisitioner and the CO form a partnership in obtaining the goods and services needed to execute BPA programs. While the CO is the source selection official, the program office determines what is needed to best execute the program. Requisitioners, Quality Assurance, and other technical personnel are often prime sources of information on the capabilities of various products or suppliers, as they are frequently in contact with a wide variety of firms providing goods or services used by BPA. Therefore, they are in a position to provide information that will help the CO in the selection of suppliers.

(b) ***INFORMATION:*** Requisitioners are encouraged to provide COs with information about potential suppliers or products which would meet the project needs. Such information could include information on each potential supplier, product, or service, relative quality, price, and delivery terms.

(c) ***POLICY:*** Requisitioners may independently contact potential suppliers for product and pricing information at any time prior to initiation of purchasing action as represented by the submission of a PR to the CO. During any contacts with prospective or actual BPA supplier, however, personnel other than COs are required to emphasize that--

(1) The discussion is for the purpose of obtaining information, not placing an order;
(2) The person is not authorized to issue an order, and any order will be placed by a BPA CO;
(3) The firm is not authorized to expend any money based on this contact; and
(4) The firm is not authorized to expect an award.

(d) ***POLICY:*** Requisitioners should clearly communicate to the supplier or prospective vendor that the contact is for research purposes only and does not include any commitment to purchase.

6.11 LEASING CONSIDERATIONS.

6.11.1 Equipment Lease or Purchase.

(a) ***POLICY:*** Program offices should consider whether to lease or purchase equipment based on a case-by-case evaluation of comparative costs and other factors.

(b) ***PROCEDURE:*** The decision to lease or buy should be based on an analysis and comparison of all cost factors, such as lease and purchase costs, and maintenance expenses, which are extended over the period of anticipated use of the equipment (Total Cost of Ownership or Life Cycle Costing). After the costs of leasing and purchase have been compared, other non-financial issues should be considered. These include: the state of the technology and the probability of rapid change in the capabilities of newer machines, the lack of control which results from not owning the equipment, availability of funding for the purchase, length of time the equipment will be required, etc. COs are available to discuss, investigate and help requisitioners consider these alternatives. The program office shall maintain documentation of such analyses.

6.11.2 Reserved.

6.12 TRADE-IN OF PERSONAL PROPERTY.

POLICY:

(a) BPA may trade in non-excess personal property concurrent with the purchase of similar replacement items. Such a trade-in may be desirable because it will result in a trade-in allowance against the cost of the new purchase.

(b) BPA may trade, without monetary appraisal or detailed listing or reporting, books and periodicals in its libraries not needed for permanent use for other books and periodicals.

(c) The sale (other than by a trade-in) of personal property is not covered by this subpart. See BPA Personal Property Instructions (PPI), Part 5 and PPI Appendix 5-A.

(d) BPA shall seek the maximum return for any item of property to be traded, when compare to the effective amount of credit BPA would otherwise receive against its U. S. Treasury debt if the property is transferred to another Federal agency. This credit is not provided when property is traded in on a purchase of similar property. Therefore, requisitioners should assess the benefits from each approach before determining the approach to take.

(e) A trade-in is authorized only when ALL the following conditions apply:

(1) The items traded and the items acquired are similar in function, unless otherwise approved by the HCA/OPMO;
(2) The items traded (with the exception of automatic data processing equipment to be exchanged by GSA) are not excess;
(3) One item is acquired to replace one similar item. However, there need not be one-for-one replacement if more or fewer items must be acquired to perform the tasks for which the old items were used; or the items being traded are containers; and
(4) The provisions of Part 5 of the PPI have been met.

(f) All categories of non-excess personal property (except high-risk items as defined in PPI Part 1) are eligible for trade-in consistent with good business practice and program requirements.

(g) Before issuing a solicitation or otherwise entering into a contract involving the trade-in of property the requisitioner shall provide the CO with a copy of the Asset Center Representative's cost disposal analysis and approved Property Survey Report, and any restrictions or limitations that apply to the solicitation for exchange. See BPI 7.2.10 for CO responsibility for trade-ins.

6.13 RESERVED.

6.14 RESERVED.

6.15 STRATEGY PANELS.

(a) ***POLICY:*** The purpose of a Strategy Panel is to establish a strategy for sensitive and mission critical procurements that maximizes the probability of a successful procurement through identification and mitigation of high probability and high consequence risks. Purchases or groups of related purchases in excess of $500,000 that pose significant risks to the agency and are mission critical as determined by the CO, Performance Manager, Program/Project Manager, Sourcing Services Manager, Chief Supply Chain Officer, HCA, or Administrator's office, shall be subject to a Strategy Panel. Strategy panels are not normally convened for new awards and modifications to awards with federal, state, or local governments, if the entity has sole jurisdictional control over the affected program or project site.

(b) ***INFORMATION***:

(1) The purpose of the panel is to assist the CO and other purchasing team members by insuring that all risk factors relevant to the procurement have been identified and analyzed to develop a purchase strategy that incorporates treatments to mitigate or eliminate high probability and high consequence risks.

(2) Such panels may be used for specific contracts (contract strategy panels) or for projects that will require multiple contracts that could impact each other (business strategy panels).

6.15.1 Designation of Strategy Panel Members.

PROCEDURE: The Chief Supply Chain Officer (or designee), shall chair the strategy panel for purchasing activities. The panel chairperson will designate members of the panel as necessary for a specific contract, and include the Head of Contracting Activity (HCA) or designee. Legal counsel and Risk Management staff shall be invited to participate.

6.15.2 Selection of Program/Purchase Actions for Review.

PROCEDURE: In selecting purchasing actions for review, the CO and Chairperson shall conduct a risk assessment that considers factors such as:

1.) Dollar value of the proposed purchase;
2.) Dollar value of the total project;
3.) Contract/project complexity and financial risk;
4.) Contract/project uniqueness;
5.) Sensitivity of the contract/project;
6.) Public impact of the contract/project;
7.) Other unusual or nonstandard characteristics;
8.) Transactions which contemplate the use of multiple indefinite quantity indefinite delivery contracts constituting a "pool" or "stable" of contractors available for the same type of work;
9.) Unique or high safety or work practice hazards: and
10.) Procurements which present a high risk that the contract award will be protested.

6.15.3 Operation of the Strategy Panel.
PROCEDURES:

(a) The panel shall be convened prior to finalization of the specifications or work statement and early enough in the process so that BPA has not committed to any given approach.

(b) At the panel meeting, presentations by the Program Office and the CO shall describe alternative courses of action and the recommended strategy to purchase the requirement as specified, on schedule, and within budget. The Program Office and the CO jointly prepare and deliver this presentation. It must describe their assessment of the critical risks associated with the procurement and explain how the recommended purchasing strategy will eliminate or mitigate the impact of those risks.

(c) The panel will consider the overall business strategy for the program or projects, the management plan, purchasing, contractual, and related business approaches which are appropriate to the proposed project or contract. The panel will also review the risk analysis conducted by the CO and Program/Project Manager

(d) Minutes of panel meetings, including the advisory recommendations of the panel, shall be prepared but will be limited to documentation of major points and issues discussed. The CO has final authority regarding whether or not to follow the panel's recommendations. The reasons for not following these recommendations shall be documented in the official file.

6.16 RATIFICATION OF UNAUTHORIZED CONTRACT COMMITMENTS.
INFORMATION: As described in BPI 2.4.1, only BPA employees who possess written delegation of authority from the HCA may commit BPA funds or enter into a contract. All other commitments are unauthorized, and must be ratified by a CO or the HCA. See Appendix 6-A, Requisitioner's Guide to Preaward Activities, Part 3.5, for requisitioner procedures concerning ratification, and BPI 2.4.2 for CO responsibilities.

6.17 CONTRACTS WITH FEDERAL EMPLOYEES.

6.17.1 Contracts With Current Federal Employees.
POLICY: BPA shall not knowingly award a contract to a Federal employee or to a business concern owned or substantially controlled by one or more Federal employees.

6.17.2 Contracts With Former BPA Employees.
POLICY: BPA may enter into contracts with former BPA employees so long as all applicable legal and regulatory requirements are met, including BPI 23.1. No special documentation is required for contracts with former employees if multiple sources were considered under 11.6. When contracts are contemplated with former BPA employees without considering multiple sources other than ex-BPA employees, the cognizant Vice President, must approve the PR and forward a copy to the HCA.

6.17.3 Contracts With Other Federal Annuitants.
POLICY: BPA may enter into contracts with Federal annuitants so long as all applicable legal and regulatory requirements are met, including BPI 23.1. No special documentation is required when contracting with Federal annuitants.

6.50 TEXT OF CLAUSES.
The following clauses are referred to in BPI Part 6:

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Clause 6-1 ALTERNATIVE TO BRAND NAME REQUIREMENT (Jul 13)(BPI 6.4.1.1)

Notwithstanding the requirement for a specific brand name contained in this solicitation, BPA reserves the right to award to the best buy offer. Offerors submitting products other than the one specified which they believe will provide the same or improved performance will receive consideration if such products are clearly identified in the offers and are determined by BPA to meet its basic requirements. Unless the Offeror clearly indicates otherwise, the offer shall be considered as offering a brand name product specified. BPA's judgment concurring the acceptability of alternative products will be final.

(End of clause)

Clause 6-2 PRINTING (Oct 93)(BPI 6.8.3.1)

The contractor shall not engage in, nor subcontract for, any printing (as that term is defined in Title I of the U.S. Government Printing and Binding Regulations in effect on the effective date of this contract) in connection with the performance of work under this contract: Provided, however, that performance of a requirement under this contract involving the duplication of less than 5,000 copies of a single unit, or no more than 25,000 units in the aggregate of multiple units, will not be deemed to be printing. A unit is defined as one sheet, size 8-1/2 by 11 inches, one side only, one color.

(a) The term "printing" includes the following processes: composition, plate making, presswork, binding, microform publishing, silk screening, or the end items produced by such processes.

(b) If fulfillment of the contract will necessitate reproduction in excess of the limits set forth above, the contractor shall notify the Contracting Officer in writing and obtain the contracting officer's approval prior to acquiring on BPA's behalf production, purchase, and dissemination of printed matter.

(c) Printing services not obtained in compliance with this guidance may result in the cost of such printing being disallowed.

(d) The Contractor shall include in each subcontract hereunder a provision substantially the same as this clause including this paragraph (d).

(End of clause)

PART 7 CONTRACT TYPES AND METHODS

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7.1 CONTRACT TYPES.

(a) ***INFORMATION:*** "Contract Type" means the pricing structure of a contract which is used to allocate risk between the contractor and BPA. The pricing structure may be used to provide additional incentive to the contractor to perform faster, more economically, and/or with higher quality. Contract types typically vary according to the degree of cost risk to be assumed by the contractor. The amount of profit appropriately given depends on the degree of risk assumed. For example, fixed price contracts typically have higher risk and profit than cost reimbursement contracts.

(b) ***POLICY:*** The CO shall select the most appropriate contract type based on an assessment of the nature of the project and associated risks. The objective is to select a contract type which results in the best business approach for BPA, considering contractor risk and incentives for high performance. The CO shall consider the administrative costs to both BPA and the contractor when selecting the appropriate contract type. Exhibit 7A, Contract Types, compares contract types commonly used at BPA. It is provided for purposes of information except for portions specifically identified as "Policy" or "Procedure."

(c) ***POLICY:*** COs may use variations of the contract types described in the BPI as well as other contract types, with the following exceptions: 1) cost plus percentage of cost contracts may not be entered into without the approval of the HCA and 2) acquisitions of commercial items and services are subject to the restrictions identified in BPI 28.3.1. The HCA will not approve the use of any cost plus a percentage of cost contract if the contractor has control over either the quantity or the cost of goods/services being sold to BPA.

(d) ***INFORMATION:*** Contracts may be written in either Completion form or Term form.

(1) Completion form: the Statement of Work states a definite goal or target and specifies an end product which the Contractor is required to provide (e.g., a final report of research accomplishing the goal or target). In this case, BPA is buying an end product, and the Contractor carries greater risk regarding whether the goal of the project is met.

(2) Term form: the Statement of Work is written in general terms and obligates the Contractor to devote a specified level of effort (labor hours, materials, etc.) or assume specific responsibilities for a stated period of time. In this case, BPA is buying a level of effort, not an end product, and the Contractor is only obligated to provide a good faith effort to provide those hours. BPA carries greater risk regarding whether the goal of the project is met. Contracts where BPA buys a level of effort may be written as a time-and-material, fixed-price, or cost plus fixed-fee contract.

EXHIBIT 7-A -- CONTRACT TYPES

	7.1.1 Firm Fixed Price.	**7.1.2 Fixed Price with Economic Price Adjustment.**
DESCRIPTION	Price not subject to change regardless of actual costs incurred by contractor after award.	Same as fixed price, except contract price adjusted, upward or downward, based on occurrence of specific price adjustment conditions specified in contract. Price adjustments factors are commonly based upon percent changes in a published index, either for material, commodity, or labor, or a combination of these indexes.
USE WHEN	Typically used when: 1. Performance risk predicted to be minimal (e.g., readily available commercial items or repeat use of BPA detailed specification with minimal or no prior performance problems). 2. Price risk is minimal, based upon market pricing or cost information that permits realistic evaluation of probable performance cost.	Typically used when: 1. Price risk is high, usually from unstable market or labor conditions, either in the short or long term (e.g., commodity item with high content of precious metals or impending labor strike) 2. Long term business arrangement is advantageous (contract performance period usually greater than one year), but price risk--upward or downward--is unacceptable to either BPA or contractor.
CONSIDERATIONS	1. Price and performance risk for contractor is high, since contractor is responsible for controlling its costs and associated risks of performance within the fixed price. 2. Price risk for BPA is low, since BPA is to receive the contract deliverable for the fixed price. However, careful evaluation of project requirements and the offeror's price proposal must be made to ensure a meeting of the minds and ensure price does not include excessive allowance for risk.	1. Price risk for contractor and BPA are reduced if contract economic price adjustment factor(s) provide a reliable basis for adjusting contract price to reflect market price changes. 2. Important to ensure that the contingency (typically an index published by the Bureau Of Labor Statistics) is an objective indicator of the contractor's probable changes in cost. For example, the Employment cost Index (ECI) is generally preferable to the Consumer Price Index (CPI-U) if labor costs are the primary component of the contractor's price. 3. ***POLICY:*** If the contract is subject to the Service Contract Act and includes BPI Clause 10-4, Labor Standards - Price Adjustment, the CO shall ensure BPA does not duplicate price adjustments allowed under each clause. 4. ***PROCEDURE:*** See BPI 7.1.10 for applicable contract clause.

EXHIBIT 7-A -- CONTRACT TYPES (CONT.)

	7.1.3 Fixed Price Award Fee.
DESCRIPTION	Fixed price contract, not subject to any adjustment on the basis of the contractor's actual costs in performing the contract. Fee consists of an award amount that the contractor may earn in whole, in part, or not at all during performance. Fee must be sufficient to provide motivation for performance excellence per award fee plan (e.g., in such areas as quality, timelines, etc.). The amount of the award fee paid is determined by BPA's judgmental evaluation of the contractor's performance in terms of the criteria stated in the contract. Fee determination is made unilaterally by BPA, not subject to the Disputes clause (although impropriety in the determination process is subject to the Disputes clause).
USE WHEN	Typically used when: 1. Work can be well enough defined to permit the use of a fixed price contract, and the CO believes BPA can benefit by providing added incentives to encourage the contractor to perform beyond the minimum contract requirements. 2. Additional administrative effort and cost required to monitor and evaluate performance are justified by the expected benefits (typically price exceeding $2 million). 3. Typically multiple offices or functions will be supported by the contract.
CONSIDERATIONS	1. POLICY: COs shall consider the probable profit included in the fixed price when establishing the award fee amount. 2. POLICY: The contract shall contain an award fee determination plan which describes how BPA will determine award fee amount and frequency of payment to contractor. The following topics shall be covered: A. Performance criteria (describes the specific areas of performance to be evaluated, and the weighting given to each area). B. Frequency of evaluations, total award fee, and amount of fee allocated per performance evaluation period. C. Process for making changes to the plan. D. Termination (describes how the final period of evaluation will be treated should the contract be terminated for convenience). 3. ***PROCEDURE:*** See BPI 7.1.10 for applicable contract clause.

EXHIBIT 7-A -- CONTRACT TYPES (CONT.)

	7.1.4 Time and Materials.	**7.1.5 Cost Reimbursement- General.**
DESCRIPTION	Time and Materials contracts have characteristics of both fixed price contracts (hourly rates are fixed) and cost reimbursement contracts (labor hours are estimates and payment is based on actual hours incurred and the actual cost of materials, travel, and other incidental costs.) Time and Materials contracts include a contract ceiling limitation which the contractor may not exceed without approval of BPA. The specified fixed hourly rates include direct wages, overhead, general & administrative expenses, and profit. The profit rate may consider all cost elements, including labor, materials, etc.	Cost reimbursement contracts provide for payment of allowable, allocable, and reasonable costs. They establish an estimate of total cost for purposes of setting a contract ceiling limitation which the contractor may not exceed without approval of BPA. There are several sub-types: A. Cost B. Cost Sharing C. Cost Plus Fixed Fee (CPFF) D. Cost Plus Award Fee (CPAF)
USE WHEN	Typically used when: It is not possible to reasonably estimate the level of effort, but where a cost reimbursement contract would be inappropriate due to either relatively high administrative costs or the lack of an adequate accounting system on the part of a contractor to accumulate costs.	Typically used when: 1. Uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use a fixed price contract, and 2. Total value of the contract is high enough to justify the higher administrative costs when compared to a Time and Materials contract, and 3. Contractor's accounting system is adequate for determining costs.
CONSIDERATIONS	***POLICY:*** 1. All Time & Material contracts shall include a ceiling price which the contractor may not exceed without the CO's approval. 2. Costs for materials, travel, and subcontracts are compensable only if the contract specifically provides for such costs. Such costs are reimbursable at cost (excluding profit), except that a material handling fee is allowed if materials are being purchased.	***POLICY :*** 1. All Cost Reimbursement contracts shall include a ceiling price which the contractor may not exceed without the CO's approval. 2. Costs shall be determined in accordance with BPI Part 13, Cost Principles and Audit Considerations. 3. Contractor's accounting system must be adequate for determining costs applicable to the contract.

EXHIBIT 7-A -- CONTRACT TYPES (CONT.)

	7.1.6 Cost and Cost Sharing	**7.1.7 Cost Plus Fixed Fee (CPFF).**
DESCRIPTION	A cost reimbursement contract where BPA pays all or a portion of the costs, but no fee. **Cost**: BPA pays costs, but no fee. **Cost sharing**: BPA pays a preagreed portion of the costs, but no fee.	A cost reimbursement contract that provides for payment to the contractor of a negotiated fee that is fixed at the inception of the contract. The fixed fee does not vary with actual cost, but may be adjusted as a result of changes in the scope of work to be performed under the contract. CPFF contracts are typically written in either completion form or term form. See BPI 7.1 for additional information.
USE WHEN	In addition to the criteria under "Cost Reimbursement- General", typically used where profit is not appropriate, e.g., where both BPA and the contractor will benefit significantly from the contract deliverable such as research & development with non-profits, educational institutions, etc.	In addition to the criteria under "Cost Reimbursement- General", typically used where 1. Level of effort required is unknown, and 2. Extra incentive of a Cost Plus Award Fee contract is not necessary, but payment of profit is still appropriate.
CONSIDERATIONS	See the considerations under "Cost Reimbursement- General."	In addition to the considerations under "Cost Reimbursement- General", 1. CPFF contracts do not provide fee incentives for superior performance compared to CPAF contracts. 2. CPFF contracts are generally less costly to administer from an administrative standpoint than CPAF contracts. 3. Completion form is preferable to term form if the work can be adequately defined to permit development of estimates within which the contractor can be expected to complete the work. For completion form, failure to complete the work within the estimated cost may result in an increase in the cost ceiling, but not the fixed fee.

EXHIBIT 7-A -- CONTRACT TYPES (CONT.)

	7.1.8 Cost Plus Award Fee (CPAF).
DESCRIPTION	A cost reimbursement contract that provides for a fee consisting of a base amount fixed at inception of the contract and an award fee amount that the contractor may earn in whole or in part during performance and that is sufficient to provide motivation for excellence. The amount of the award fee to be paid is based on BPA's subjective evaluation of the contractor's performance. This determination is made unilaterally by BPA and is not subject to the disputes clause.
USE WHEN	In addition to the criteria under "Cost Reimbursement- General", typically used where 1. Level of effort cannot be easily estimated, 2. It is important to provide the contractor with a special motivation for excellence, and 3. Relatively high administrative costs are offset by the anticipated benefits.
CONSIDERATIONS	In addition to the considerations under "Cost Reimbursement- General," 1. ***POLICY:*** Contract must include an incentive to control costs as one of the incentive items. 2. ***POLICY:*** Contract shall contain an award fee determination plan which discusses the method BPA will use to determine how much of the award fee will be paid to the contractor. The following topics generally shall be covered: A. Performance criteria (describes the specific areas of performance to be evaluated, and the weighting given to each area). B. Frequency of evaluations, total award fee, and amount of fee allocated per performance evaluation period. C. Process for making changes to the plan. D. Termination (describes how the final period of evaluation will be treated should the contract be terminated for convenience). 3. ***PROCEDURE:*** See BPI 7.1.10 for applicable contract clause.

7.1.9 Concession Contracts
INFORMATION:

(a) A concession contract is a specialized contractual document between BPA and a contractor, referred to in this instance as the concessionaire. Such contracts are normally used when BPA requires a service to be performed, for which funds are collected by the concessionaire from third parties for services performed by the concessionaire, but where BPA has provided significant support. Examples of concession contracts include those for food service and day care centers. Concession contracts may require payment to BPA by the concessionaire, or by BPA to the concessionaire.

(b) Each concession contract is unique, and must be tailored to the specific situation. Concession contracts need not include the clauses normally required by the BPI. However, COs must ensure that appropriate clauses are used which clearly define the rights and responsibilities of the parties. Among the issues which must be considered are:

(1) What facilities or services will BPA provide to the concessionaire?
(2) Will the facility be provided at no cost, or will the concessionaire be required to pay a use fee?
(3) Are other payments to BPA required, and if so, how will they be calculated?
(4) How will the quality of service be evaluated, and what types of corrective actions may be initiated by BPA for inadequate performance?
(5) What liabilities will be assumed by each party?
(6) What labor and/or compensation standards are to be established for concessionaire employees?
(7) What are the parties' responsibilities for property maintenance, repair and replacement?
(8) What insurance requirements are advisable?
(9) Are there public safety and health considerations which must be addressed?
(10) What termination rights should be reserved to each party?
(11) What rights to change the contract should be reserved to each party?
(12) Is the work to be performed in spaces which subject the concessionaire to the application of BPA policies such as those described in 3.7?

7.1.10 Clause Usage Prescriptions.

(a) ***PROCEDURE:*** COs shall include a clause similar to Clause 7-1, Contract Type, in solicitations and contracts over $50,000. Clause 7-1 shall not be included in solicitations and contracts for commercial acquisitions; see Clauses 28-1.1 through 28-1.5, Basic Terms.

(b) ***PROCEDURE:*** COs may include a clause similar to Clause 7-2, Price Adjustment, in fixed price or time and materials solicitations and contracts when they want to adjust the contract price after award based on an economic price adjustment formula. The references in the clause to "option periods" should be deleted if the clause is used in contracts without options. If labor costs are the primary component of the contractor's price, the Employment Cost Index (ECI) is generally preferable to the Consumer Price Index (CPI-U). However, this clause should not be used if the contract is subject to the Service Contract Act and includes BPI Clause 10-4, Labor Standards - Price Adjustment, unless the CO ensures BPA does not duplicate price adjustments allowed under each clause. COs shall include a clause similar to 7-2 in solicitations and contracts for the acquisition of commercial items and services where the price will be adjusted based on an economic price adjustment formula.

(c) ***PROCEDURE:*** COs shall include a clause similar to Clause 7-3, Award Fee and Payment (Fixed-price Award-fee), in Fixed Price Award Fee contracts. The CO shall substitute paragraph (a) of Alternate I in Cost-Plus Award Fee Contracts. The CO may modify paragraph (b) to allow unearned fees to be added to the award fee pool for future periods. COs shall include a clause similar to 7-3 in fixed price award fee solicitations and contracts for the acquisition of commercial items and services, except Alternative I shall not be included in commercial acquisitions.

7.2 CONTRACT METHODS.

(a) ***INFORMATION:*** "Contract Methods" are approaches used to purchase supplies, services, or construction. The following are examples: leases or purchases; indefinite quantity contracts or definite quantity contracts; master agreements or master contracts; partnering, etc.

(b) ***POLICY:*** The CO shall select the appropriate method of contracting based on an assessment of the nature of the project and inherent risks.

(c) ***INFORMATION:*** This subpart describes some commonly used contract methods. The CO may use variations of the methods described below or may use methods other than those described below.

7.2.1 Long Term Relationships and Methods.

(a) ***POLICY:*** Purchasing teams are encouraged to develop long term business relationships with suppliers whenever it makes good business sense. There are many methods of doing so, ranging from commonly used contract types (such as including options to extend the contract or combining requirements through an indefinite quantity contract) to commercial types of business arrangements, typically used with key suppliers (such as partnering, systems contracts, or joint management).

(b) ***INFORMATION:*** Although long term contracts tend to be relatively long in duration, the words "long term" more accurately refer to the extent to which individual purchase transactions are "bundled" and the contractor's ongoing performance is used as a basis for awarding future work. For example, an indefinite quantity contract for circuit breakers is long term because it provides an effective mechanism to "bundle" numerous individual orders which would otherwise have to be made by individual purchase orders or contracts. Under this concept, a one year master agreement which enables BPA to more efficiently buy small circuit breakers is considered "long term" because it eliminates the need for perhaps 50 individual purchase orders during that one year period. Whereas a contract for a single large power circuit breaker would not be considered long term even though it may take one and a half years for the contractor to manufacture and deliver the breaker.

(c) ***INFORMATION:*** There are several advantages to long-term business relationships:

(1) Administrative costs are generally lower for both BPA and the contractor.
(2) The contractor and BPA have added incentive to track performance, to improve the quality of performance, and to conduct joint planning.
(3) Economies of scale are generally achieved, resulting in higher quality and lower contract prices.

(d) ***INFORMATION:*** Long-term business relationships are not an end in themselves. Because both the business world and most markets are constantly evolving, the length of individual contracts as well as contractor relationships should be reexamined on a periodic basis. The frequency of reexamination may vary according to the market. For example, contracts for some types of utility services may not need to be closely reexamined for many years. Contracts for supplies/services in volatile markets such as computers may warrant more frequent review. It may not make good business sense to enter into long term contracts or relationships where:

(1) The volume of similar purchases is low or infrequent.
(2) The market is particularly volatile, possibly resulting in the exclusion of a new source with exceptional capability.

(e) ***INFORMATION:*** For solicitations and contracts for the acquisition of commercial items and services, see BPI 28.3.3.

7.2.2 Partnering.

INFORMATION: "Partnering" is not a precisely defined term. In general, partnering is a relationship between a buyer and a supplier which may or may not include a written agreement. The relationship is characterized by a mutual commitment over an extended period of time, sharing of information, and sharing of the risks and rewards of the relationship. This relationship is in contrast to the more traditional,

adversarial approach which emphasizes "today's" purchase with little consideration of whether the purchaser may want (or need) to do business with a particular supplier again. The traditional approach tends to place heavy emphasis on low purchase price, rather than the total long term costs and benefits of establishing an ongoing business relationship. Partnering recognizes that a successful contractual relationship requires effective communication and problem solving which continues after award and over multiple contracts.

7.2.3 Systems Contracts.
INFORMATION:

(a) Systems contracts are contracts which authorize designated employees of BPA, using a predetermined ordering system, to place orders directly with the supplier for specified supplies or materials. The contractual terms of a systems contract may be similar to the terms of an indefinite delivery contract or a master agreement. However, a systems contract is distinguished by the fact that the buyer and seller integrate and simplify as many materials management and administrative functions as possible. For example, both parties work closely to manage inventories and simplify the order placement process, the receiving process, and the payment process.

(b) Under a systems contract, joint analysis of inventory levels and internal demand for particular materials may make it possible to reduce BPA's inventories, yet also expand the variety of materials available for purchase. Joint analysis of administrative functions may result in significant savings in BPA's administrative costs or improved efficiency by relying on the supplier to perform some administrative functions. This cannot effectively be done unless BPA and the seller establish a mutually beneficial long-term relationship and focus on the efficiencies to be gained by a cooperative effort to manage the entire purchasing and materials management process. The focus of the buyer-seller relationship created by the systems contract is to look at the total costs of acquisition and management of the supply items over the long-run, not just the purchase price and quality of each item being purchased.

7.2.4 Paperless Purchasing.
(a) ***INFORMATION:*** "Paperless purchasing," as used in this subpart, means a paperless process using both electronic records, systems, and processes (such as, electronic mail, electronic bulletin boards, electronic funds transfer, electronic data interchange) and non-electronic means (such as, oral orders) and similar techniques to accomplish requisitioning, purchasing, receiving and purchasing payment processing transactions.

(b) ***POLICY:*** Paperless purchasing techniques are authorized for use at BPA whenever practicable or cost-effective. Purchasing Managers shall establish processes and management oversight to ensure that such paperless systems are capable of authentication and confidentiality commensurate with the risk and magnitude of harm from loss, misuse, or unauthorized access to or modification of information. Orders may be transmitted via facsimile and task/delivery orders in an amount specified by the Contracting Officer in a Master Agreement or master contract may be placed electronically via facsimile or the Internet or any other means identified in the contract without an original signature on a printed document whenever the contractor has agreed in writing to the terms and conditions for acceptance of such electronic orders.

7.2.4.1 Clause Usage Prescriptions
(a) ***PROCEDURE:*** COs shall include a clause similar to Clause 7-10 E-Commerce Marketplace Ordering, in solicitations and contracts over $50,000 for the acquisition of commercial items and services that include electronic transactions.

(b) **Reserved.**

(c) **Reserved.**

(d) ***PROCEDURE:*** COs shall include a clause similar to 7-13, Computer Fraud and Abuse Act, in solicitations and contracts in which ordering transactions will be executed through electronic means, or in any other contract utilizing electronic methods for information exchange.

(e) ***PROCEDURE:*** COs may include Clause 7-14, Definitions, in solicitations and contracts in which electronic transactions will take place.

7.2.5 Master Contracts and Master Agreements.
(a) ***INFORMATION:*** Master contracts or master agreements are used when the exact times and/or quantities of future deliveries cannot be specified at the time of award. See Exhibit 7B, Options when Quantities/Delivery Locations Are Not Known, for a comparison of master contracts and master agreements.

(b) ***INFORMATION:*** "Master contracts" are legally binding contracts. They establish a firm commitment for the contractor to accept and deliver any order for specific supplies or services ordered within the terms of the contract. They include definite quantity and indefinite quantity contracts. See Exhibit 7C, Master Contracts - Indefinite Delivery Contracts, for a comparison of these methods.

(c) ***INFORMATION:*** "Master agreements" are not legally binding contracts. They establish terms and conditions for any future orders. Their terms and conditions only become binding upon placement of an order. Master agreements do not obligate BPA to place any orders nor obligatethe supplier to accept any orders. Master agreements replace what may be known elsewhere as Blanket Purchase Agreements and Basic Order Agreements.

7.2.5.1 Master Contracts - Indefinite Delivery Contracts.
(a) ***INFORMATION:*** Indefinite delivery contracts are used when the exact times and/or quantities of future deliveries cannot be specified at the time of award. Indefinite delivery contracts include a commitment by the buyer to purchase at least a minimum quantity of supplies/services at time of award. Indefinite delivery contracts are one method of reducing administrative costs and encouraging long term relationships by "bundling" individual purchases.

(b) ***INFORMATION:*** The term "requirements contract" is often used as a synonym for indefinite delivery contract. However, the term "requirements contract" more accurately describes a contract where the buyer agrees to purchase all of its requirements from a particular contractor during a specific contract period. Although this contract method should, in theory, result in more competitive pricing and assurance that delivery schedules will be met, it is seldom an effective method in actual practice because it contractually binds both parties to a long term relationship which may not be appropriate if circumstances change.

7.2.5.1.1 Clause Usage Prescriptions.
(a) ***INFORMATION:*** The two most commonly used indefinite delivery contracts at BPA are definite quantity and indefinite quantity contracts. See Exhibit 7C, Master Contracts - Indefinite Delivery Contracts, for a comparison of these methods.

(b) ***PROCEDURE:*** The CO shall include a clause similar to Clause 7-4, Definite Quantity Contract: Ordering, in definite quantity solicitations and contracts. The CO may eliminate the minimum and maximum order limitations if acceptable to the Contractor. The CO shall modify paragraph “(c)” to reflect the terms and conditions that the Contractor agrees to accept for receipt and confirmation of an order (release) by means other than writing. The CO and the Contractor may agree to any one or more or written, oral, facsimile or electronic Internet order placement and confirmation means that is consistent with the policy in BPI 7.2.4.

(c) ***PROCEDURE:*** The CO shall include a clause similar to Clause 7-5, Indefinite Quantity Contract: Ordering, in indefinite quantity solicitations and contracts. The CO may eliminate the minimum and maximum order limitations if acceptable to the Contractor with the following exception: the CO shall retain the maximum limit for total orders in order to provide an opportunity to renegotiate contract prices if BPA's

orders exceed the amounts originally anticipated. The CO shall modify paragraph “(b)” to reflect the terms and conditions that the Contractor agrees to accept for receipt and confirmation of an order (release) by means other than writing. The CO and the Contractor may agree to any one or more of written, oral, facsimile or electronic Internet order placement and confirmation means that is consistent with the policy in BPI 7.2.4.

Exhibit 7-B
OPTIONS WHEN QUANTITIES/DELIVERY LOCATIONS ARE NOT KNOWN

	MASTER CONTRACTS	MASTER AGREEMENTS
DESCRIPTION	Establishes a firm commitment to accept and deliver any order for specific supplies/services ordered within the terms of the contract. COs may redelegate authority if prices and delivery terms have been specified in the contract. Includes Definite Quantity and Indefinite Quantity contracts.	Establishes terms and conditions for any future orders that may be placed, but does not require the supplier to accept any orders. (Replaces what may be known elsewhere as Basic Ordering Agreements and Blanket Purchase Agreements.) COs may redelegate authority as permitted under 7.2.5.2.
USE WHEN	1. Use when BPA wants a firm commitment from the contractor to accept all orders placed in accordance with the contract terms. 2. Market conditions indicate it would be in BPA's best interest to fix contract prices.	1. Use to document long term relationships where orders will be accepted only with supplier consent. 2. BPA's total requirements are unknown and it is inadvisable for BPA to commit itself to any quantity or orders. 3. Written orders should be issued when specifications or statements of work are necessary for clear understanding of the requirements or when complicated delivery terms or bid schedules are necessary.
CONSIDERATIONS	1. Competition requirements of BPI Part 11 must be met. Competition occurs prior to contract award. 2. Prices are negotiated and remain fixed for the duration of the contract unless specific provisions are included for price adjustment.	1. Competition requirements of BPI subpart 11.6 must be met. 2. Prices may or may not be included in the master agreement.

Exhibit 7-C
MASTER CONTRACTS - INDEFINITE DELIVERY CONTRACTS

	DEFINITE QUANTITY	INDEFINITE QUANTITY
DESCRIPTION	Provides for the delivery of a definite quantity of specific supplies/services for a fixed period, with deliveries to be scheduled at designated locations upon order. Example: Two year contract for 2000 personal computers to be delivered when delivery orders are issued.	Provides for the delivery of an indefinite quantity within stated limits, of specific supplies/services for a fixed period, with deliveries to be scheduled by placing orders with the contractor. Example: Two year contract for personal computers; BPA commits to order at least 100; to be delivered when delivery orders are issued.
USE WHEN	1. BPA's total requirements are known but the delivery schedule or locations are not known in advance, and 2. The supplies/services are regularly available or will be available after a short lead time.	1. BPA's total requirements are unknown (above a specified minimum), and 2. It is inadvisable for BPA to commit itself for more than a minimum quantity.
CONSIDERATIONS	1. Limits BPA's and Contractor's obligation to the quantity specified in the contract. 2. Definite quantity contracts may also contain provisions to order option quantities. See BPI 7.2.7	***PROCEDURE:*** In addition to the considerations shown for definite quantity contracts, the Schedule of Items shall include a realistic estimate of total orders to be placed during the contract term

7.2.5.2 Master Agreements.

(a) ***INFORMATION:*** Master agreements are typically used to establish an ordering agreement for multiple purchases of items or services of a similar nature where it is more cost effective to consolidate order placement procedures, invoicing, payment, etc. into one written agreement. Specific items, quantities, and prices may or may not be listed in the agreement.

(b) ***POLICY:*** Master Agreements may cover any estimated dollar value BPA expects to purchase each year. The CO shall include contract clauses which are applicable to contracts of anticipated value of purchases each year.

(c) ***POLICY:*** Each order placed under master agreements is subject to the competitive requirements of BPI subpart 11.6. In those instances where a master agreement has been established non-competitively, no additional documentation other than that required by BPI 11.7 is required for orders that are within the scope of the agreement.

(d) ***PROCEDURE:*** Master agreements shall be awarded on the electronic form generated within the Bonneville Enterprise System, or other format approved by the HCA.

(e) ***POLICY:*** The CO may specifically designate BPA employees who may place orders against the master agreements. The CO shall designate the dollar limit of authority for each individual within the following limitations:

(1) A requisition is required. The individual shall ensure that funds are available. In addition, the following limits apply per order:

(A) For items that are specifically priced in the master agreement, COs may authorize individuals to place orders in any dollar amount for those priced items.

(B) For items that are not specifically priced in the master agreement, the CO may, subject to advance notification and concurrence of HCA, establish a limited delegation of authority for ordering officials to issue orders in an amount not to exceed the following limits for any unpriced items:

(i) For ordering officials who are also warranted COs, the limit per order may not exceed their warrant authority.

(ii) For ordering officials who are not warranted COs, the limit per order shall generally not exceed $10,000 (i.e., the non-competitive purchase limit). The limit per order may be greater than $10,000 if (1) the items being purchased are exempt from the competitive requirements of BPI 11.6 (e.g., replacement parts from an original equipment manufacturer); or (2) the ordering officials obtain and document competition of each order in excess of $10,000 and the CO has established appropriate oversight to ensure appropriate use of the agreement and continued fair and reasonable prices.

(2) ***POLICY***: Daily limits and annual limits:

The CO may choose any limit on the amount of orders placed per day or per year. However, the CO shall review the volume and amount of orders not less than annually to ensure the volume of business warrants renegotiation of the agreed prices, changes to the terms and conditions, or use of a different contractual instrument.

7.2.5.2.1 Clause Usage Prescriptions.
(a) ***PROCEDURE:*** The CO shall include a clause similar to Clause 7-6, Master Agreement: Basic Terms, in master agreements in solicitations and contracts for the acquisition of noncommercial items and services. The CO may add additional provisions as appropriate, but shall include at least the following:

(1) Delivery terms.
(2) A description of the point at which each order becomes a binding contract (upon issuance, upon receipt in a specified manner, etc.).
(3) Ordering procedures.
(4) Applicable terms and conditions. See 7.2.5.2(b), above.

Clause 7-6 shall not be included in solicitations and contracts for the acquisition of commercial items and services; see Clause 28-1.3.

7.2.5.3 Delivery Orders and Task Orders.
(a) ***INFORMATION:*** "Delivery Order" means an individual order for supplies placed under the terms of a master contract or master agreement. "Task Order" means an individual order for services placed under the terms and conditions of a master contract or master agreement. Delivery orders and task orders are typically used where the scope of work can be generally defined in the master contract/agreement, but there is some uncertainty regarding the individual orders to be placed or tasks to be performed. There are two general categories of orders commonly used at BPA:

(1) Orders where numerous delivery or task orders are contemplated and each item or task is typically for a small dollar amount. Negotiations are typically brief and the item is delivered or the task is completed in a few days or weeks. A requisition is required for each order.
(2) All other orders, where items or tasks may be of high dollar amounts, more complex, and of a longer duration than those described in (1) above. This level of complexity typically results in more extensive negotiations before the order is awarded. A requisition is required for each order.

(b) ***PROCEDURE:*** Orders may be placed orally, via facsimile, electronically, or in writing as agreed to by the Contractor in the terms of the Master Contract or Master Agreement.

(1) Written orders should be issued when specifications or statements of work are necessary for clear understanding of the requirements or when complicated delivery terms, bid schedules, etc. are necessary. Written orders (releases) shall be prepared using the BES generated order (release) form.
(2) Oral or electronic orders to the Contractor may be placed, provided the terms and conditions for oral or electronic orders are included in the written bilateral Master Agreement or Master Contract. Electronic orders may be placed via facsimile or as an unalterable electronic read-only format document transmitted via the Internet. A binding order will be formed when the Contracting Officer or his/her authorized representative transmits to the Contractor a complete and legible order that includes an order (release) number and the Master Agreement Number of Master Contract number, and receives from the Contractor a written or facsimile of electronic Internet confirmation. An order or confirmation transmitted via facsimile or the Internet will be deemed “writings.”

7.2.6 Task Assignments*.*
(a) ***INFORMATION****:* Task Assignments may be issued where a time and materials, fixed-price, or cost-plus-fixed-fee contract is awarded on a level of effort basis and includes a limit on total authorized labor hours (level of effort), (see also BPI 7.1.(d)(2)). Generally tasks should be identified in the contract's Statement of Work, but the sequence of performance of those tasks may change after award. For this reason, tasks are assigned after award of the contract as the sequence of tasks becomes clearer.

(b) ***POLICY***: COs shall provide adequate oversight to ensure proper usage.

(c) ***PROCEDURE:*** Because the scope of the project and individual tasks can be adequately defined at the time the contract is awarded, the total budget is committed at the time of award and no additional Requisitions or CO signatures are necessary to order the sequence of work. Task Assignments are typically signed by the COTR, with a copy provided to the CO.

7.2.7 Options.
(a) ***INFORMATION:*** The use of options in contracts can be an effective method of managing risk, reducing the administrative costs of resoliciting for recurring requirements, and encouraging high quality/long term performance.

(b) ***POLICY:*** Options shall be pre-priced. Pre-priced options may contain specific option pricing or an appropriate economic price adjustment index.

(c) ***INFORMATION:*** Pre-priced options give BPA the unilateral right to purchase additional supplies/services or extend the term of the contract at pre-agreed prices and/or terms. Pre-priced options may be appropriate where the market is relatively stable, price inflation is fairly predictable, the nature of the contract is not likely to change significantly between award and the time the option is exercised, or where it may be difficult to test the market at a future date.

7.2.7.1 Clause Usage Prescriptions.
(a) ***PROCEDURE:*** COs shall include a clause similar to Clause 7-7, Performance Period And Options, in solicitations and contracts for noncommercial acquisitions where an option is appropriate to add to the term of the contract. Clause 7-7 shall not be included in solicitations and contracts for commercial acquisitions; see Clauses 28-1.1 through 28-1.5, Basic Terms.

(b) ***PROCEDURE:*** COs shall include a clause similar to Clause 7-8, Option For Increased Quantity, in solicitations and contracts where an option is appropriate to increase the quantities of supplies or services being purchased.

7.2.8 Free Trial Agreements.
(a) ***INFORMATION:*** "Free Trial" is the use of a product offered by a vendor without obligation or consideration (i.e. no fees, reports, technical advice, shipping, supplies, or any other costs) for a specified time period, with the ability to return the product at any time during the trial period without explanation. Free Trial Agreements are an effective method of evaluating the characteristics of supplies or equipment while protecting the rights of the offeror and BPA in case of loss, damage, or release of proprietary information. More informal arrangements may be appropriate for consumable and/or non-returnable items, excluding software.

(b) ***POLICY:*** Free Trial Agreements are required for items only when property or proprietary data rights must be protected. The following restrictions apply when a free trial agreement is being considered:

(1) The total value of all items must be within the authority limit of the CO.
(2) Use of the program/product is at BPA's sole discretion and within the parameters for which the program/product was designed.
(3) Programs/products do not require extensive training programs or start-ups.
(4) Programs/products do not create a dependency on them.
(5) The use of the program/product will be for a reasonable period, usually not for more than 90 days.
(6) Only the OCIO may enter into free trial agreements for software. No one at BPA outside the OCIO is allowed to download any software at his or her desktop without OCIO pre-approval.

(c) ***PROCEDURE:***

(1) Any BPA employee interested in accepting an offer to try a program/product requiring a free trial agreement shall submit a request to the CO. The request shall include any relevant background information.
(2) The CO shall negotiate the agreement to ensure that the supplier understands that the use on a free trial basis of the program/product does not preclude the use of BPA's competitive process in the purchase of the same or similar program/product.
(3) The CO and the supplier shall execute a written agreement outlining the parameters of the transaction (see Exhibit 7D, Sample Free Trial Agreement).
(4) BPA may return the merchandise at any time during or at the completion of the free trial period.

Exhibit 7-D -- SAMPLE FREE TRIAL AGREEMENT

1. This agreement is between Bonneville Power Administration (BPA) and _____(Submitter). The program/product submitted by the firm shall hereinafter be referred to as "merchandise."

2. The trial use period shall begin on _____ and terminate on_____.

3. The Submitter hereby agrees to provide BPA the following merchandise:

[This section is for the CO to provide the description of the merchandise to be evaluated on a free trial basis. The description should include but not be limited to descriptive instruction material, manuals, diagrams, flow charts, installation instructions, or technical advice needed to evaluate the merchandise. The CO shall instruct the submitter to carefully mark or label all of the materials associated with the merchandise being used by BPA which are to be returned at the end of the trial period.]

4. BPA shall use reasonable care with the merchandise, but it shall not be liable for loss of or damage to the merchandise during the trial use if such loss or damage results from defective merchandise. BPA shall be responsible for costs for any damage resulting from non-normal operation or misuse of the merchandise.

5. BPA agrees to keep confidential and will not copy, in whole or in part, any of the technical data, materials, or other proprietary information furnished to it for use during the Free Trial.

6. There shall be no payment made from BPA to submitter under this agreement. Each party shall pay its own expenses that may be incurred because of this trial. Submitter is responsible for all costs associated with delivery and return of the merchandise.

7. The submitter shall not publish any information about BPA's trial use of the merchandise without prior written approval from BPA, nor shall the submitter use BPA's name in any advertisement or promotion or other solicitation for business without written approval from BPA.

8. At any time during the free trial evaluation period, BPA may return the merchandise to the submitter without explanation or obligation and at no cost to BPA.

_____
BPA Contracting Officer's Signature Date

_____
Submitter's Signature Date

7.2.9 Quick Response Contracts.

(a) ***INFORMATION:*** A quick response contract, sometimes referred to as a "letter contract," is a written contract, signed by a CO, that authorizes the contractor to immediately begin the manufacture of supplies or performance of services before all contract terms and requirements have been finalized. It is a unilateral authorization or offer by BPA that becomes a binding contractual agreement if performance by the contractor has commenced. The signature of the prospective contractor is not required, but may be obtained in order to protect BPA's interests.

(b) ***POLICY:*** A quick response contract may be used when:

(1) The interests of BPA demand that the contractor be given a binding commitment so that work can start immediately; and

(2) Complete negotiation and assembly of a definitive contract is not possible in time to meet the requirement.

(c) ***POLICY:*** Quick response contracts shall be used judiciously, and not as substitutes for properly planned, scheduled, and executed acquisition plans. They may not be awarded until after the parties have reached agreement in principle on the substance of the contract. Quick response contracts must be definitized within 30 days unless the CO's first line performance manager approves an extension. Funding commitments should not exceed what is required for performance before definitization and for acquisition of specific long lead-time materials. Quick response contracts shall not:

(1) Be entered into without competition when competition is practicable;

(2) Be amended to satisfy a new requirement unless that requirement is inseparable from the existing quick response contract. Any such amendment is subject to the same requirements and limitations as a new quick response contract.

(d) ***PROCEDURE:***

(1) Prior to initiating a quick response contract, the CO must have received:

(A) A material request, purchase requisition, or contract requisition.

(B) An initial statement of work or specification that describes the fundamental goods or services to be provided, key elements of quality or acceptability, and deliverables. (Such statement of work or specification may be revised to provide greater detail when the contract is definitized); and

(C) An approved request for ratification, if applicable.

(2) Quick response contracts are subject to the competitive requirements described in BPI subpart 11.6.

(3) Each quick response contract must contain provisions substantially the same as shown in Exhibit 7E, Sample Quick Response Contract. The contract may be documented in letter form, as shown in Exhibit 7E, or may be documented on a paper or electronic contract award form.

(4) Copies of the quick response contract shall be distributed to the same organizations that will receive the definitized contract when it is executed.

(5) The definitized contract, when completed, shall incorporate the quick response contract. The effective date of the contract shall be the start work date authorized in the quick response contract.

(6) For contracts which require a subcontracting plan (see BPI 8.3.1), the plan shall be obtained within 90 days after award of the quick response contract, or by contract definitization, whichever occurs first.

EXHIBIT 7-E -- SAMPLE QUICK RESPONSE CONTRACT

Alex Johnson Services Company
6847 Kingsway East Court
Baldwin, Oklahoma 84711

Dear Mr. Johnson:

Subject: Proposed Contract No. 01234, Hazardous Waste Clean-up

This letter constitutes an authorization for you to commence work on the project described above, subject to the following:

(a) A maximum of $75,000 of costs may be incurred.

(b) Expenditures above that amount are not authorized, and are at your risk.

(c) Work is authorized to begin _____ (insert date not earlier than date of letter).

(d) This authorization is subject to the cost principles described in Part 13 of the Bonneville Purchasing Instructions.

(e) When the contract for this project is definitized, it will be a (insert appropriate type of contract) type contract.

(f) In the event of contract termination, calculation of payments due under this authorization will be accomplished under the provisions of Clause(s) _____ (enter appropriate termination clauses) of the Bonneville Purchasing Instructions.

(g) The work authorized by this letter is described in your proposal of _____ (date or other appropriate reference to the statement of work or company offer and type of transmission: oral, written, facsimile, e-mail, etc.).

(h) No payments will be made before a definitized contract is completed for this project. (CO may allow for interim payments, if necessary. In this case, appropriate payment and invoicing clauses shall be included in the quick response contract).

(i) The Contracting Officer's Representative is Alice Adams and her telephone number is (503) 230-48l7.

(j) You are obligated to furnish cost or pricing information if the Contracting Officer requests such information.

(k) (The CO may enter any other terms and conditions deemed necessary for the proper execution of the project).

(l) A definitized contract is expected to be executed within 30 days.

(m) This is contract number ___(fill in)___; Accounting data: ___(fill in)___.

Sincerely,

Contracting Officer

7.2.10 Trade-Ins.
(a) ***POLICY:*** BPA may trade-in non-excess personal property concurrent with the purchase of similar replacement items with the concurrence of the responsible Asset Center Representative. A separate solicitation is not required when the need or opportunity to trade in property occurs after contract award.

(b) ***PROCEDURE:*** Requisitioners are responsible for determining whether current property should be traded in, concurrent with the purchase of similar replacement property. CO's shall not enter into contracts that involve trade-ins of property without first obtaining from the requisitioner a copy of the Asset Center Representative's disposal analysis and approved Property Survey Report. See BPI Part 6.12.

7.2.10.1 Clause Usage Prescriptions.
PROCEDURE: COs shall include a clause similar to Clause 7-9, Trade-In of Personal Property, in solicitations and contracts that include trade-in of personal property.

7.50 TEXT OF CLAUSES.
The following clauses are referred to in BPI Part 7:

7-1 Contract Type
7-2 Price Adjustment
7-3 Award Fee and Payment (Fixed-price award fee)
7-4 Definite Quantity Contract: Ordering
7-5 Indefinite Quantity Contract: Ordering
7-6 Master Agreement: Basic Terms
7-7 Performance Period And Options
7-8 Option for Increased Quantity
7-9 Trade-In of Personal Property
7-10 E-Commerce Marketplace Ordering
7-11 Reserved
7-12 Reserved
7-13 Computer Fraud and Abuse Act
7-14 Definitions

Clause 7-1 CONTRACT TYPE (Jul 13)(BPI 7.1.10)
This is a _FILL IN_ type contract.

(End of clause)

Clause 7-2 PRICE ADJUSTMENT (Jul 13)(BPI 7.1.10)
(a) From _____[FILL IN event or date which triggers price adjustment review, e.g., "the start of the 13th month after the date of award"], through the remainder of the contract option periods, the _____[FILL IN, e.g., "hourly rates", "unit prices", etc.] identified in the Schedule of Items may be adjusted upward or downward based on increases or decreases in _____[FILL IN appropriate index including appropriate dates, e.g., "the Consumer Price Index (CPI-U) for All Urban Consumers, all Items 1982-84 = 100, as published by the U.S. Bureau of Labor Statistics"]. The final index point at date of award is _____.[FILL IN], dated _____.[FILL IN].

(b) On _____[FILL IN date or event which triggers price adjustment review, e.g., "each anniversary of the date of award"], if an option year is exercised, the percent of increase or decrease in the index will be computed by the Contracting Officer. No prices will be adjusted unless the percent of change in the index (since the date of contract award or date of last adjustment) amounts to _____ FILL IN, e.g., "six percent or more"]. If the index has changed by six percent or more since the date of award or since the previous calculation that resulted in a price adjustment, the specific prices will be adjusted for the ensuing year. If an adjustment is warranted in accordance with the above, the then current unit prices will be increased or decreased, for the ensuing year, by the product of the unit price times the percent of change reported in the index (figured to two decimal places).

(c) No upward adjustment shall apply to supplies or services which are required to be delivered or performed prior to the effective date of the adjustment unless the Contractor's failure to deliver or perform in accordance with the delivery schedules results from causes beyond the control and without the result or negligence of the Contractor.

(d) The index base rate shown above for the first year of the contract shall be the latest rate published at the date of contract award. Should an adjustment in the hourly rates be effected per this clause, the index base rate will be revised to reflect the latest rate published at the date of contract renewal.

(End of clause)

Clause 7-3 AWARD FEE AND PAYMENT (Fixed-Price Award Fee)(Jul 13)(BPI 7.1.10)
(a) In addition to any profit included in the fixed price portion of the contract payment, the Contractor may earn an additional fee, referred to as an award fee, not to exceed $_____. Payment of the award fee will be based on the degree to which the Contractor's performance exceeds the requirements of the contract during each evaluation period. See the Award Fee Plan, Attachment _____.

(b) The Contractor's performance will be evaluated after the completion of each evaluation period, which shall be every 4 months. The available award fee allocation in an evaluation period is determined by dividing the award fee pool negotiated annually as stated in the Schedule of Items by three. Unearned award fee will <u>not</u> be added to any evaluation periods for future periods.

(c) The award fee will be paid after determination of the award fee by BPA and submission of an invoice by the Contractor for the earned amount.

(d) Before an evaluation period is started, BPA may unilaterally modify the award fee performance evaluation criteria, performance evaluations areas, and/or weights applicable to the evaluation period. The Contractor will be notified in writing of these changes by the Contracting Officer before the relevant evaluation period is started. The Award Fee Plan will be modified accordingly.

(e) Award fee decisions are subject to the Contract Disputes Act. 41 U.S.C. § 7101-7109

(End of clause)

Alternate I (Sep 98)
(a) In addition to a base fee of not to exceed _____ percent of estimated costs, the Contractor may earn an award fee on the basis of its performance during each evaluation period. See the Award Fee Plan, Attachment _____.

(End of Alternate I)

Clause 7-4 DEFINITE QUANTITY CONTRACT: ORDERING (SEP 02)(BPI 7.2.5.1.1)
(a) This is a definite-quantity, indefinite-delivery contract. The Contractor shall furnish to BPA, when ordered, all supplies or services specified in the Schedule of Items. Delivery or performance shall be at locations designated in orders.

(b) BPA will order the quantity of supplies or services specified in the Schedule of Items.

(c) Only orders placed by individuals or BPA offices designated by the Contracting Officer will be considered valid orders. If mailed, a delivery order is considered “issued” when BPA deposits the order in the mail. Orders may also be issued orally or by facsimile. Orders may also be issued electronically as an unalterable, electronic read-only formatted document transmitted via the Internet. A binding order will be formed after the Contracting Officer or his;/her authorized representative transmits to the Contractor a complete and legible order that includes an order (release) number and the contract number, and has received from the Contractor a written, or electronic Internet confirmation. An order or confirmation transmitted via facsimile or the Internet will be deemed “writings.”

(d) Except for any limitations on quantities shown below, there is no limit on the number of orders that may be issued.

(1) Minimum Individual Order: _____ [FILL IN quantity or dollar amount]

(2) Maximum Individual Order: _____ [FILL IN quantity or dollar amount]

(e) Any order issued must be completed/delivered prior to the expiration date of this contract.

(f) All orders are subject to the Terms and Conditions of this contract. In the event of conflict or terms between an individual order and this contract, the contract shall control.

(End of clause)

Clause 7-5 INDEFINITE QUANTITY CONTRACT: ORDERING (SEP 02)(BPI 7.2.5.1.1)

(a) This is an indefinite-quantity contract. The Contractor shall furnish to BPA, when and if ordered, the supplies or services specified in the Schedule of Items. The quantities of supplies and services specified in the Schedule of Items are estimates only and are not purchased by this contract. Delivery or performance shall be at locations designated in orders.

(b) Only orders placed by individuals, or by BPA offices, that are specifically designated in writing by the Contracting Officer, are valid orders. If mailed, a delivery order is considered "issued" when BPA deposits the order in the mail. Orders may also be issued orally or by facsimile. Orders may also be issued electronically as an unalterable, electronic read-only formatted document transmitted via the Internet. A binding order will be formed when the Contracting Officer or his/her authorized representative transmits to the Contractor a complete and legible order that includes an order (release) number and the contract number, and receives from the Contractor a written or facsimile or electronic Internet confirmation. An order or confirmation transmitted via facsimile or the Internet will be deemed “writings.”

(c) Except for any limitations on quantities shown below, there is no limit on the number of orders that may be issued.

(1) Minimum, Individual Order: _____[FILL IN quantity or dollar amount]

(2) Maximum, Individual Order: _____[FILL IN quantity or dollar amount]

(3) Minimum, Total Orders: _____[FILL IN quantity or dollar amount] BPA will order at least this quantity of supplies or services.

(4) Maximum, Total Orders _____[FILL IN quantity or dollar amount]

(d) Any order issued during the effective period of this contract and not completed within that time shall be completed by the Contractor within the time specified in the order. The contract shall govern the Contractor's and BPA's rights and obligations with respect to that order to the same extent as if the order

were completed during the contract's effective period; provided that the Contractor is not obligated to make deliveries after_____[FILL IN date or period of time.]

(e) All orders are subject to the Terms and Conditions of this contract. In the event of conflict between an order and this contract, the contract shall control.

(End of clause)

Clause 7-6 MASTER AGREEMENT: BASIC TERMS (Jul 13)(BPI 7.2.5.2.1)

(a) Effective Period. This agreement is effective upon receipt and acceptance of this Agreement and continues until canceled by BPA in writing, or the date on the signature page of this master agreement, whichever occurs first.

(b) BPA's Obligation. This agreement places no obligation on BPA to purchase a minimum amount of supplies or services. BPA is obligated only to the extent of authorized orders actually placed against this agreement.

(c) Order Placement, Confirmation and Contract Formation. Only orders placed by individuals specifically authorized by the Contracting Officer will be considered valid orders. Orders may also be issued orally or by facsimile. Orders may also be issued electronically as an unalterable, electronic, read-only formatted document transmitted via the Internet. A binding order will be formed when the Contracting Officer or his/her authorized representative transmits to the Contractor a complete and legible order that includes an order (release) number and the contract number, and receives from the Contractor a written or facsimile or electronic Internet confirmation. An order or confirmation transmitted via facsimile or the Internet will be deemed “writings.” There is no limit on the number of orders that may be issued, unless otherwise limited in the Schedule of Items.

(d) Order Numbers. An "order number" will be the identifying number for each order placed against this agreement. Both this order number and the Master Agreement Number must be included on all correspondence, packing lists, invoices, etc.

(e) Delivery Tickets. All deliveries made under this agreement shall be accompanied by a delivery ticket or sales slip which shall contain the following minimum information: (1) Name of Contractor; (2) Master Agreement Number; (3) Date of order; (4) Name of BPA employee placing order; (5) Order number; (6) Itemized list of supplies or services furnished (quantity, unit price, and extended price, less discounts; and (7) Date of delivery or shipment.

(f) Variation In Quantity. No variation in the quantity of any item ordered will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this agreement or in any specific order.

(g) Transportation Charges. No allowance will be made for packing, cartage, carting, or transportation charges unless specifically provided elsewhere in this agreement or unless provided at the time a specific order is placed.

(h) Inspection and Acceptance. Inspection and acceptance will be at the place specified in each order for delivery or performance.

(i) Taxes and Duties. The price includes all applicable Federal, State, and local taxes and duties in effect on the date an order is placed, but does not include any taxes from which BPA, the Supplier, or any specific order is exempt. Upon request of the Supplier, BPA shall furnish a Tax Exemption Certificate or similar evidence of exemption, if appropriate, with respect to any such tax not included in the price pursuant to this clause.

(j) Payment.

(1) Payment Due Date. Payment shall be due not later than thirty (30) calendar days after the later of the date on which BPA actually receives a proper invoice in the designated billing office or the date when the items delivered or completed services are accepted by BPA. For purposes of payment only, items will be deemed accepted not later than seven (7) working days after proper delivery. If delivered items or completed services are found defective, the provisions of this paragraph will be reapplied upon receipt of a corrected item or service.

(2) Invoices. Suppliers may invoice monthly or at more frequent intervals as may be agreed to by the CO. Invoices shall include:

(a) supplier's name and address;
(b) invoice date;
(c) master agreement number;
(d) order number;
(e) description of products delivered or work performed;
(f) price and quantity of item(s) actually delivered or rendered identified separately by order number,
(g) the name and address of the person to whom payment will be made, and
(h) name (where practicable), title, phone number, and mailing address of person to be notified in event of a defective invoice.

If the order is for supplies, each invoice shall also contain a reference to each delivery ticket and shall be supported by a copy of the delivery ticket. Failure to submit a proper invoice may result in a delay in payment.

(3) Prompt Payment Act. This agreement is subject to the provisions of the Prompt Payment Act (31 U.S.C. § 3901 et seq.), and the regulations at 5 CFR Part 1315.

(4) Interest Penalty Payments. If interest penalty payments are determined due under the provisions of the Prompt Payment Act, payment shall be made at the rates determined by the U.S. Treasury, Section 12 of the Contract Disputes Act of 1978 (41 U.S.C. § 7109)

(End of clause)

Clause 7-7 PERFORMANCE PERIOD AND OPTIONS (Jul 13)(BPI 7.2.7.1)
(a) This is a _____[FILL IN] year contract with options to extend for _____[FILL IN] additional _____[FILL IN] year periods.

(b) BPA may unilaterally extend the term of this contract by written notice to the Contractor. BPA will give the Contractor preliminary notice of its intent to extend at least 30 days before the contract expires.

(End of clause)

Clause 7-8 OPTION FOR INCREASED QUANTITY (Sep 98)(BPI 7.2.7.1)
BPA may acquire the option quantity listed in the Schedule of Items at the unit price(s) specified. The Contracting Officer may exercise the option by written notice to the Contractor not later than 30 days prior to the end of the contract. Delivery of the option quantity shall be _____[FILL IN delivery terms].

(End of clause)

Clause 7-9 TRADE-IN OF PERSONAL PROPERTY (Sep 98)(BPI 7.2.10.1)
The following property is offered for trade-in. The property is offered on an "as is/where is" basis. BPA's descriptions of the property may not accurately reflect the condition or value of the property. The Contractor is responsible for determining the condition of the property and assessing its value prior to

award. The contractor will be given title to the specified property upon award of the contract, and will remove the property from BPA's custody within 30 days after award.

Description of Property	Location
FILL IN	FILL IN

(End of clause)

Clause 7-10 E-COMMERCE MARKETPLACE ORDERING (Jul 13) (BPI 7.2.4.1)
BPA has an agreement with _____ (CO FILL IN) for Internet ordering. BPA intends to place orders against this agreement by accessing the _____ (CO FILL IN) where the E-Catalog will reside.

BPA shall make the electronic catalog content of this contract available on the _____ (CO FILL IN) for authorized agents to place orders. Access shall be limited to individuals designated in writing by the Contracting Officer. BPA will provide instructions and requirements for use of the _____ (CO FILL IN) ordering system upon award of contract or when available. BPA will Host and assume all costs associated with hosting the _____ (CO FILL IN).

(End of clause)

Clause 7-11 RESERVED.

Clause 7-12 RESERVED.

Clause 7-13 COMPUTER FRAUD AND ABUSE ACT (Sep 04) (BPI 7.2.4.1)
Unauthorized attempts to upload information and/or change information on this Web site are strictly prohibited and subject to prosecution under the Computer Fraud and Abuse Act of 1986 and Title 18 U.S.C. §.1001 and 1030.

(End of clause)

Clause 7-14 DEFINITIONS (Jul 13) (BPI 7.2.4.1)

(a) Terms and Meanings. The following terms are used interchangeably in this award and carry the same meaning: Contract and Agreement, and Order and Release.

(b) Electronic Commerce.

(1) Electronic Commerce (EC) is the interchange and processing of information using electronic techniques for accomplishing business within the framework of commercial standards and practices. Further, an integral part of implementing EC is the application of business process improvements or reengineering principles to streamline business processes prior to the incorporation of technologies facilitating the electronic exchange of business information.

(2) EC is the paperless exchange of business information. The following is a partial list of some of the techniques being used in the industry to assist companies in doing business electronically:

(c) Electronic Catalogs. Electronic Catalogs (ECAT) are Internet-based entities that allow Agency buyers to browse for products and services, compare prices, and place orders.

(d) Electronic Malls. Electronic Malls (EMALLs) consist of several ECATs spliced together. At EMALLs, Federal Government buyers can access supplier catalogs in "mall"-type settings. To have a presence on an EMALL, vendors must submit their catalogs in an electronic format.

(End of clause)

PART 8 SUPPLIER DIVERSITY PROGRAM AWARDS

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8.1 BPA SUPPLIER DIVERSITY PROGRAM (SDP) AWARDS.

8.1.1 BPA Supplier Diversity Program.

POLICY:

(a) It is BPA's supplier diversity program policy to place a fair proportion of its purchases with small businesses, disadvantaged small businesses, woman-owned small businesses, veteran-owned small businesses, and disabled veteran-owned small businesses through its normal course of business. For the purposes of this Part, all the categories mentioned above are included in the term 'Supplier Diversity Program Categories'.

(b) The HCA is responsible for overseeing BPA's performance regarding these awards.

(c) CO's shall take into account BPA's supplier diversity policy, 8.1.1(a) above, when carrying out their responsibilities for purchasing strategy and making awards.

(d) The BPA supplier diversity program shall be managed as follows:
(1) The HCA shall assess the degree of participation of all supplier diversity program businesses. No specially focused programs shall be implemented so long as participation meets satisfactory norms.
(2) In the event BPA fails to meet acceptable standards BPA shall intensify its outreach efforts.
(3) If participation is still lagging, BPA shall activate narrowly tailored purchasing programs, as appropriate. Purchasing and technical personnel shall take all reasonable action to place a fair proportion of purchases with such businesses.

(e) The CO shall obtain and document the information required by clause 8-1, Supplier Diversity Program Award Representation, prior to awarding any contract.

8.1.2 Supplier Diversity Program Manager.
INFORMATION: BPA has established a Supplier Diversity Program Manager position. This person's duties include the facilitation of the supplier diversity award policies as set forth in the BPI, and interactions with small business concerns and SBA representatives. The Manager has a direct line of communication with the HCA to ensure that top-level BPA management is actively involved in the supplier diversity program implementation.

8.1.3 ROLES and RESPONSIBILITIES:
8.1.3.1 HCA
The HCA is ultimately accountable for the success of the BPA Supplier diversity Program by performing the following:
(1) Providing oversight of program;
(2) Issuing SDP supporting policy and data requirements;
(3) Setting program goals;
(4) Reviewing Quarterly and annual reports on program status; and
(5) Performing compliance reviews of Supply Chain Services implementation of policy.

8.1.3.2 Supply Chain Organization Management
Supply Chain Organization Management is responsible for the following:
(1) Maintaining the supplier Diversity Program Manager position; and
(2) Developing a performance plan and metrics for this position that facilitates the program's success.

8.1.3.3 Supplier Diversity Program Manager
The Supplier Diversity Program Manager is responsible for the following:
(1) Acting as the subject matter expert (SME) for the program;
(2) Assisting COs in reviewing and managing Subcontracting Plans;
(3) Developing SDP training curriculum;
(4) Conducting training and informational outreach to Supply Chain and program office personnel; and
(5) Reporting program status to the HCA and CSCO quarterly, or as requested.

8.1.3.4 Supply Chain and Program Office Personnel

Supply Chain and Program Office personnel are responsible for implementing Supplier Diversity Program policy and process as established by the HCA and SDP Manager by considering small businesses first for each award.

8.2 DEFINITIONS.
"Small Business" means a business that has average annual receipts over the previous three years or average number of employees over the past 12 months, of less than the values identified by the current U. S. Small Business Administration list for the NAICS codes. These codes are identified for each specific procurement and can be found at http://www.sba.gov/category/navigation-structure/contracting/contracting-officials/eligibility-size-standards .

A small business is organized for profit, has a place of business in the United States, operates primarily within the United States or makes a significant contribution to the United States economy through payment of taxes or use of American products materials or labor, is independently owned and operated, and is not dominant in its field on a national basis.

"Disadvantaged Small Business" means a small business that is at least 51 percent unconditionally owned by one or more individuals who are members of socially or economically disadvantaged groups, or a publicly owned business that has at least 51 percent of its stock unconditionally owned by one or more socially or economically disadvantaged individuals and has its management and daily business

operations controlled by one or more such individuals. This category also includes small businesses identified as Subcontinent-Asian Americans, Asian-Pacific Americans, and Native Americans, including American Indians, Eskimos, Aleuts and Native Hawaiians.

"Socially disadvantaged individuals" means individuals who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their qualities as individuals (Small Business Act, Public Law 85-536, as amended).

"Economically disadvantaged individuals" means socially disadvantaged individuals who are economically disadvantaged due to an inability to compete in the free enterprise system because of diminished capital and lack of credit opportunities as compared to others in the same business area who are not socially disadvantaged. Individuals who certify that they are members of named groups (Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent-Asian Americans, are to be considered socially and economically disadvantaged (Small Business Act, Public Law 85-536, as amended).

"Women-Owned Small Business" means a business that is at least 51 percent owned and managed by one or more women. The women must be U. S. citizens and the business must be considered small according to Small Business Administration standards.

"Veteran-Owned Small Business" means a business that is at least 51 percent owned and daily business operations managed by one or more veterans. The term "veteran" means a person who served in the active military, naval, or air service, and who was discharged or released under conditions other than dishonorable (title 38, section 101 (2), United States Code).

"Service-Disabled Veteran-Owned Small Business**"** means a business that at least 51 percent owned and daily business operations managed by one or more veterans. The term "service-disabled" means with respect to disability or death, that such disability was incurred or aggravated, or that the death resulted from a disability incurred or aggravated, in line of duty in the active military, naval, or air service (title 38, section 101 (16), United States Code).

"Supplier Diversity Program Categories" includes small businesses, disadvantaged small businesses, women-owned small business, veteran-owned small businesses, and service-disabled veteran-owned small businesses. This term is used throughout this part to include all of these categories.

"Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native Corporation as defined in 13 CFR 124.100 which is recognized as eligible for the special programs and services provided by the U.S. to Indians because of their status as Indians, or which is recognized as such by the State in which such tribe, band, nation, group or community resides.

8.3 SUBCONTRACT PLAN.

8.3.1 Subcontracting Requirements.

(a) The policy contained herein requires subcontracting plans, except as otherwise provided in BPI 8.3.3.1. The successful offeror(s) awarded contracts exceeding $50,000 are expected to use best efforts to afford small and small disadvantaged business categories the opportunity to participate as subcontractors if such an arrangement is consistent with efficient contract performance. Contractors receiving awards that exceed $650,000 for supplies and services, and $1,500,000 for construction, for the total contract including optional extensions, shall submit an appropriate subcontracting plan.

POLICY:

(b) Any contractor (except, for BPA purposes, small businesses, or contracts with individuals) receiving a contract for more than $50,000 shall agree to use best efforts to afford small business concerns and disadvantaged small business concerns the opportunity to participate as subcontractors in contract performance, consistent with its efficient performance.

(c) It is BPA policy, except as per 8.3.1(d) and (e) below, to fully implement subcontracting plans. Each solicitation or contract expected to exceed $650,000 ($1.5 million for construction) for the total contract including optional extensions, and which has subcontracting possibilities, shall require offerors who are not small businesses to submit an estimate of the amounts they will subcontract to small and small disadvantaged business. The successful offeror shall also submit an appropriate subcontracting plan prior to award.

(d) If the contract does not provide subcontracting opportunities, but does meet the criteria, the CO will document the lack of subcontracting opportunities in the official file.

(e) A subcontracting plan is neither required nor does it apply to:
(1) Small business concerns;
(2) Personal services contracts;
(3) Utility contracts; or
(4) Intergovernmental Contracts awarded per BPI Part 25.
(5) Contracts or contract modifications that will be performed entirely outside any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(f) A subcontracting plan shall meet the criteria set forth by statute and according to the procedures published in this BPI Part.

(g) The CO shall be responsible for determining the adequacy of a subcontracting plan and that the subcontracting plan is performed by the contractor.

8.3.1.1 Clause Usage Prescription.

PROCEDURE:

(a) The CO shall include Clause 8-1 Supplier Diversity Program Award Representation in all solicitations.

(b) The CO shall include Clause 8-3 Utilization of Supplier Diversity Program Categories, in all solicitations and contracts. Clause 8-3 shall not be included in contracts awarded to a small business or to an individual.

8.3.2 Reviewing the Subcontracting Plan.
The CO shall review the subcontracting plan for adequacy. Assistance with this review may be obtained from BPA's Supplier Diversity Program Manager.

(a) No detailed standards apply to every subcontracting plan. Instead, the CO must consider each plan in terms of the circumstances of the particular purchase, including --
(1) Previous involvement of small business concerns as prime contractors or subcontractors in similar purchases;
(2) Proven methods of involving small business concerns as subcontractors in similar purchases; and
(3) The relative success of methods the contractor intends to use to meet the goals and requirements of the plan, as evidenced by records maintained by contractors.

(b) The CO shall determine whether the plan is acceptable based on the negotiation of each of the elements of the plan. Subcontracting goals should be set at a level that the parties reasonably expect can result from the offeror expending good faith efforts to use small and small disadvantaged subcontractors to the maximum practicable extent. Particular attention should be paid to the identification of steps that, if taken, would be considered a good faith effort. No goal should be negotiated upward if it is apparent that a higher goal will significantly increase BPA's cost or seriously impede the attainment of purchase objectives.

(c) In determining the acceptability of a proposed subcontracting plan, the CO may obtain advice and recommendations from the BPA Supplier Diversity Program Manager.

(d) The CO should ensure that the goals offered are attainable in relation to:
(1) The subcontracting opportunities available to the contractor, commensurate with the efficient and economical performance of the contract;
(2) The pool of eligible subcontractors available to fulfill the subcontracting opportunities; and
(3) The actual performance of such contractor in fulfilling the subcontracting goals specified in prior plans.

8.3.3 Awards Involving Subcontracting Plans.
In making an award that requires a subcontracting plan, the CO shall:

(a) Consider the contractor's compliance with the subcontracting plans submitted on previous contracts as a factor in determining contractor responsibility.

(b) Assure that a subcontracting plan was submitted when required.

(c) Notify the BPA Supplier Diversity Program Manager of the opportunity to review the proposed contract (including the plan and supporting documentation). The notice shall be issued in sufficient time to provide the Program Manager a reasonable time to review the material and submit advisory recommendations to the CO. Failure of the Program Manager to respond in a reasonable period of time shall not delay award of the contract.

(d) Determine any fee that may be payable if an incentive is used in conjunction with the subcontracting plan.

(e) Ensure that an acceptable plan is incorporated into and made a material part of the contract.

8.3.3.1 Clause Usage Prescriptions.
The CO shall include Clause 8-4 Subcontracting Plan Requirement, in solicitations, and Clause 8-5 Liquidated Damages-Small Business Subcontracting Plan, in solicitations and contracts that (1) offer subcontracting possibilities and (2) are expected to exceed $650,000 ($1.5 million for construction of any public facility) for the total contract including optional extensions. Clause 8-4 and Clause 8-5 shall not be included in contracts awarded to a small business or an individual.

8.3.4 Liquidated Damages.
POLICY:

(a) When a contractor fails to make a good faith effort to comply with a subcontracting plan, 15 U.S.C. § 637(d)(4)(F) directs that liquidated damages shall be paid by the contractor.

(b) If, after consideration of all the pertinent data, the CO finds that the contractor failed to make a good-faith effort to comply with its subcontracting plan, the CO shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The CO's final decision shall state that the contractor has the right to appeal under the Disputes clause.

(c) If, at contract completion a contractor has failed to meet its subcontracting goals, and the CO decides that the contractor failed to make a good-faith effort to comply with the subcontracting plan, the CO shall give the contractor written notice specifying the failure, advising the contractor of the possibility that the contractor may have to pay to BPA liquidated damages, and providing a period of 10 days (or longer period as necessary) within which to respond. The notice shall give the contractor an opportunity to demonstrate what good-faith efforts have been made before the CO issues the final decision, and shall further state that failure of the contractor to respond may be taken as an admission that no valid explanation exists. The notice may invite the contractor to discuss the matter.

(d) In determining whether a contractor failed to make a good-faith effort to comply with its subcontracting plan, a CO must examine the totality of the contractor's actions, consistent with the information and assurances provided in its plan. The fact that the contractor failed to meet its subcontracting goals does not, in and of itself, constitute a failure to make a good-faith effort. For example, notwithstanding a contractor's diligent effort to identify and solicit offers from small business and small disadvantaged business concerns, factors such as unavailability of anticipated sources or unreasonable prices may frustrate achievement of the contractor's goals. However, when considered in the context of the contractor's total effort in accordance with its plan, the following may be considered as indications of a failure to make a good faith effort: a failure to attempt to identify, contact, solicit, or consider for contract award, small business or small disadvantaged business concerns; a failure to designate a company official to administer the subcontracting program; a failure to maintain records or otherwise demonstrate procedures adopted to comply with the plan; and the adoption of company policies or procedures which have as their objectives the frustration of the objectives of the plan.

(e) If, after consideration of all the pertinent data, the CO finds that the contractor failed to make a good-faith effort to comply with its subcontracting plan, the CO shall issue a final decision to the contractor to that effect and require the payment of liquidated damages in an amount stated. The CO's final decision shall state that the contractor has the right to appeal under the Disputes clause.

8.3.5 Post-award Responsibilities of the Contracting Officer.
After a contract or contract modification containing a subcontracting plan is awarded, the CO is responsible for the following:

(a) Notifying the BPA Supplier Diversity Program Manager, if not done so during contract negotiation.

(b) Forwarding a copy of each plan and any associated approvals to the BPA Supplier Diversity Program Manager.

(c) Giving to the BPA Supplier Diversity Program Manager a copy of the final negotiated subcontracting plan that was incorporated into a contract or contract modification.

(d) Notifying the BPA Supplier Diversity Program Manager of the opportunity to review subcontracting plans in connection with contract modifications.

(e) Monitoring, evaluating, and documenting contractor performance under the subcontracting plan included in the contract. This will include, as appropriate --

(1) Information on the extent to which the contractor is meeting the plan's goals for subcontracting with eligible small and small disadvantaged business concerns;
(2) Information on whether the contractor's efforts to ensure the participation of small and small disadvantaged business concerns are in accordance with its subcontracting plan;
(3) Information on whether the contractor is requiring its subcontractors to adopt similar subcontracting plans;
(4) Immediate notice if, during performance, the contractor is failing to meet its commitments under the contract or the subcontracting plan; and
(5) Immediate notice if, during performance, the contractor is failing to comply in good faith with the subcontracting plan.

(f) Initiating action to assess liquidated damages in accordance with BPI 8.3.2 upon receipt of evidence to indicate that such action is warranted.

8.3.6 Subcontract Plans - SBA's Role
INFORMATION:
(a) If requested by the SDP Manager the SBA may --

(1) Support BPA and contractors in carrying out their responsibilities with regard to subcontracting plans,
(2) Review any solicitation that meets the dollar threshold in 8.3.1;

(3) Review any negotiated contractual document requiring a subcontracting plan, including the plan itself; and

(4) Evaluate compliance with subcontracting plans, either on a contract-by-contract basis, or, in the case of contractors having multiple contracts, on an aggregate basis.

(b) The SBA is not authorized to prescribe the extent to which any contractor or subcontractor shall subcontract, specify concerns to which subcontracts will be awarded, or exercise any authority regarding the administration of individual BPA prime contracts or subcontracts.

8.50 TEXT OF CLAUSES.
The following clauses are referred to in BPI Part 8:

Clause 8-1 SUPPLIER DIVERSITY AWARD REPRESENTATION..... 7
Clause 8-2 RESERVED 7
Clause 8-3 UTILIZATION OF SUPPLIER DIVERSITY PROGRAM CATEGORIES..... 7
Clause 8-4 SUBCONTRACTING PLAN REQUIREMENT 8
Clause 8-5 LIQUIDATED DAMAGES -- SMALL BUSINESS SUBCONTRACTING PLAN 8

Clause 8-1 SUPPLIER DIVERSITY AWARD REPRESENTATION (Oct 13)(BPI 8.3.1.1)

(a) CO Fill-in:

NAICS CODE	Size Standard in Millions of Dollars **OR** Size Standards in Number of Employees

(b) The offeror represents that:
(1) it is /_/, is not /_/ a small business concern.
(2) it is /_/, is not /_/ a disadvantaged small business concern (this includes Native American owned small business, 8-A Certified or Hub-zone and any other disadvantaged small business concerns).
(3) it is /_/, is not /_/ a women-owned small business concern.
(4) it is /_/, is not /_/ a veteran-owned small business concern.
(5) it is /_/, is not /_/ a disabled veteran-owned small business concern

(End of clause)

Clause 8-2 RESERVED

Clause 8-3 UTILIZATION OF SUPPLIER DIVERSITY PROGRAM CATEGORIES (Oct 13)(BPI 8.3.1.1)

(a) It is the policy of the United States that supplier diversity program categories; small businesses, disadvantaged small businesses, women-owned small businesses, veteran-owned small businesses, and disabled veteran-owned small businesses shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency, including contracts and subcontracts.

(b) Prime contractors shall establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with these supplier diversity program categories.

(c) The Contractor hereby agrees to carry out the policies in (a) and (b) in the awarding of subcontracts to the fullest extent consistent with efficient contract performance. The Contractor agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the Department of Energy as may be necessary to determine the extent of the Contractor's compliance with this clause.

(d) As used in this contract, the terms "small business " and " disadvantaged small business", "veteran owned small business", and "disabled veteran-owned small business" shall mean a business as defined in this BPI Part 8, pursuant to section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto.

(End of clause)

Clause 8-4 SUBCONTRACTING PLAN REQUIREMENT (Oct 13)(BPI 8.3.3.1)

Offerors who are not small businesses as defined in Clause 8-1, Supplier Diversity Award Representation, shall:

(a) Submit with their offer, either
(1) an estimate of the dollar amounts they plan to award to subcontractors who are one of the supplier diversity program categories, or
(2) a statement, with supporting reasons, that the nature of the contract does not offer subcontracting possibilities.

(b) Negotiate a detailed subcontracting plan as described in BPI 8.3.3 prior to award if the nature of the contract offers subcontracting possibilities. The plan shall provide maximum practicable opportunity for small businesses, disadvantaged small businesses, veteran-owned small businesses, and disabled veteran-owned small businesses to participate in performance of the contract. The plan will be incorporated into the contract.

(End of clause)

Clause 8-5 LIQUIDATED DAMAGES -- SMALL BUSINESS SUBCONTRACTING PLAN (Oct 13)(BPI 8.3.3.1)

(a) "Failure to make a good faith effort to comply with the subcontracting plan," as used in this clause, means a willful or intentional failure to perform in accordance with the subcontracting plan approved under this contract, or willful or intentional action to frustrate the plan.

(b) If the Contractor has failed to meet its subcontracting goals and the Contracting Officer decides that the Contractor failed to make a good faith effort to comply with its subcontracting plan, the Contractor shall pay BPA liquidated damages in an amount stated. The amount of damages attributable to the Contractor's failure to comply shall be an amount equal to the actual dollar amount by which the contractor failed to achieve each subcontract goal, or in the case of a commercial products plan, that portion of the dollar amount allocable to the BPA contract by which the Contractor failed to achieve each subcontract goal.

(c) Before the Contracting Officer makes a final decision that the Contractor has failed to make such good faith effort, the Contracting Officer shall give the Contractor written notice specifying the failure and permitting the Contractor to demonstrate what good faith efforts have been made. Failure to respond to the notice may be taken as an admission that no valid explanation exists. If the Contracting Officer finds that the contractor failed to made a good faith effort to comply with the subcontracting plan, the Contracting Officer shall issue a final decision to that effect and require that the Contractor pay the Government liquidated damages as provided in paragraph (b) of this clause.

(d) With respect to approved commercial products plans, i.e., company-wide or division-wide subcontracting plans, the Contracting Officer of the agency that originally approved the plan will exercise the functions of the Contracting Officer under this clause on behalf of all agencies that awarded contracts covered by that commercial products plan.

(e) The Contractor shall have the right of appeal, under the clause in this contract entitled Disputes, from any final decision of the Contracting Officer.

(f) Liquidated damages shall be in addition to any other remedies that the Government may have.

(End of clause)

PART 9 CONTRACTING WITH FOREIGN BUSINESSES

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9.1 BUY AMERICAN ACT - SUPPLIES.

INFORMATION: This subpart implements the Buy American Act (41 U.S.C. §8301-8305) obligations of the United States under certain international agreements regarding government procurement, and under Executive Order 10582, as amended. It applies to supply contracts and to the supply portion of contracts for services that involve the furnishing of supplies.

9.1.1 Policy.

(a) The Buy American Act requires that only domestic end products be acquired for public use, except articles, material and supplies:

(1) Where award is based on price only and the cost would be unreasonable after application of the differentials in BPI 9.1.4(a)(1) and (2);

(2) For which the HCA determines that domestic preference would be inconsistent with the public interest;

(3) That are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(b) The Buy American Act does not apply to acquisitions subject to certain trade agreements as outlined in BPI 9.4.

(c) The Buy American Act shall not be applied to the purchase of information technology products that are commercial items.

(d) In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for an end product that is a COTS item.

9.1.2 Definitions.

"Commercially available off-the-shelf (COTS) item"

(1) Means any item of a supply (including construction material) that is:

(1) A commercial item (as defined in BPI 1.8);

(2) Sold in substantial quantities in the commercial marketplace; and

(3) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 USC App 1702) such as agricultural products and petroleum products.

"Components" means those articles, materials, and supplies incorporated directly into the end products.

"Domestic end product" means;

(a) An unmanufactured end product mined or produced in the United States, or;

(b) An end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining whether an end product is domestic, only the end product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the end product and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with BPI 9.1.1 (b) and (c) are treated as domestic.

"Domestic offer" means an offered price for a domestic end product, including transportation to destination.

"End product" means those articles, materials and supplies to be acquired for public use under the contract.

"Foreign end product" means an end product other than a domestic end product.

"Foreign offer" means an offered price for a foreign end product, including transportation to destination and duty (whether or not a duty-free entry certificate is issued).

9.1.3 Acquisition of Civil Aircraft and Related Articles.
INFORMATION: The U. S. Trade Representative has waived the application of the Buy American Act to the purchase of civil aircraft and related articles manufactured in certain countries. See Clause 9-2, Waiver of Buy American Act for Civil Aircraft and Related Articles, for details. That clause is to be inserted into contracts for aircraft and related articles.

9.1.4 Evaluation Procedure.
(a) The following price differentials shall be computed and used in the evaluation of domestic and foreign offers. After computation and addition of the resulting differentials to the offered price of a domestic end product as a basis for comparison with any foreign offer, price evaluation shall be considered as otherwise stated in the solicitation. The offered price of a domestic end product is unreasonable when the lowest acceptable domestic offer exceeds the lowest acceptable foreign offer (including duty), by--

(1) More than 6 percent, if the domestic offer is from a large business concern; or
(2) More than 12 percent, if the domestic offer is from a small business concern.

(b) The evaluation in (a) above shall be applied on an item-by-item basis or to any group of items on which award may be made as specifically provided by the solicitation.

(c) The clause at 9-1, Buy American Certificate, constitutes a certification by the offeror that each end product, except as noted by the offeror beneath the certification, is a domestic source end product as defined by the Buy American Act clause. When an offeror makes no entry under the certificate and does not otherwise exclude any end products from the representation and the solicitation also includes the Buy American Act clause, the offer is regarded as a domestic offer.

(d) Where the offeror indicates that it intends to furnish both foreign and domestic articles, BPA shall apply the appropriate differential to each item determined to be an end product. BPA evaluates the purpose of the particular solicitation to determine whether an item is an end product as distinguished from a component. When the purpose of the solicitation is to acquire a particular article, material or supply, that item is an end product. Components are those articles, materials, or supplies which are directly incorporated in the end product, but which would not be useful separately for the purpose of the solicitation. The offeror's representations as to components of foreign origin must be carefully analyzed to assure that the items listed are components and not end products, as the offeror's judgment in these matters is not controlling. Where the solicitation is oral, the offeror will be asked about foreign content if any doubt exists as to whether the product offered is of domestic origin.

(e) The origin of a component of a manufactured product will be considered (for purposes of determining whether an item qualifies as a domestic source end product) only in those cases where that component is directly incorporated in the end product by the offeror. The origin of materials used in domestic components furnished to the offeror by other manufacturers or producers will not be so considered.

(f) Where an offeror fails to identify the origin of the product, and in the absence of any previous experience with the offeror or information to the contrary, BPA shall assume that domestic firms intend to furnish domestic products and that foreign firms intend to furnish products of foreign origin.

(g) Since contracts are awarded based on the evaluated price and not on the offered price, the applicable Buy American differential shall be applied only after all other product evaluation factors set forth in the solicitation have been applied. The Buy American differential shall not be applied to any domestic end product or BPA-furnished property (such as transformer oil) or to award evaluation factors such as multiple award or cost of inspection evaluation factors.

(h) To determine whether a trade agreement (see BPI 9.4) applies to the purchase of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to-purchase), the estimated purchase value shall be calculated as follows:

(1) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of the purchase;

(2) If a fixed-term contract of more than 12 months is contemplated, use the total estimated value of the purchase plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract;

(3) If an indefinite-term contract is contemplated, use the estimated monthly payment multiplied by 48; or

(4) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.

(i) If a contemplated purchase includes an option clause, when calculating the threshold for the application of a trade agreement, include the value of all options.

(j) When offers are obtained orally, offerors shall be informed that if an offer of foreign products is made, the factors in 9.1.4(a) will be applied.

9.1.5 Reserved.

9.1.6 Clause Usage Prescriptions.
PROCEDURE:

(a) The following clauses are to be used when the origin of materials and supplies is not known. If the CO knows that the offers received will be all foreign or all domestic products, these clauses need not be used, but a note should be placed in the file to indicate the nature of the offers expected.

(b) The CO shall include Clause 9-1 Buy American Certificate, in all solicitations for the acquisition of supplies, or for services involving the furnishing of supplies that are expected to exceed $50,000, except those for the purchase of:

(1) civil aircraft and related articles (see Clause 9-2);

(2) supplies subject to a trade agreement and expected to exceed the thresholds established in BPI 9.4; and

(3) information technology equipment or supplies that are commercial items.

(c) The CO shall include Clause 9-2 Waiver of Buy American Act for Civil Aircraft and Related articles, in solicitations for the acquisition of civil aircraft and related articles.

(d) The CO shall include Clause 9-3 Buy American Act-Supplies, in all solicitations and contracts for supplies, or for services involving the furnishing of supplies that are expected to exceed $50,000, except those for the purchase of:

(1) civil aircraft and related articles (see Clause 9-2);

(2) supplies subject to a trade agreement and expected to exceed the thresholds established in BPI 9.4; and

(3) information technology equipment or supplies that are commercial products.

For commercial acquisitions, Clause 9-3 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-20.

(e) The CO shall include Clause 9-4 Foreign Offers, in solicitations where foreign firms may submit offers, or offers may be received that will offer foreign end products and which are expected to exceed $50,000, except those for the purchase of civil aircraft and related articles (see Clause 9-2 Waiver of Buy American Act for Civil Aircraft and Related articles) and those for purchase of supplies subject to certain trade agreements as outlined in BPI 9.4.

9.2 BUY AMERICAN ACT - CONSTRUCTION MATERIALS.

INFORMATION: This subpart implements the Buy American Act (41 U.S.C. §8301-8305) and obligations of the United States under trade agreements (see BPI 9.4) and under Executive Order 10582, as amended. It applies to contracts for the construction, alteration, or repair of any public building or public work in the United States. For construction projects attributed in whole or in part to Recovery Act funds, refer to BPI 9.2.5.

9.2.1 Policy.

(a) The Buy American Act requires that only domestic construction materials be used in construction in the United States, except when --

(1) The contract is evaluated as described in BPI 9.1.1(a),

(2) The HCA determines that use of a particular domestic construction material would be impracticable; or

(3) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality;

(b) The Buy American Act does not apply to the purchase of construction materials that is subject to certain trade agreements as outlined in section BPI 9.4.

(c) When it is determined for any of the reasons stated in this section that certain foreign construction materials may be used, the excepted materials shall be listed in the contract.

9.2.2 Definitions.

INFORMATION:

"Components" means those articles, materials, and supplies incorporated directly into construction materials.

"Construction" means construction, alteration, or repair of any public building or public work in the United States.

"Construction materials" means articles, materials, and supplies brought to the construction site for incorporation into the building or work.

"Domestic construction material" means:

(a) An unmanufactured construction material mined or produced in the United States, or

(b) A construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components.

"Foreign construction material" means a construction material other than a domestic construction material.

9.2.3 Evaluation Procedures.

(a) Unless the HCA determines otherwise, when the cost of a comparable domestic construction material exceeds by more than 6 percent the cost of a foreign construction material included in an offer, using the domestic construction material would unreasonably increase the cost and use of a foreign construction

material is acceptable. This evaluation shall be made for each foreign construction material not specifically excepted by the solicitation.

(b) The clause at 9-7, Buy American Act Notice, requires offerors proposing to use foreign construction materials to provide adequate data for evaluation under paragraph (a) above, and permits alternative offers for comparable domestic construction materials at stated prices. When a foreign construction material is not acceptable under paragraph (a) above, evaluation of the offer shall proceed on the basis of the stated price for a comparable domestic construction material, if offered. If the offer does not state a price for a comparable domestic construction material, the offer may be rejected.

(c) The acceptable offer that remains low after adding (for evaluation purposes only) 6 percent of the cost of all foreign construction materials, determined acceptable under paragraph (a) above and, after considering all other evaluation factors, shall be considered the successful offer.

(d) In making evaluations under this section, the cost of both foreign and domestic construction material shall include all cost of delivery to the construction site including offsite storage facilities. The cost of foreign construction material shall include any applicable duty (whether or not a duty-free entry certificate is issued).

(e) The evaluation in (a) above shall not be applied to offers of construction materials subject to certain trade agreements as outline in BPI 9.4.

9.2.4 Clause Usage Prescriptions.
PROCEDURE:

(a) The CO shall include Clause 9-5 Buy American Act -- Construction Materials, in solicitations and contracts which are for construction which are expected to exceed $50,000. Clause 9-5 shall not be included in solicitations and contracts for construction materials subject to certain trade agreements as outlined in BPI 9.4.

(b) The CO shall include Clause 9-6 Buy American Act Representations, in solicitations for construction expected to exceed $50,000. The clause shall not be included in solicitations and contracts for construction materials subject to certain trade agreements as outlined in BPI 9.4.

(c) The CO shall include Clause 9-7 Buy American Act Notice, in solicitations for construction expected to exceed $50,000. The clause shall not be included in solicitations and contracts for construction materials subject to certain trade agreements as outlined in BPI 9.4.

(d) For construction projects which are attributed, in whole or in part, to the American Reinvestment and Recovery Act of 2009 (Pub. L. 111-5) “Recovery Act” funds, the CO shall not include Clauses 9-5, 9-6 and 9-7 as prescribed in (a) through (c) of this subpart. The CO shall instead include the ARRA specific clauses prescribed in BPI 9.2.5.10.

9.2.5 American Recovery and Reinvestment Act Requirements for Buy American Act-Construction Materials
9.2.5.1 INFORMATION:
This section implements the requirements for application of the Buy American Act when project funding is attributed to, in whole or in part, the Recovery Act.

9.2.5.2 POLICY:
BPA shall comply with the unique requirements for Buy American Act as imposed by the American Reinvestment and Recovery Act of 2009.

9.2.5.3 DEFINITIONS:
As used in this subpart—

"Domestic construction material" means—
(1) An unmanufactured construction material mined or produced in the United States; or
(2) A construction material manufactured in the United States.

"Foreign construction material" means a construction material other than a domestic construction material.

"Manufactured construction material" means any construction material that is not unmanufactured construction material.

"Public building or public work" means building or work, the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

"Recovery Act designated country" means a World Trade Organization Government Procurement Agreement country, a Free Trade Agreement country, or a least developed country.

"Steel" means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

"Unmanufactured construction material" means raw material brought to the construction site for incorporation into the building or work that has not been—
(1) Processed into a specific form and shape; or
(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

9.2.5.4 *POLICY*:
Except as provided in BPI 9.2.5.5—

(a) None of the funds made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work, as defined in BPI 9.2.5.3, unless—
(1) The public building or public work is located in the United States; and
(2) All of the iron, steel, and other manufactured goods used as construction material in the project are produced or manufactured in the United States.
(i) Production in the United States of the iron or steel used as construction material requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured construction material.
(ii) There is no requirement with regard to the origin of components or subcomponents in other manufactured construction material, as long as the manufacture of the construction material occurs in the United States.

(b) Use only domestic unmanufactured construction material, as required by the Buy American Act.

9.2.5.5 EXCEPTIONS

(a) When one of the following exceptions applies, the contracting officer may allow the contractor to incorporate foreign construction materials without regard to the restrictions of section 1605 of the Recovery Act or the Buy American Act:
(1) Nonavailability. The head of the contracting activity may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(2) Unreasonable cost. The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with BPI 9.2.5.7.
(3) Inconsistent with public interest. The head of the agency may determine that application of the restrictions of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(b) Determinations. When a determination is made, for any of the reasons stated in this section, that certain foreign construction materials may be used—

(1) The contracting officer shall list the excepted materials in the contract; and
(2) The head of the agency shall publish a notice in the Federal Register within two weeks after the determination is made, unless the construction material has already been determined to be domestically nonavailable. See BPI 9.2.5.5. The notice shall include:

(i) The title "Buy American Exception under the American Recovery and Reinvestment Act of 2009";
(ii) The dollar value and brief description of the project; and
(iii) A detailed justification as to why the restriction is being waived.

(c) Acquisitions under trade agreements.

(1) For construction contracts with an estimated acquisition value of $7,777,000 or more, also see BPI 9.4. Offers of products determined to be eligible products per BPI 9.4 shall receive equal consideration with domestic offers per BPI 9.4.
(2) For purposes of the Recovery Act, designated countries do not include the Caribbean Basin Countries.
(3) Canada is identified by the US federal government as a trade agreement country. However, for BPA as a Power Marketing Agency of the Department of Energy, Canada is currently excluded as to the trade agreement exemption from the Buy American Act.

9.2.5.6 PREAWARD DETERMINATION CONCERNING THE INAPPLICABILITY OF SECTION 1605 OF THE RECOVERY ACT OR THE BUY AMERICAN ACT

(a) For any acquisition, an offeror may request from the contracting officer a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act for specifically identified construction materials. The time for submitting the request is specified in the solicitation in paragraph (b) of either Clause 9-47 or 9-49, as appropriate to the subject procurement. The information and supporting data that must be included in the request are also specified in the solicitation in paragraphs (c) and (d) of either Clause 9-46 or Clause 9-48.

(b) Before award, the contracting officer must evaluate all requests based on the information provided and may supplement this information with other readily available information.

(c) Determination based on unreasonable cost of domestic construction material.

(1) Iron, steel, and other manufactured construction material. The contracting officer must compare the offered price of the contract using foreign manufactured construction material to the estimated price if all domestic manufactured construction material were used. If use of domestic manufactured construction material would increase the overall offered price of the contract by more than 25 percent, then the contracting officer shall determine that the cost of the domestic manufactured construction material is unreasonable.
(2) Unmanufactured construction material. The contracting officer must compare the cost of each foreign unmanufactured construction material to the cost of domestic unmanufactured construction material. If the cost of the domestic unmanufactured construction material exceeds the cost of the foreign unmanufactured construction material by more than 6 percent, then the contracting officer shall determine that the cost of the unmanufactured construction material is unreasonable.

9.2.5.7 PROCEDURE FOR EVALUATING OFFERS OF FOREIGN CONSTRUCTION MATERIAL

(a) To ensure receipt of all information necessary to perform evaluation of offers, the contracting officer must inform the offerors to complete and submit the information as requested in contract Clauses 9-46 or 9-48, as appropriate to the subject procurement, of the draft contract as sent to offerors during solicitation phase.

(b) If the contracting officer has determined that an exception applies because the cost of certain domestic construction material is unreasonable, in accordance with BPI 9.2.5.6, the contracting officer shall apply evaluation factors to the offer incorporating the use of such foreign construction material as follows:

(1) Use an evaluation factor of 25 percent, applied to the total offered price of the contract, if foreign iron, steel, or other manufactured goods are incorporated in the offer as construction material based on an exception for unreasonable cost requested by the offeror.
(2) In addition, use an evaluation factor of 6 percent applied to the cost of foreign unmanufactured construction material incorporated in the offer based on an exception for unreasonable cost requested by the offeror.
(3) Total evaluated price = offered price + (.25 x offered price, if (a)(1) applies) + (.06 x cost of foreign unmanufactured construction material, if (a)(2) applies).

(c) If two or more offers are equal in price, the contracting officer must give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(d) Offerors also may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer if the Government determines that an exception permitting use of a particular foreign construction material does not apply.
(e) If the contracting officer awards a contract to an offeror that proposed foreign construction material not listed in the applicable clause in the solicitation (paragraph (b)(3) of Clause 9-46, or paragraph (b)(3) of Clause 9-48, the contracting officer must add the excepted materials to the list in the contract clause.

9.2.5.8 POSTAWARD DETERMINATIONS

(a) If a contractor requests a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act after contract award, the contractor must explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the contracting officer concludes that the contractor should have made the request before contract award, the contracting officer may deny the request.

(b) The contracting officer must base evaluation of any request for a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 9-46 or 9-48 and/or other readily available information.

(c) If a determination, under BPI 9.2.5.5(a) is made after contract award that an exception to section 1605 of the Recovery Act or to the Buy American Act applies, the contracting officer must negotiate adequate consideration and modify the contract to allow use of the foreign construction material. When the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is at least the differential established in BPI 9.2.5.7(a).

9.2.5.9 NONCOMPLIANCE

The contracting officer must—

(a) Review allegations of violations of section 1605 of the Recovery Act or Buy American Act;

(b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action; and

(c) If the review reveals that a contractor or subcontractor has used foreign construction material without authorization, take appropriate action, including one or more of the following:

(1) Process a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act in accordance with BPI 9.2.5.8.

(2) Consider requiring the removal and replacement of the unauthorized foreign construction material.

(3) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the contracting officer may determine in writing that the foreign construction material need not be removed and replaced. A determination to retain foreign construction material does not constitute a determination that an exception to section 1605 of the Recovery Act or the Buy American Act applies, and this should be stated in the determination. Further, a determination to retain foreign construction material does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of section 1605 of the Recovery Act or the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspension or debarment official in accordance with BPI 9.4. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

9.2.5.10 CLAUSE USAGE PRESCRIPTIONS

The CO shall include the following clauses into solicitations and contracts for construction, that are funded with increased borrowing authority attributed to the Recovery Act, or funded in whole or in part with an appropriations under the Recovery Act.

(a) The CO shall include Clause 9-46 Required Use of American Iron, Steel, and Other Manufactured Goods--Buy American Act--Construction Materials, in solicitations and contracts for construction that is performed in the United States, valued at less than $7,777,000.

(1) List in paragraph (b) (3) of the basic clause all foreign construction material excepted from the requirements of the Buy American Act.

(2) If the head of the agency determines that a higher percentage is appropriate, substitute the higher evaluation percentage in paragraph (b)(4)(i) of the clause.

(b) The CO shall include Clause 9-47 Notice of Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials, in solicitations for construction that include Clause 9-46.

(1) COs shall use Alternate I to replace paragraph (b) if insufficient time is available to process a determination regarding the inapplicability of the Buy American Act before receipt of offers.

(c) The CO shall include Clause 9-48 Required Use of American Iron, Steel, and Other Manufactured Good—Buy American Act—Construction Materials Under Trade Agreements in solicitations and contracts for construction that is performed in the United States, and valued at $7,777,000 or more.

(1) In the basic clause, the CO shall list in paragraph (b)(3) all foreign construction materials excepted from the Buy American Act or section 1605 of the Recovery Act, other than Recovery Act designated country construction material.

(2) If the head of the agency determines that a higher percentage is appropriate, substitute the higher evaluation percentage in paragraph (b)(4)(i) of the clause.

(3) The CO shall use Alternate I of the clause when the acquisition is valued between at $7,777,000 or more but less than $10,074,262. List in paragraph (b)(3) of the clause all foreign construction material excepted from the Buy American Act or section 1605 of the Recovery Act,

unless the excepted foreign construction material is from a Recovery Act designated country other than Bahrain, Mexico, or Oman.

(d) The CO shall include Clause 9-49 Notice of Required Use of American Iron, Steel, and Other Manufactured Good—Buy American Act—Construction Materials Under Trade Agreements, in solicitations for construction that include Clause 9-48.

(1) The CO shall use Alternate I to replace paragraph (b) if insufficient time is available to process a determination regarding the inapplicability of the Buy American Act before receipt of offers.

(2) The CO shall use Alternate II to replace paragraph (d) Alternate Offers, if the acquisition is valued at $7,777,000 or more, but less than $10,074,262.

(3) If the conditions of Alternate I and II both exist, the CO shall use Alternate III to replace basic clause paragraphs with Alternate I paragraph (b), and Alternate II paragraph (d).

9.3 ADDITIONAL FOREIGN ACQUISITION POLICIES.

9.3.1 Foreign Shipments by Sea.

INFORMATION: See Part 14.15, Use of Privately-owned U. S. Flag Vessels.

9.3.2 Restricted Foreign Purchases.

(a) ***POLICY:*** The Office of Foreign Assets Control (OFAC) maintains a database of those persons and entities that are prohibited from transacting under U.S. jurisdiction. Except as authorized by Office of Foreign Assets Control (OFAC), agencies and their contractors and subcontractors must not acquire any supplies or services if any proclamation, Executive order, or statute administered by OFAC, or if OFAC's implementing regulations at 31 CFR Chapter V, would prohibit such a transaction by a person subject to the jurisdiction of the United States. COs shall contact the HCA to obtain advice and approval to solicit or award to any firm identified in (b) below.

(b) ***INFORMATION***: As part of its enforcement efforts, OFAC publishes a list of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific. Collectively, such individuals and companies are called "Specially Designated Nationals" or "SDNs." Their assets are blocked and U.S. persons are generally prohibited from dealing with them. Except as authorized by OFAC, most transactions involving Cuba, Iran, and Sudan are prohibited, as are most imports from Burma or North Korea into the United States or its outlying areas. In addition, lists of entities and individuals subject to economic sanctions are included in OFAC's List of Specially Designated Nationals and Blocked Persons at http://www.treas.gov/offices/enforcement/ofac/sdn. More information about these restrictions, as well as updates, is available in OFAC's regulations at 31 CFR Chapter V and/or on OFAC's website at http://www.treas.gov/offices/enforcement/ofac. COs shall coordinate with the HCA to submit questions concerning the restrictions in paragraphs (a) or (b) of this section to the— Department of the Treasury Office of Foreign Assets Control

(c) Iran Sanctions Act – Prohibition on Contracting with Certain Entities

(i) The CO is prohibited from awarding or extending a contract with a person that exports certain sensitive technology to Iran, as determined by the President and listed in the System for Award Management Exclusions at http://www.sam.gov (22 U.S.C. § 8515).

(ii)In this section and clause 9-9, "Person" means a natural person; a corporation, and any other business organization, including any governmental entity that is operating as a business enterprise.

(iii) Certification:

(A) The Iran Sanction Act (PL 104-172, PL 111-195) requires each offeror to certify that the offeror and any person owned or controlled by the offeror does not engage in any activity for which sanctions may be imposed under section 5 of the Iran sections Act.

(B) The Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 PL 111-195 Section 106 requires each offeror to certify that the offeror does not export any sensitive

technology to the government of Iran or any individuals or entities controls by or acting on behalf or at the direction of the government of Iran. Offerors shall address any questions concerning sensitive technology to the Department of State at CISADA106@state.gov.

(iv) Exemption for trade agreements: The certification requirements in BPI 9.3.2(c)(iii) and Clause 9-9(b)(1)-(b)(3) do not apply if the procurement is subject to trade agreements and the offeror certifies that all the offered products are designated country end products or designated country construction materials.

(v) Remedies: False certification may result in termination of the contract, suspension of the contractor, and debarment of the contractor.

(d) Restricted Business Operations in Sudan

(i) The CO is prohibited from awarding a contract to an entity that conducts restricted business operations in Sudan as defined in the Sudan Accountability and Divestment Act of 2007 (PL 110-174).

(ii) Certification: The Act requires each offeror to certify that it does not conduct restricted business operations in Sudan.

(iii) Remedies: False certification may result in termination of the contract, suspension of the contractor, and debarment of the contractor.

9.3.2.1 Clause Usage Prescription

(a) The CO shall include Clause 9-8 Restrictions on Certain Foreign Purchases, in all solicitations and contracts. For commercial acquisitions, Clause 9-8 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-20.

(b) The CO shall include Clause 9-9 Offeror Representation and Certifications - Prohibited Foreign Transactions in all solicitations.

9.3.3 NAFTA Patent Notification Requirements.

INFORMATION: Contractors from a country that is a party to the North American Free Trade Agreement (NAFTA) are required by Article 1709(10) of NAFTA to obtain authorization prior to use of patented technology covered by a valid United States patent. If the CO has reason to believe that a NAFTA contractor is or will be using a patent without authorization in the performance of a BPA contract, contact the HCA or General Counsel for instructions.

9.3.4 Services.

PROCEDURE:

(a) The evaluation of offers of: (1) covered services; or (2) construction services that are subject to certain trade agreements shall be in accordance with the provisions of BPI 9.4.

(b) The term “covered services” does not include transportation services, dredging, services purchases in support of military forces overseas, management and operating contracts of certain government or privately-owned facilities used for government purposes, including federally-funded research and development centers, research and development services, or printing services.

9.4 TRADE AGREEMENTS.

(a) This subpart implements the obligations of the United States under agreements regarding government procurement, and the Trade Agreements Act (19 U.S.C. § 2501 *et seq.*), which provides the authority to waive the Buy American Act as delegated to the U.S. Trade Representative(USTR) by the President.

(b) The agreements covered by this section are:

(1) The World Trade Organization Government Procurement Agreement (WTO GPA), as approved by Congress in the Uruguay Round Agreements Act (Public Law 103-465);
(2) Free Trade Agreements (FTA), consisting of—
(A) NAFTA (the North American Free Trade Agreement, as approved by Congress in the North American Free Trade Agreement Implementation Act of 1993 (19 U.S.C. § 3301 note));
(B) Chile FTA (the United States-Chile Free Trade Agreement, as approved by Congress in the United States-Chile Free Trade Agreement Implementation Act (Public Law 108-77));
(C) Singapore FTA (the United States-Singapore Free Trade Agreement, as approved by Congress in the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. 108-78) (19 U.S.C. § 3805 note));
(D) Australia FTA (the United States-Australia Free Trade Agreement, as approved by Congress in the United States-Australia Free Trade Agreement Implementation Act (Pub. L. 108-286) (19 U.S.C. § 3805 note));
(E) Morocco FTA (The United States-Morocco Free Trade Agreement, as approved by Congress in the United States-Morocco Free Trade Agreement Implementation Act (Pub. L. 108-302) (19 U.S.C. § 3805 note));
(F) DR-CAFTA (The Dominican Republic-Central America-United States Free Trade Agreement, as approved by Congress in the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109-53) (19 U.S.C. § 4001 note));
(G) Bahrain FTA (the United States-Bahrain Free Trade Agreement, as approved by Congress in the United States-Bahrain Free Trade Agreement Implementation Act (Pub. L. 109-169) (19 U.S.C. § 3805 note));
(H) Oman FTA (the United States-Oman Free Trade Agreement, as approved by Congress in the United States-Oman Free Trade Agreement Implementation Act (Pub. L. 109-283) (19 U.S.C. § 3805 note));
(I) Peru FTA (the United States-Peru Trade Promotion Agreement, as approved by Congress in the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. 110-138) (19 U.S.C. § 3805 note));
(J) Korea FTA (the United States-Korea Free Trade Agreement Implementation Act (Pub. L. 112-41) (19 U.S.C. 3805 note));
(K) Colombia FTA (the United States-Colombia Trade Promotion Agreement Implementation Act (Pub. L. 112-42) (19 U.S.C. 3805 note)); and
(L) Panama FTA (the United States-Panama Trade Promotion Agreement Implementation Act (Pub. L. 112-43)(19 U.S.C. 3805 note)).
(3) The least developed country designation made by the U.S. Trade Representative, pursuant to the Trade Agreements Act (19 U.S.C. § 2511(b)(4)), in acquisitions covered by the WTO GPA;
(4) The Caribbean Basin Trade Initiative (CBTI) (determination of the U.S. Trade Representative that end products or construction material granted duty-free entry from countries designated as beneficiaries under the Caribbean Basin Economic Recovery Act (19 U.S.C. § 2701, *et seq*.), with the exception of Panama, must be treated as eligible products in acquisitions covered by the WTO GPA);
(5) The Israeli Trade Act (the U.S.-Israel Free Trade Area Agreement, as approved by Congress in the United States-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note)); or
(6) The Agreement on Trade in Civil Aircraft (U.S. Trade Representative waiver of the Buy American Act for signatories of the Agreement on Trade in Civil Aircraft, as implemented in the Trade Agreements Act of 1979 (19 U.S.C. § 2513)). See BPI 9.1.3.

(c) The value of the acquisition is a determining factor in the applicability of trade agreements. The trade agreements and thresholds for applicability to Bonneville procurements are listed in BPI 9.4.2.

9.4.1 Definitions.

"Caribbean Basin country" means any of the following countries: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago. These countries are covered by the WTO GPA.

"Free Trade Agreement country" means any of the following countries: Australia, Bahrain, Canada, Chile, Columbia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore.

"Least developed country" means any of the following countries: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia. These countries are covered by the WTO GPA.

"North American Free Trade Agreement country" means any of the following countries: Mexico, Canada. Canada is currently excluded as to the trade agreement exemption from the Buy American Act.

A "World Trade Organization Government Procurement Agreement" (WTO GPA) country means any of the following countries: Armenia, Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Panama, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan or United Kingdom.

9.4.2 Trade Agreement Thresholds.

(a) The various thresholds for supplies, services, and construction services under trade agreements are summarized in the table below. See BPI 9.4.1 for the list of parties to the WTO GPA, DR-CAFTA, and NAFTA, and for the list of least developed countries.

(b) If the value equals or exceeds the amount listed, the offer shall receive equal treatment with U.S. domestic offers. All values are in U.S. Dollars. The CO shall specify that offerors must submit offers in the English language and in U.S. dollars.

Trade Agreement	Supplies and Services	Construction
World Trade Organization Government Procurement Agreement (WTO GPA) [also covers least developed countries and Caribbean Basin countries] [Canada is excluded from coverage until it covers its provinces and hydro utilities]	$622,000	$7,777,000
Dominican Republic-Central American-United States Free Trade Agreement (DR-CAFTA)	$250,000	$7,777,000
North American Free Trade Agreement (NAFTA) [Canada is excluded from coverage until it covers its provinces and hydro utilities]	$387,471	$12,399,671
U.S. - Australia Free Trade Agreement	$387,471	$7,777,000
U.S. - Bahrain Free Trade Agreement	$250,000	$12,399,671
U.S. – Columbia Free Trade Agreement	$250,000	$7,777,000
U.S. - Chile Free Trade Agreement	$387,471	$7,777,000
U.S. – Israel Free Trade Agreement	$50,000	
U.S. – Korea Free Trade Agreement	$100,000	$7,777,000
U.S. - Morocco Free Trade Agreement	$250,000	$7,777,000
U.S. - Oman Free Trade Agreement	$250,000	$12,399,671
U.S. – Panama Free Trade Agreement	$250,000	$7,777,000
U.S. - Peru Trade Promotion Agreement	$250,000	$7,777,000
U.S. - Singapore Free Trade Agreement	$622,000	$7,777,000

9.50 TEXT OF CLAUSES.
The following clauses are referred to in Part 9:

Clause 9-1 BUY AMERICAN CERTIFICATE 16
Clause 9-2 WAIVER OF BUY AMERICAN ACT FOR CIVIL AIRCRAFT AND RELATED ARTICLES 17
Clause 9-3 BUY AMERICAN ACT - SUPPLIES 17
Clause 9-4 FOREIGN OFFERS 18
Clause 9-5 BUY AMERICAN ACT – CONSTRUCTION MATERIALS 18
Clause 9-6 BUY AMERICAN ACT REPRESENTATIONS 19
Clause 9-7 BUY AMERICAN ACT NOTICE 21
Clause 9-8 RESTRICTIONS ON CERTAIN FOREIGN PURCHASES 21
Clause 9-9 OFFEROR REPRESENTATIONS AND CERTIFICATIONS – PROHIBITED FOREIGN TRANSACTIONS 22
Clause 9-46 REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS--BUY AMERICAN ACT--CONSTRUCTION MATERIALS 22

Clause 9-47 NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS--BUY AMERICAN ACT--CONSTRUCTION MATERIALS 24
Clause 9-48 REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS--BUY AMERICAN ACT--CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS 25
Clause 9-49 NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS--BUY AMERICAN ACT--CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS 29

Clause 9-1 BUY AMERICAN CERTIFICATE
(Oct 93)(BPI 9.1.6)

(a) The Offeror certifies that each end product, except the end products listed below, is a domestic end product (as defined in the clause entitled "Buy American Act - Supplies"); and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States.

EXCLUDED END PRODUCTS AND COUNTRY OF ORIGIN
(List as necessary)

_____

_____

_____

(b) An Offeror who proposes to furnish domestic source end products containing components of foreign origin the cost of which exceeds 15 percent of the offered price, shall furnish in the spaces below a complete list of components of foreign origin in sufficient detail to clearly identify each.

FOREIGN COMPONENTS AND POINT OF ORIGIN

_____

_____

_____

The Offeror represents that the total cost of the above components of foreign origin, including applicable duty and transportation costs constitutes ____ percent of the cost of all components to be incorporated in the end products being furnished. The Offeror agrees to furnish, for the exclusive use of BPA, such additional information as the Contracting Officer may request in order to verify the foregoing in evaluating the offer.

The Offeror agrees that no components of foreign origin, other than those listed above, will be incorporated in the end products being furnished without written approval of the Contracting Officer.

(c) Where an Offeror fails to complete the representation of foreign content provision above, and in the absence of any previous experience with the offeror or information to the contrary, BPA assumes that

domestic firms intend to furnish domestic end products and that foreign firms intend to furnish products of foreign origin.

(End of clause)

Clause 9-2 WAIVER OF BUY AMERICAN ACT FOR CIVIL AIRCRAFT AND RELATED ARTICLES (Dec 12)(BPI 9.1.6)

(a) "Civil aircraft and related articles", as used in this provision, means -

(1) All aircraft other than aircraft to be purchased for use by the Department of Defense or the U.S. Coast Guard;
(2) The engines (and parts and components for incorporation into the engines) of these aircraft;
(3) Any other parts, components and subassemblies for incorporation into the aircraft; and
(4) Any ground flight simulators, and parts and components of these simulators, for use with respect to the aircraft, whether used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of the aircraft, and without regard to whether the aircraft or articles receive duty-free treatment under section 601(a)(2) of the Trade Agreements Act of 1979.

(b) The U.S. Trade Representative has waived application of the Buy American Act to the acquisition of civil aircraft and related articles (as defined in paragraph (a) above) of countries or instrumentalities that are parties to the Agreement on Trade in Civil Aircraft. Those countries and instrumentalities include Albania, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Macao, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, Taiwan (Chinese Taipei), and the United Kingdom.

(c) For the purpose of this waiver, an article is a product of a country or instrumentality only if -
(1) It is wholly the growth, product, or manufacture of that country or instrumentality; or
(2) In the case of an article that consists in whole or in part of materials from another country of instrumentality, that it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

(d) The waiver is subject to modification or withdrawal by the U.S. Trade Representative.

(End of clause)

Clause 9-3 BUY AMERICAN ACT - SUPPLIES (Jul 13)(BPI 9.1.6)

The Buy American Act (41 U.S. Code §8301-8305) provides that the Government give preference to domestic source end products.

“Commercially available off-the-shelf (COTS item”
(1) Means any item of a supply (including construction material) that is:
(1) A commercial item (as defined in BPI 1.8);
(2) Sold in substantial quantities in the commercial marketplace; and
(3) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 USC App 1702) such as agricultural products and petroleum products.

"Components" means those articles, materials, and supplies, which are incorporated directly into the end products.

"End products" means those articles, materials, and supplies to be acquired for public use under this contract.

"Domestic end product" means (1) an unmanufactured end product mined or produced in the United States or (2) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as the products referred to in (b) (2) or (3) of this clause shall be treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

(b) The Contractor shall deliver only domestic end products, except those
(1) That BPA determines are not mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality;
(2) For which BPA determines that domestic preference would be inconsistent with the public interest; or
(3) For which BPA determines the cost to be unreasonable.

(c) In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for an end product that is a COTS item.
(The foregoing requirements are administered in accordance with Executive Order No. 10582, as amended, and Part 9 of the BPI.)

(End of clause)

Clause 9-4 FOREIGN OFFERS (Sep 98)(BPI 9.1.6)

(a) Offers proposing to furnish material or equipment produced or manufactured outside the United States will be considered on an f.o.b. destination basis only, cleared through U.S. customs and with all import duties and charges paid.

(b) When comparing foreign offers with the low domestic offer under the Buy American Act, an evaluation differential of six percent will be added to the price of each foreign end item delivered at destination, but excluding the price of any additional work to be performed at the site such as installation or testing; provided that the differential will be doubled to twelve percent in the event that the low domestic Offeror qualifies as a small business concern.

(End of clause)

Clause 9-5 BUY AMERICAN ACT – CONSTRUCTION MATERIALS (Jul 13)(BPI 9.2.4)

(a) Agreement

In accordance with the Buy American Act (41 U.S.C. §8301-8305), and Executive Order 10582, (as amended), the Contractor agrees that only domestic construction material will be used (by the Contractor, subcontractors, materialmen, and suppliers) in the performance of this contract, except for nondomestic material listed in the contract. In accordance with 41 USC 1907, the component test of the Buy American Act is waived for construction material that is a COTS item as defined in BPI 1.8.

(b) Domestic construction material

"Construction material" means any article, material, or supply brought to the construction site for incorporation in the building or work. An unmanufactured construction material is a "domestic construction material" if it has been mined or produced in the United States. A manufactured construction material is a "domestic construction material" if it has been manufactured in the United States and if the

cost of its components which have been mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. "Component" means any article, material, or supply directly incorporated in a construction material.

(c) Domestic component

A component shall be considered to have been "mined, produced, or manufactured in the United States" (regardless of its source in fact) if the article, material, or supply in which it is incorporated was manufactured in the United States and the component is of a class or kind determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(d) Excluded materials.
The requirements of this clause do not apply to the following raw material and construction material components:

Antimony, as metal or oxide.
Asbestos, amosite, chrysolite, and crocidolite.
Bauxite.
Cadmium, ores and flue dust.
Calcium cyanamide.
Chrome ore or chromite.
Cobalt, in cathodes, rondelles, or other primary ore and metal forms.
Cork, wood or bark and waste.
Diamonds, industrial, stones and abrasives.
Fibers of the following types: jute, jute burlaps, and sisal.
Graphite, natural, crystalline, crucible grade.
Hemp.
Leather, sheepskin, hair type.
Manganese.
Mica.
Nickel, primary, in ingots, pigs, shots, cathodes, or similar forms; nickel oxide and nickel salts.
Platinum and related group metals.
Quartz crystals.
Rubber, crude and latex.
Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available.

(End of clause)

Clause 9-6 BUY AMERICAN ACT REPRESENTATIONS (Jul 94)(BPI 9.2.4)

(a) Offeror represents that all construction materials to be used will be domestic materials conforming to the Buy American Act clause except as noted below:

Name of each item of nondomestic material	Quantity and Units	Cost Delivered
_____	_____	_____
_____	_____	_____
_____	_____	_____
	Total	$ _____

(b) The contractor will be limited in the use of nondomestic materials to those listed above and those specifically exempt from the requirements of the Buy American Act as listed in clause 9-7, Buy-American

Act Notice. List below the lowest cost of domestic material comparable to each item of nondomestic material shown above, based upon offeror's canvass of domestic suppliers.

Name of item of domestic material comparable to offered foreign material	Quantity & Unit (Weight, feet, Number, etc.)	Cost Delivered
_____	_____	_____
_____	_____	_____
_____	_____	_____

(c) If nondomestic construction materials are listed above, an alternate offer may be submitted offering comparable domestic materials. However, unless the offeror specifically states alternate prices for specific items of the schedule, based upon use of comparable domestic materials, the offeror will be evaluated only on the basis of the foreign materials listed above.

(End of clause)

Clause 9-7 BUY AMERICAN ACT NOTICE (Dec 12)(BPI 9.2.4)

(a) The Buy American Act (41 U.S.C. §8301-8305) generally requires that only domestic construction material be used in the performance of this contract (see the clause entitled "Buy American Act--Construction Materials"). This requirement does not apply to the following construction materials:

_____
(List excepted material or indicate "none.")

(b) Offers based on the use of other foreign construction material may be acceptable for award if the Government determines that--

(1) Comparable domestic construction material in sufficient and reasonably available commercial quantities, and of a satisfactory quality, is unavailable, or

(2) Use of comparable domestic construction material is impracticable or would unreasonably increase the cost.

(c) When an offer is based on the use of one or more other foreign construction materials the offer shall include data clearly demonstrating, for each particular foreign construction material, that the cost thereof, plus 6 percent, is less than the cost of comparable domestic construction material. The cost of construction material shall be computed as including all cost of delivery to the construction site, and the cost of foreign construction material shall also include any applicable duty (whether or not a duty-free entry certificate may be issued).

(d) For evaluation purposes, BPA shall add to the offer 6 percent of the cost of the foreign construction material qualifying under paragraph (c) above.

(e) When offering other foreign construction material, offerors may also offer, at stated prices, any available comparable domestic construction material, in order to avoid the possibility that failure of a foreign construction material to be acceptable under this provision will cause rejection of the entire offer.

(End of clause)

Clause 9-8 RESTRICTIONS ON CERTAIN FOREIGN PURCHASES (Jul 13)(BPI 9.3.2.1)

(a) Except as authorized by the Office of Foreign Assets Control (OFAC) in the Department of the Treasury, the Contractor shall not acquire, for use in the performance of this contract, any supplies or services if any proclamation, Executive order, or statute administered by OFAC, or if OFAC's implementing regulations at 31 CFR Chapter V, would prohibit such a transaction by a person subject to the jurisdiction of the United States.

(b) Except as authorized by OFAC, most transactions involving Cuba, Iran, and Sudan are prohibited, as are most imports from Burma or North Korea, into the United States or its outlying areas. Lists of entities and individuals subject to economic sanctions are included in OFAC's List of Specially Designated Nationals and Blocked Persons at *http://www.treas.gov/offices/enforcement/ofac/sdn*. More information about these restrictions, as well as updates, is available in the OFAC's regulations at 31 CFR Chapter V and/or on OFAC's website at *http://www.treas.gov/offices/enforcement/ofac*.

(c) The Contractor shall insert this clause, including this paragraph (c), in all subcontracts.

(End of clause)

Clause 9-9 OFFEROR REPRESENTATIONS AND CERTIFICATIONS – PROHIBITED FOREIGN TRANSACTIONS (Oct 13)(BPI 9.3.2.1)

(a) The representations in (b)(1) and certifications in (b)(2) and b(3) do not apply if the procurement is covered by a trade agreement as defined in BPI 9.4.2 and the offeror has certified that all the offered products are designated country end products or designated country material.

(b) By submission of its offer, the offeror:
(1) Represents, to the best of its knowledge that the offeror does not export any sensitive technology as defined in Pub. L. 111-195 Section 106 to the government of Iran or any entities or individuals owned or controlled by, or acting on the behalf of the government of Iran.
(2) Certifies that the offeror, or any person owned of controlled by the offeror, does not engage in activities that may result in sanctions under Section 5 of the Iran Sanctions Act (Pub. L. 111-195 et seq.).
(3) Certifies that the offeror, and any person owned or controlled by the offeror, does not knowingly engage in any transaction that exceeds $3,000 with Iran's Revolutionary Guard Corps or any of its officials, agents, or affiliates, the property and interests in property of which are blocked pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)
(4) Certifies that the offeror does not conduct any restricted business operations in Sudan as defined in in the Sudan Accountability and Divestment Act of 2007 (Pub. L. 110-174).

Clause 9-46 REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS--BUY AMERICAN ACT--CONSTRUCTION MATERIALS (Oct 13) (BPI 9.2.5.10)

(a) Definitions. As used in this clause—
"Construction material" means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.
"Domestic construction material" means—
(1) An unmanufactured construction material mined or produced in the United States; or
(2) A construction material manufactured in the United States.
"Foreign construction material" means a construction material other than a domestic construction material.
"Manufactured construction material" means any construction material that is not unmanufactured construction material.
"Steel" means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.
"United States" means the 50 States, the District of Columbia, and outlying areas.
"Unmanufactured construction material" means raw material brought to the construction site for incorporation into the building or work that has not been—
(1) Processed into a specific form and shape; or
(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.
(b) Domestic preference.
(1) This clause implements—
(i) Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub. L. 111-5), by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and

(ii) The Buy American Act (41 U.S.C. 10a-10d) by providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraph (b)(3) and (b)(4) of this clause.

(3) This requirement does not apply to the construction material or components listed by the Government as follows:

(fill in)

[Contracting Officer to list applicable excepted materials or indicate "none"]

(4) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(3) of this clause if the Government determines that—

(i) The cost of domestic construction material would be unreasonable.

(A) The cost of domestic iron, steel, or other manufactured goods used as construction material is unreasonable when the cumulative cost of such material will increase the cost of the contract by more than 25 percent;

(B) The cost of unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;

(ii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(c) Request for determination of inapplicability of Section 1605 of the Recovery Act or the Buy American Act.

(1)

(i) Any Contractor request to use foreign construction material in accordance with paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the request, including—

(A) A description of the foreign and domestic construction materials;

(B) Unit of measure;

(C) Quantity;

(D) Cost;

(E) Time of delivery or availability;

(F) Location of the construction project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(4) of this clause.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this clause.

(iii) The cost of construction material shall include all delivery costs to the construction site and any applicable duty.

(iv) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does not submit a satisfactory explanation, the Contracting Officer need not make a determination.

(2) If the Government determines after contract award that an exception to section 1605 of the Recovery Act or the Buy American Act applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(4)(i) of this clause.

(3) Unless the Government determines that an exception to section 1605 of the Recovery Act or the Buy American Act applies, use of foreign construction material is noncompliant with section 1605 of the American Recovery and Reinvestment Act or the Buy American Act.

(d) Data. To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

Foreign and Domestic Construction Materials Cost Comparison

Construction material description	Unit of measure	Quantity	Cost (dollars) *
Item 1:			
Foreign construction material			
Domestic construction material			
Item 2			
Foreign construction material			
Domestic construction material			

[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.] [Include other applicable supporting information.]

*Include all delivery costs to the construction site.

(End of clause)

Clause 9-47 NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS--BUY AMERICAN ACT--CONSTRUCTION MATERIALS (Oct 13) (BPI 9.2.5.10)

(a) Definitions. “Construction material,” “domestic construction material,” “foreign construction material,” “manufactured construction material,” “steel,” and “unmanufactured construction material,” as used in this clause, are defined in the clause of this solicitation entitled “Required Use of Iron, Steel, and Other Manufactured Goods--Buy American Act--Construction Materials” (BPI Clause 9-46).

(b) Requests for determinations of inapplicability. An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) or the Buy American Act should submit the request to the Contracting Officer in time to allow a determination before submission of offers. The offeror shall include the information and applicable supporting data required by paragraphs (c) and (d) of BPI Clause 9-46 in the request. If an offeror has not requested a determination regarding the inapplicability of 1605 of the Recovery Act or the Buy American Act before submitting its offer, or has not received a response to a previous request, the offeror shall include the information and supporting data in the offer.

(c) Evaluation of offers.

(1) If the Government determines that an exception based on unreasonable cost of domestic construction material applies, the Government will evaluate an offer requesting exception to the requirements of section 1605 of the Recovery Act or the Buy American Act by adding to the offered price of the contract—

(i) 25 percent of the offered price of the contract, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and

(ii) 6 percent of the cost of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.

(2) If two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(d) Alternate offers.

(1) When an offer includes foreign construction material not listed by the Government in this solicitation in paragraph (b)(2) of the clause at BPI Clause 9-46, the offeror also may submit an alternate offer based on use of equivalent domestic construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Cover/Signature Page for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of BPI Clause 9-46 if the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of the clause at BPA Clause 9-46 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic construction material, and the offeror shall be required to furnish such domestic construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or
(ii) May be accepted if revised during negotiations.

(End of clause)

Alternate I (Aug 09)

(b) Requests for determinations of inapplicability. An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) or the Buy American Act shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of the clause at BPI Clause 9-46.

Clause 9-48 REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS--BUY AMERICAN ACT--CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (Oct 13)(BPI9.2.5.10)

(a) Definitions. As used in this clause—

"Caribbean Basin country construction material" means a construction material that--

(1) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different construction material distinct from the materials from which it was transformed.

"Commercially available off-the-shelf (COTS) item"—

(1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in BPI 1.8);
(ii) Sold in substantial quantities in the commercial marketplace; and
(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

"Component" means an article, material, or supply incorporated directly into a construction material.

"Construction material" means an article, material, or supply brought to the construction site by the Contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components

of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

"Designated country" means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Maldives, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, or United Kingdom);

(2) A Free Trade Agreement country (FTA)(Australia, Bahrain, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, , Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

"Designated country construction material" means a construction material that is a WTO GPA country construction material, an FTA country construction material, or a least developed country construction material or a Caribbean Basin Country construction material.

"Domestic construction material" means—

(1) An unmanufactured construction material mined or produced in the United States; or(2) A construction material manufactured in the United States if—

(i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic: or

(ii)The construction material is a COTS item.

"Foreign construction material" means a construction material other than a domestic construction material.

"Free trade agreement (FTA) country construction material" means a construction material that—

(1) Is wholly the growth, product, or manufacture of an FTA country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in an FTA country into a new and different construction material distinct from the materials from which it was transformed.

"Least developed country construction material" means a construction material that—

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different construction material distinct from the materials from which it was transformed.

"Manufactured construction material" means any construction material that is not unmanufactured construction material.

"Steel" means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

"United States" means the 50 States, the District of Columbia, and outlying areas.

"Unmanufactured construction material" means raw material brought to the construction site for incorporation into the building or work that has not been—

(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

"WTO GPA country construction material" means a construction material that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different construction material distinct from the materials from which it was transformed.

(b) Construction materials.

(1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) and the Buy American Act (41 U.S.C. 10a-10d) do not apply to Recovery Act designated country construction material. Consistent with U.S. obligations under international agreements, this clause implements—

(i) Section 1605 of the Recovery Act by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and

(ii) The Buy American Act by providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic or Recovery Act designated country construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

(3) The requirement in paragraph (b)(2) of this clause does not apply to the construction materials or components listed by the Government as follows:

(Fill in)

[Contracting Officer to list applicable excepted materials or indicate "none".]

(4) The Contracting Officer may add other construction material to the list in paragraph (b)(3) of this clause if the Government determines that—

(i) The cost of domestic construction material would be unreasonable.

(A) The cost of domestic iron, steel, or other manufactured goods used as construction material is unreasonable when the cumulative cost of such material will increase the overall cost of the contract by more than 25 percent;

(B) The cost of unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;

(ii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(c) Request for determination of inapplicability of section 1605 of the Recovery Act or the Buy American Act.

(1)

(i) Any Contractor request to use foreign construction material in accordance with paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the request, including—

(A) A description of the foreign and domestic construction materials;

(B) Unit of measure;

(C) Quantity;

(D) Cost;

(E) Time of delivery or availability;

(F) Location of the construction project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(4) of this clause.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this clause.

(iii) The cost of construction material shall include all delivery costs to the construction site and any applicable duty.

(iv) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does not submit a satisfactory explanation, the Contracting Officer need not make a determination.

(2) If the Government determines after contract award that an exception to section 1605 of the Recovery Act or the Buy American Act applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(4)(i) of this clause.

(3) Unless the Government determines that an exception to the section 1605 of the Recovery Act or the Buy American Act applies, use of foreign construction material other than that covered by trade agreements is noncompliant with the applicable Act.

(d) Data. To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

Foreign and Domestic Construction Materials Cost Comparison

Construction material description	Unit of measure	Quantity	Cost (dollars) *
Item 1:			
Foreign construction material			
Domestic construction material			
Item 2			
Foreign construction material			
Domestic construction material			

[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.][Include other applicable supporting information.]

[* Include all delivery costs to the construction site.]

(End of clause)

Alternate I (Aug 09)

"Bahrainian, Mexican, or Omani construction material" means a construction material that—

(1) Is wholly the growth, product, or manufacture of Bahrain, Mexico, or Oman; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain, Mexico, or Oman into a new and different construction material distinct from the materials from which it was transformed.

(b) Construction materials.

(1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) and the Buy American Act do not apply to Recovery Act designated country construction material. Consistent with U.S. obligations under international agreements, this clause implements—

(i) Section 1605 of the Recovery Act, by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and

(ii) The Buy American Act providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

(End of clause)

Clause 9-49 NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS--BUY AMERICAN ACT--CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (Oct 13)(BPI 9.2.5.10)

(a) Definitions. “Commercially available off-the-shelf (COTS) item,” “construction material,” “designated country construction material,” “domestic construction material,” “foreign construction material,” “manufactured construction material,” “steel,” and “unmanufactured construction material,” as used in this clause, are defined in the clause of this solicitation entitled “Required Use of Iron, Steel, and Other Manufactured Goods--Buy American Act--Construction Materials Under Trade Agreements” (BPI Clause 9-48).

(b) Requests for determination of inapplicability. An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) or the Buy American Act should submit the request to the Contracting Officer in time to allow a determination before submission of offers. The offeror shall include the information and applicable supporting data required by paragraphs (c) and (d) of BPI Clause 9-48 in the request. If an offeror has not requested a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act before submitting its offer, or has not received a response to a previous request, the offeror shall include the information and supporting data in the offer.

(c) Evaluation of offers.

(1) If the Government determines that an exception based on unreasonable cost of domestic construction material applies, the Government will evaluate an offer requesting exception to the requirements of section 1605 of the Recovery Act or the Buy American Act by adding to the offered price of the contract—

(i) 25 percent of the offered price of the contract, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and

(ii) 6 percent of the cost of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.

(2) If two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(d) Alternate offers.

(1) When an offer includes foreign construction material, other than Recovery Act designated country construction material, that is not listed by the Government in this solicitation in paragraph (b)(3) of BPI clause 9-48, the offeror also may submit an alternate offer based on use of equivalent domestic or Recovery Act designated country construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Cover/Signature Page for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of BPI Clause 9-48 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of BPI Clause 9-48 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or Recovery Act designated country construction material, and the offeror shall be required to furnish such domestic or Recovery Act designated country construction material. An offer based on use of the foreign construction material for which an exception was requested may be accepted if revised during negotiations.

(End of clause)

Alternate I (Aug 09)
(b) Requests for determination of inapplicability. An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) or the Buy American Act shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of BPI Clause 9-48.

Alternate II (Aug 09)
(d) Alternate offers.

(1) When an offer includes foreign construction material, except foreign construction material from a Recovery Act designated country other than Bahrain, Mexico, or Oman that is not listed by the Government in this solicitation in paragraph (b)(3) of BPI Clause 9-48, the offeror also may submit an alternate offer based on use of equivalent domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Cover/Signature Page for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of BPI Clause 9-48 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of BPI Clause 9-48 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material. An offer based on use of the foreign construction material for which an exception was requested may be accepted if revised during negotiations.

(End of clause)

Alternate III (Oct 09)
There is no new text for Alternate III. Replace paragraphs (b) and (d) of the basic clause with the text of paragraph (b) at Alternate I and paragraph (d) at Alternate II.

PART 10 LABOR LAWS

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10.1 AUTHORITIES OF THE SECRETARY OF LABOR.

Under the Act, the Secretary of Labor is authorized and directed to enforce the provisions of the Act, make rules and regulations, issue orders, hold hearings, make decisions, and take other appropriate action. The Department of Labor has issued implementing regulations on such matters as--

(a) Service contract labor standards provisions and procedures (29 CFR Part 4, Subpart A);

(b) Wage determination procedures (29 CFR Part 4, Subpart B);

(c) Application of the McNamara-O'Hare Service Contract Act (rulings and interpretations) (29 CFR Part 4, Subpart C);

(d) Compensation standards (29 CFR Part 4, Subpart D);

(e) Enforcement (29 CFR Part 4, Subpart E);

(f) Safe and sanitary working conditions (29 CFR Part 1925);

(g) Rules of practice for administrative proceedings enforcing labor standards in federal construction and service contracts (29 CFR Part 6); and

(h) Practice before the Administrative Review Boards for federal service contracts (29 CFR Part 8).

10.2 GENERAL.

10.2.1 Definitions.

"Act" may refer to either the "Service Contract Act of 1935, as Amended", or "Davis Bacon Act" depending on which subpart is being referenced.

"Contractor," as used in this subpart, includes a subcontractor at any tier whose subcontract is subject to the provisions of the Act.

"Construction" means construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. For purposes of this definition, the terms "buildings, structures, or other real property" include but are not limited to improvements of all types, such as electrical substations, maintenance facilities, fish hatcheries, office facilities, bridges, dams, roads, sewers, water mains, power lines, pumping stations, railways, airport facilities, and terminals. Construction does not include exploratory drilling or other investigative work which is intended to obtain preliminary data for engineering studies and which is not a part of commencing or continuing the construction process; nor does it include the manufacture, production, furnishing, construction, alteration, repair, processing, or assembling of personal property, or demolition without construction.

"Laborers or mechanics," includes --

(a) Apprentices, trainees, helpers, watchmen and guards;

(b) Working foremen who devote more than 20 percent of their time during a workweek performing duties of a laborer or mechanic, and who do not meet the criteria of 29 CFR Part 541, for the time so spent; and

(c) Every person performing the duties of a laborer or mechanic, regardless of any contractual relationship alleged to exist between the contractor and those individuals. The terms exclude workers whose duties are primarily executive, supervisory (except as provided in paragraph (c) of this definition), administrative, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in 29 CFR Part 541 are not deemed to be laborers or mechanics.

"Public building" or "public work," means building or work, the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

"Service contract," as used in this subpart, means any Government contract, the principal purpose of which is to furnish services in the United States through the use of service employees, except as exempted under section 7 of the Service Contract Act (41 U.S.C. 6702), or any subcontract at any tier there under.

"Service employee" means any person engaged in the performance of a service contract other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR Part 541.

"Site of the work," is defined as follows:

(a) The "site of the work" is limited to the physical place or places where the construction called for in the contract will remain when work on it is completed, and nearby property, as described in paragraph (b) of this definition, used by the contractor or subcontractor during construction that, because of proximity, can reasonably be included in the "site."

(b) Except as provided in paragraph (c) of this definition, fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., are parts of the "site of the work"; provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and are so located in proximity to the actual construction location that it would be reasonable to include them.

(c) The "site of work" does not include permanent home offices, branch plant establishments, fabrication plants, or tool yards of a contractor or subcontractor whose locations, and continuance in operation, are determined wholly without regard to a particular Federal contract or project. In addition, fabrication plants, batch plants, borrow pits, job headquarters, yards, etc., of a commercial supplier or material handler which are established by a supplier of materials for the project before proposals are received and are not on the project site, are not included in the "site of work." Such permanent, previously-established facilities are not a part of the "site of the work," even if their operations may for a period of time, be dedicated exclusively, or nearly so, to the performance of a contract.

"Wage and Hour Division" means the unit in the Employment Standards Administration of the Department of Labor to which functions of the Secretary of Labor are assigned under the Act.

"Wage determination" means a determination of minimum wages or fringe benefits made under sections 2(a) or 4(c) of the Act (41 U.S.C. 6702 or 6703 applicable to the employment in a given locality of one or more classes of service employees.

"Wages," means the basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to

carry out a financially responsible plan or program, which was communicated in writing to the laborers and mechanics affected. The fringe benefits enumerated
in the Davis-Bacon Act include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits. Fringe benefits do not include benefits required by other Federal State, or local law.

10.2.2 General Labor Policies.
(a) BPA is responsible for ensuring full and impartial enforcement of the labor standards in the administration of our contracts. BPA shall maintain an effective program that ensures that contractors, and subcontractors, carry out their obligations under the labor standards clauses.

(b) BPA will show no preference for either union or non-union contractors.

(c) BPA will remain impartial concerning any dispute between labor and contractor management and not undertake the conciliation, mediation, or arbitration of a labor dispute. COs, and their representatives, shall refrain from discussing with the contractor, or any labor representative, any aspect of their collective bargaining agreements which may require revision to enable compliance with terms of BPA contract. They shall be referred to the Department of Labor (DOL). BPA's Manager for Labor Management Relations should be advised of the referral.

(d) BPA will exchange information concerning labor matters with other affected agencies to ensure a uniform Government approach concerning a particular plant or labor-management dispute.

(e) BPA will notify the agency responsible for conciliation, mediation, arbitration, or other related action of the existence of any labor dispute affecting, or threatening to affect, BPA purchase programs.

(f) BPA will prohibit its contractors from discriminating due to age, race, color, religion, sex, or national origin and will promote affirmative action for Equal Employment Opportunity (41 CFR 60), for qualified covered veterans, or workers with physical or mental disabilities.

(g) A delay caused by a strike may be excusable if the strike was unforeseeable at time of award and the contractor and its subcontractors act in good faith and in a lawful manner to end the strike. (See BPI Clause 20-3, Termination for Default, BPI 28.4.6, and Clause 28-8 Force Majeure/Excusable Delay).

(h) The CO shall promptly refer, in writing, to the appropriate regional office of the DOL, (1) any complaints received, (2) any apparent violations which have significant impact, (3) any recurring violations and (4) any failures to promptly correct identified violations. When there is question of whether a contractor's performance is in violation or not, the matter shall be discussed with the regional office of the DOL. Any contractor employee complaints received shall not be discussed directly with the employer.

(i) See BPI Subpart 3.7 for related BPA policies, such as Harassment-Free Workplace, which will be applied to contracts at BPA worksites.

10.3 GENERAL LABOR CLAUSES.
PROCEDURE:

(a) The Secretary of Labor has issued regulations in 29 CFR Subtitle A, prescribing standards and procedures to be observed by the Department of Labor and the Federal contracting agencies. Those standards and procedures are implemented here and in Appendix 10-A, Labor Laws and Procedures.

(b) The CO shall not attempt to investigate or resolve complaints received from individuals without specific instruction from the HCA.

10.3.1 Clause Usage Prescriptions.
PROCEDURE:

(a) The CO shall include the Clause 10-1, Nondiscrimination and Affirmative Action, in all solicitations and contracts for $10,000 or more except those:
(1) with individuals (as opposed to a firm with multiple employees), or
(2) on or within 40 miles of an Indian reservation where a Tribal Employment Rights Ordinance (TERO) is known to be in effect.
For commercial acquisitions, Clause 10-1 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-20.

(b) The CO shall include the Clause 10-6, Notification of Employee Rights under the National Labor Relations Act, in all solicitations and contracts or subcontracts. Clause 10-6 may not be incorporated by reference. Clause 10-6 is not required in the following contracts:
(1) for collective bargaining agreements as defined in 5 USC 7103(a)(8);
(2) for purchases less than $150,000, provided that:
(A) supplies or services are not procured in a manner designed to avoid applicability of this policy; and
(B) the employee notice clause must be included in contracts for indefinite quantities, unless the amount ordered in any year under such contract will be less than $150,000;
(3) for subcontracts of $10,000 or less in value, except that contractors and subcontractors are not permitted to procure supplies or services in a manner designed to avoid applicability of this policy.
(4) for work performed exclusively outside the territorial United States; or
(5) for work covered (in their entirety) by an exemption granted by the Director of OLMS, U.S. Department of Labor as described in EO 13496. COs shall submit requests for exemption through the Head of Contracting Activity for approval prior to submitting the request to U.S. Department of Labor in accordance with 29 CFR 471.3.
(6) with Federal, State and local governments.
(7) For commercial acquisitions, Clause 10-6 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-20.

10.4 LABOR POLICIES FOR SERVICE CONTRACTS.

10.4.1 General.
INFORMATION: This subpart prescribes policies and procedures implementing the provisions of the Service Contract Act of 1965, (41 U.S.C. 6701, et seq.), the applicable provisions of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 201, et seq.), and related Secretary of Labor regulations and instructions (29 CFR Parts 4, 6, 8, and 1925). (See Appendix 10-A for procedural matters).

10.4.2 Applicability.
(a) ***INFORMATION*:** This subpart applies to those BPA contracts, the principal purpose of which is to furnish services in the United States through the use of service employees, except as exempted below. The nomenclature, type, or particular form of contract used is not determinative of coverage.

(b) ***INFORMATION*:** The Act does not apply to any purchase:
(1) valued at less that $2,500;
(2) for construction, alteration, or repair of public buildings or public works, including painting and decorating;
(3) for dismantling, demolition or removal of improvements when purchased as part of a construction contract (see BPI 24.3);
(4) for transporting freight or personnel by vessel, aircraft, bus, truck, express, railroad, or oil or gas pipeline where published tariff rates are in effect;
(5) any contract for furnishing services by radio, telephone, telegraph, or cable companies subject to the Communications Act of 1934;
(6) for public utility services;

(7) with an individual (rather than a firm with multiple employees);
(8) principally established for the maintenance, calibration or repair of certain items of ADP, scientific, medical, and office/business equipment; or
(9) where the predominant purpose is to provide executive, administrative or professional services as defined in 29 CFR 541.

(c) ***PROCEDURE*:** Requests for limitations, variances, tolerances, and exemptions from the Act shall be drafted by the CO and submitted through the performance manager and the HCA to the DOL.

10.4.3 Policy.
Service contracts shall contain appropriate provisions regarding minimum wages and health and welfare benefits, safe and sanitary work conditions and notification to employees of the minimum allowable compensation.

10.4.4 Clause Usage Prescriptions for Service Contracts.
***PROCEDURE*:**

(a) The CO shall include Clause 10-2, Employment Practices, in all solicitations and contracts.

(b) The CO shall include Clause 10-3, Service Contract Act of 1965, in solicitations and contracts for services covered by the Act (see 10.4.2(b) for exemptions). Clause 10-3 may not be incorporated by reference. For commercial acquisitions, Clause 10-3 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-20.

(c) The CO shall include a clause similar to 10-4, Labor Standards -- Price Adjustment, in solicitations and contracts if the contract is expected to be a firm-fixed-price, or time-and-materials, service contract subject to the Service Contract Act of 1965, and has a period of performance exceeding two years or will include option(s) for which a differing wage determination will apply. If an economic price adjustment clause such as Clause 7-2, Pricing Adjustment, is also used, the clauses must be edited to protect against duplication of labor-related price adjustments.

(d) The CO shall include Clause 10-5, Wage Determination, in solicitations and contracts which are subject to the Service Contract Act of 1965 when the wage determination will be attached to the solicitation and contract.

10.5 LABOR POLICIES FOR CONSTRUCTION CONTRACTS.

10.5.1 General.
***INFORMATION*:** Contracts for dismantling, demolition, or removal of improvements are subject to either the Service Contract Act (41 U.S.C. 6701-6707) or the Davis-Bacon Act (40 U.S.C. 3141-3148). If the contract is solely for dismantling, demolition, or removal of improvements, the Service Contract Act applies, unless further work involving construction, alteration, or repair of a public building or public work at that location is contemplated. If such further construction work is intended, regardless of whether or not it falls under the same contract or is to be performed by BPA forces, then the Davis-Bacon Act applies to the contract for dismantling, demolition, or removal.

10.5.2 Applicability.
***INFORMATION*:**

(a) Requirements of this subpart are applicable to:
(1) Construction work that is to be performed by laborers and mechanics on a public building or public work site (See 10.2.1 for the definition of Construction);
(2) Dismantling, demolition, or removal of improvements if construction at that site is anticipated under the same, or separate, contract or by BPA forces;

(3) Manufacture or fabrication of construction materials and components to be incorporated into the work when manufacture or fabrication is performed at the construction site; and,
(4) Painting of either public buildings or public works, whether performed in connection with the original construction or as alteration or repair of an existing structure.
(5) Hazardous waste cleanup contracts that require elaborate landscaping activities or substantial excavation and reclamation work.

(b) The requirements of this subpart do not apply to:
(1) The manufacturing or fabrication of components or materials, off the construction site, or their subsequent delivery to the site by the manufacturer or fabricator, unless the manufacturing or fabrication facility is operated solely in support of the construction project;
(2) Contracts requiring construction work that is so closely related to research, experiment, and development that it cannot be performed separately, or that is itself the subject of research, experiment, or development.
(3) Employees of railroads operating under collective bargaining agreements that are subject to the Railway Labor Act; or
(4) Employees who work at the contractors' or subcontractors' permanent home offices, fabrication shops, or tool yards not located at the site of the work. When employees go to the work site and perform construction activities there, the requirements of this subpart are applicable for the actual time so spent, not including travel. However, the travel time is included when the employees transport materials or supplies to and from the site of the work.

10.5.3 Application to Contracts Other Than Construction.
***INFORMATION*:**

(a) The requirements of this subpart apply to construction work to be performed as part of contracts other than construction (supply, service, research and development, etc.) if:
(1) The construction work is to be performed on a public building or public work;
(2) The contract contains a significant amount of construction work exceeding $2,000 in value (the word "significant" relates to the construction work considered on its own rather than merely a value comparison of the construction work as compared to the total value of the contract); and
(3) The construction work is physically or functionally separate from, and is capable of being performed on a segregated basis from, the other work required by the contract.

(b) The requirements of this subpart do not apply if:
(1) The construction work is incidental to the furnishing of supplies, equipment, or services.
(2) The construction work is so merged with non-construction work, or so fragmented in terms of the locations or time spans within which it is to be performed, that it cannot be segregated as a separate contractual requirement.

10.5.4 Pertinent Laws.

(a) The Davis Bacon Act (40 U.S.C. 3141-3148) provides that contracts in excess of $2,000 to which the United States or the District of Columbia are a party for construction, alteration, or repair (including painting and decorating) of public buildings or public works within the United States, will require that no laborer or mechanic employed directly upon the site of the work shall receive less than the prevailing wage rates as determined by the Secretary of Labor.

(b) The Copeland ("Anti-Kickback") Act, as amended, (18 U.S.C. 874 and 40 U.S.C. 3145) and its implementing regulations (29 CFR Part 3) require a contractor to have reasonable procedures in place to prevent and detect unlawful practices to induce, by force, intimidation, threat of dismissal, or otherwise, any person employed in the construction or repair of public buildings or public works, to give up any part of the compensation to which the person is entitled under a contract of employment.

10.5.5 Clause Usage Prescriptions for Construction.

(a) The CO shall include the following clauses in solicitations, contracts and releases for construction as appropriate:

(1) 10-7, Davis-Bacon Act
(2) 10-8, Withholding -- Labor Violations
(3) 10-9, Payrolls and Basic Records
(4) 10-10, Apprentices, Trainees and Helpers
(5) 10-11, Subcontracts (Labor Standards)
(6) 10-12, Certification of Eligibility
(7) 10-13, Davis-Bacon Act Wage Rates

(b) The CO shall include Clause 10-14, Approval of Wage Rates, in solicitations and contracts in excess of $2,000 for construction where labor is provided on a cost-reimbursement basis. Clause 10-14 shall not be included in solicitations and contracts for commercial acquisitions.

(c) A contract that is not primarily for construction may contain a requirement for some construction work to be performed. If, as discussed in Subpart 10.4.2, requirements are segregable as construction work, the CO shall include in such solicitations and contracts the applicable construction labor clauses required in this section and identify the item or items of the contract schedule to which the clauses apply.

10.6 EQUAL EMPLOYMENT OPPORTUNITY (EEO).

10.6.1 EEO Policies.

(a) BPA will ensure compliance with the regulations of the Secretary of Labor to promote the full realization of equal employment opportunity for all persons, regardless of race, color, religion, sex, or national origin. (See Executive Order 11246).

(b) Neither BPA, nor its contractors, will solicit, or contract, in a manner to avoid applicability of the Nondiscrimination and Affirmative Action or Equal Opportunity provisions of this Part.

(c) Contractor disputes related to EEO compliance which shall be handled according to the rules, regulations, and relevant orders of the Secretary of Labor (see 41 CFR 60-1.1).

(d) An inquiry from a contractor regarding status of its compliance with Executive Order 11246, or rights of appeal, shall be referred to the Office of Federal Contract Compliance Program's (OFCCP) area office.

(e) Labor union inquiries regarding the revision of a collective bargaining agreement in order to comply with Executive Order 11246, shall be referred to the OFCCP area office.

(f) Complaints received by the CO alleging violation of the Equal Opportunity clause shall be referred immediately to the appropriate OFCCP area office. The complainant shall be advised in writing of the referral. The prime contractor or subcontractor that is the subject of a complaint shall not be advised in any manner, or for any reason, of the complainant's name, the nature of the complaint, or the fact that the complaint was received.

(g) In resolving complaints the CO will comply with the written direction of the OFCCP unless otherwise authorized by the HCA.

(h) Prior to performance of an applicable contract, the CO shall furnish to the prime contractor appropriate quantities of OFCCP Equal Employment Opportunity posters.

(i) Information about OFCCP publications, area office addresses and telephone numbers is available on OFCCP's internet homepage at http://www.dol.gov/dol/esa/public/ofcp_org.htm.

10.6.2 Exceptions.
INFORMATION: The requirements of Executive Order 11246 need not be included in contracts for the following:

(a) Work performed outside the United States by employees who were not recruited within the United States.

(b) State or local governments or any agency, instrumentality or subdivision thereof.

(c) Work on or within 40 miles of an Indian reservation where a TERO is known to be in effect.

(d) Work performed by individuals (i.e., no employees).

10.6.3 Implementation.
(a) Other than Construction contracts.
(1) ***POLICY*:** A pre-award clearance shall be obtained from the OFCCP area office for contracts and subcontracts of $10,000,000 or more in total contract value including options. A pre-award clearance shall also be obtained if an award of a modification of a contract will increase its value to $10,000,000 or more.

(2) ***PROCEDURE*:** In requesting the clearance, the CO shall provide the following information:
(A) Name, address, telephone number and any known corporate affiliation of the apparent prime contractor and any known subcontractors where their subcontract is expected to exceed $10,000,000;
(B) Whether the prime or first tier subcontractor have held previous federal contracts or applicable subcontracts;
(C) The places of contemplated performance; and
(D) The period of performance.

Requisitioners shall provide up to 35 calendar days for OFCCP processing of an EEO compliance clearance request. OFCCP must within 15 calendar days after the CO's clearance request, notify the CO of its intention to conduct a pre-award clearance evaluation. If OFCCP does not inform the CO within this 15 calendar day period of its intention to conduct a pre-award compliance review, an affirmative clearance shall be presumed and the CO may proceed with award. Provided, however, that if OFCCP informs the CO within this 15 calendar day period of its intent to conduct a pre-award compliance evaluation, the CO must withhold award for a period not to exceed 20 calendar days after the date of notice from OFCCP. If OFCCP does not inform the CO of its conclusions within that 20 calendar day period, clearance shall be presumed and the CO may proceed with award.

If waiting for the pre-award clearances would delay award of an urgent and critical contract beyond the time necessary to make award, the CO may proceed with award, documenting the reasons for the decision in the official file. The OFCCP area office shall be notified immediately of the award. If upon completion of their review OFCCP finds the contractor or subcontract not eligible for a federal contract award, the HCA will determine BPA's course of action.

(b) Construction Contracts.
(1) ***POLICY*:** Construction contractors shall be required to meet the contract terms and conditions which cite affirmative action requirements covering specified geographical areas or projects, and applicable requirements of 42 CFR 60-1 and 60-4.2
(2) ***PROCEDURE*:** COs shall give written notice to the appropriate OFCCP area office within 10 working days of award of a construction contract subject to these affirmative action requirements. The notification shall include the name, address, and telephone number of the contractor; employer identification number; dollar amount of the contract; estimated starting and completion dates of the contract; the contract number; and the geographical area in which the contract is to be performed.

(3) ***PROCEDURE:*** When requested by the OFCCP area office, the CO shall arrange a conference among contractor, BPA's contracting personnel and EEO Contract compliance personnel to discuss the contractor's compliance responsibilities.

10.6.4 Clause Usage Prescriptions for EEO.

(a) The CO shall include Clause 10-15, Pre-award On-Site Equal Opportunity Compliance Review, in all solicitations (except for construction) valued in excess of $10,000,000 except those:
(1) with individuals (as opposed to a firm with multiple employees); or
(2) on or within 40 miles of an Indian reservation where a TERO is known to be in effect.

(b) The CO shall include Clause 10-16, Affirmative Action Compliance Requirements for Construction, in all construction solicitations and contracts exceeding $100,000. The percentage goal must be inserted by the CO.

(c) The CO shall include Clause 10-17, Equal Opportunity Pre-award Clearance of Subcontracts, in all solicitations and contracts (except for construction) when there is a reasonable opportunity for a subcontract exceeding $10,000,000 except as set forth in BPI 10.6.3.

10.7 EMPLOYMENT ELIGIBILITY VERIFICATION (E-VERIFY).

10.7.1 Information.
(a) Executive Orders 12989 and 13465 instruct Federal departments and agencies that enter into contracts to require, as a condition of each contract, that the contractor agree to use the electronic E-Verify system. This system, designated by the Secretary of Homeland Security, is used to verify the employment eligibility of all persons hired during the contract term by the contractor to perform employment duties within the United States, and all persons assigned by the contractor to perform work within the United States on the Federal contract.

(b) "Employee assigned to the contract" means an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract that is required to include the clause as prescribed by 10.7.3. An employee is not considered to be directly performing work under a contract if the employee:
(1) Normally performs support work, such as indirect or overhead functions; and
(2) Does not perform any substantial duties applicable to the contract.

10.7.2 E-verify Policy.
(a) Statutes and Executive orders require employers to abide by the immigration laws of the United States and to employ in the United States only individuals who are eligible to work in the United States. The E-Verify program provides an Internet-based means of verifying employment eligibility of workers employed in the United States (see www.dhs.gov/E-Verify). However, it is not a substitute for any other employment eligibility verification requirement.

(b) Contracting Officers shall include in solicitations and contracts as prescribed by BPI 10.7.3 requirements that Federal contractors must:
(1) Enroll as Federal contractors in E-verify;
(2) Use E-Verify to verify employment eligibility of all new hires working in the United States, except that the contractor may choose to verify only new hires assigned to the contract if:
(A) An institution of higher education as defined by 20 USC 1001(a);
(B) A State or local government or the government of a federally recognized Indian tribe; or
(C) A surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond;
(3) Use E-verify to verify employment eligibility of all employees assigned to the contract; and
(4) Include these requirements in subcontracts for:

(A) Commercial or noncommercial services, except for commercial services that are part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications), performed by the COTS provider, and are normally provided for that COTS item; and
(B) Construction.

(c) In exceptional cases, the HCA may waive the E-Verify requirement for a contract or subcontract or a class of contracts or subcontracts, either temporarily or for the period of performance. This waiver authority may not be delegated.

(d) By registering with E-Verify, contractors are entering into a Memorandum of Understanding (MOU) with the Department of Homeland Security (DHS). DHS and the Social Security Administration (SSA) may terminate a contractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. If DHS or SSA terminate a contractor's MOU, the terminating agency must refer the contractor to a suspension or debarment official for possible suspension or debarment action. During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the contractor is excused from its obligations under paragraph (a) of Clause 10-18. If the contractor is suspended or debarred as a result of the MOU termination, the contractor is not eligible to participate in E-Verify during the period of its suspension or debarment. If the suspension or debarment official determines not to suspend or debar the contractor, then the contractor must reenroll in E-Verify.

10.7.3 Clause Usage Prescriptions for E-Verify.

PROCEDURE:

(a) The CO shall include Clause 10-18, Employment Eligibility Verification, in all solicitations and contracts and IGCs exceeding $150,000. Clause 10-18 is not required for contracts that:
(1) Are only for work that will be performed outside the United States;
(2) Are for a period of performance of less than 120 days; or
(3) Are only for:
(A) Commercially available off-the-shelf items;
(B) Items that would be COTS items, but for minor modifications (as defined in BPI 1.8); or
(C) Commercial services that are-
(i) Part of the purchase of a COTS item (or an item that would be a COTS item, but for minor modifications);
(ii) Performed by the COTS provider; and
(iii) Are normally provided for that COTS item.
(4) Are with other U.S. federal government agencies.
(b) For commercial acquisitions, Clause 10-18 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-20.

10.8 EQUAL EMPLOYMENT FOR VETERANS.

10.8.1 Policy.

(a) This subpart prescribes policies and procedures for implementing the following:
(1) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 (38 U.S.C. 4211 and 4212) (the Act).
(2) The Veterans Employment Opportunities Act of 1998, Public Law 105-339.
(3) The Jobs for Veterans Act, Public Law 107-288.
(4) Executive Order 11701, January 24, 1973 (3 CFR, 1971-1975 Comp., p. 752).
(5) The regulations of the Secretary of Labor (41 CFR part 60-250, part 61-250, part 60-300, and part 61-300).

(b) Contractors and subcontractors subject to the Act, must--

(1) List all employment openings, with the appropriate employment service delivery system where the opening occurs, except for Executive and senior management positions, positions to be filled from within the contractor's organization; and positions lasting three days or less.
(2) Take affirmative action to employ, advance in employment, and otherwise treat qualified individuals, including qualified disabled veterans, without discrimination based upon their status as a disabled veteran, recently separated veteran, other protected veteran, and Armed Forces service medal veteran, in all employment practices.
(3) Report on employment of veterans using the Department of Labor's annual form VETS-100/100A, Federal Contractor Veterans' Employment Report (VETS-100 report).

10.8.2 Applicability and Exemptions.
(a) The Act applies to contracts and subcontracts for personal property and nonpersonal services (including construction) of $100,000 or more except as waived by the Secretary of Labor.

(b) Contracts with foreign entities and Indian Tribal governments are exempt from all aspects of the Act.

(c) Contracts with State and local governments are exempt from the veterans' employment reporting requirement of the Act. The requirements of clause 10-19 Equal Opportunity for Veterans do not apply to any subdivision of a State or local government that does not directly participate in work required by the contract.

10.8.3 Contract Award and Modification Restrictions
(a) The Act requires clause 10-19 Equal Opportunity for Veterans and Clause 10-20 Employment Reports on Veterans in solicitations and contracts greater than $100,000 unless an exemption is provided by the Act.

(b) IGCs are exempt from the reporting and the award and modification restrictions in the Act.

(c) The Contracting Officer is permitted to award and modify contracts for commercial items and services at any dollar value without confirming the contractor has summited the required annual VETS-100 report.

(d) The Contracting Officer is permitted to award and modify contracts for non-commercial items and services that do not exceed $150,000 without confirming the contractor has summited the required annual VETS-100 report.

(e) The Contracting Officer is prohibited from awarding or modifying a contract for non-commercial services in excess of $150,000 to a contractor subject to the Act that has not summited the required annual VETS-100.

10.8.4 Verifying Contractor Reporting.
(a) To verify if a proposed contractor is current with its submission of the VETS-100 and/or the VETS-100A Report, the contracting officer shall use one of the following methods—

(1) Query the Department of Labor's VETS 100 Database via the Internet at https://webapps.dol.gov/vets100.
(2) Contact the VETS-100 Reporting Systems via e-mail at verify@vets100.com for confirmation, if the proposed contractor represents that it has submitted the VETS-100 Report and is not listed in the database.

10.8.5 Clause Usage Prescriptions For Equal Opportunity For Veterans
(a) The CO shall include 10-19 Equal Opportunity for Veterans in solicitations and contracts if the expected contract value is $100,000 or more. Clause 10-19 shall not be included when work is performed outside the United States by employees recruited outside the United States or in contracts with Indian Tribal governments. For commercial acquisitions, Clause 10-19 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-20.

(b) The CO shall include the Clause 10-20 Employment Reports on Veterans, in solicitations and contracts containing the clause 10-19 Equal Opportunity for Veterans. Clause 10-20 shall not be included in contracts with State and local governments. For commercial acquisitions, Clause 10-20 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-20.

10.50 TEXT OF CLAUSES.
The following clauses are referred to in BPI Part 10:

Clause 10-1 NONDISCRIMINATION AND AFFIRMATIVE ACTION 13
Clause 10-2 EMPLOYMENT PRACTICES..... 14
Clause 10-3 SERVICE CONTRACT ACT OF 1965 14
Clause 10-4 LABOR STANDARDS -- PRICE ADJUSTMENT 19
Clause 10-5 WAGE DETERMINATION..... 20
Clause 10-6 NOTIFICATION OF EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT..... 20
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Clause 10-9 PAYROLLS AND BASIC RECORDS 22
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Clause 10-16 AFFIRMATIVE ACTION COMPLIANCE REQUIREMENTS FOR CONSTRUCTION 26
Clause 10-17 EQUAL OPPORTUNITY PREAWARD CLEARANCE OF SUBCONTRACTS 28
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Clause 10-19 EQUAL OPPORTUNITY FOR VETERANS 29
Clause 10-20 EMPLOYMENT REPORTS ON VETERANS..... 31

Clause 10-1 NONDISCRIMINATION AND AFFIRMATIVE ACTION (Oct 13)(BPI 10.3.1)
(a) The Contractor shall not discriminate against its employees or applicants because of their race, color, religion, sex, national origin, age, status as Disabled or Vietnam Veterans, or physical or mental handicaps. The Contractor certifies that it does not, and will not, maintain segregated facilities or accommodations on the basis of race, color, religion or national origin. Regarding any position for which an employee or an applicant is qualified, the Contractor agrees to take affirmative action to employ, train, advance in employment and retain individuals in accordance with applicable laws and regulations including:

(1) For nondiscrimination based on race , color, religion, sex or national origin this includes, but is not limited to, the U. S. Constitution, and Parts II and IV of Executive Order 11246, September 24, 1965 (30 Fed. Reg. 12319). Contractor disputes related to compliance with its obligations shall be handled according to the rules, regulations and relevant orders of the Secretary of Labor (See 41 CFR 60).

(2) For nondiscrimination based on the Handicapped this includes, but is not limited to, Section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793); Executive Order 11758, January 15, 1974; and the regulations of the Secretary of Labor (41 CFR Part 60-741).

(3) For nondiscrimination based on Age this includes, but is not limited to, Executive Order 11141, February 12, 1964 (29 CFR 2477).

(b) The Contractor shall include the terms of this clause in every subcontract or purchase order as appropriate, and shall act as specified by the Department of Labor to enforce the terms and implement remedies.

(End of clause)

Clause 10-2 EMPLOYMENT PRACTICES (Mar 10)(BPI 10.4.4)

The Contractor agrees to comply with all applicable Federal, State, local laws, and regulations concerning Equal Employment Opportunity, the payment of minimum wages (including, but not limited to, the Fair Labor Standards Act) and the use of safe practices (including, but not limited to, the Occupational Safety and Health Act).

(End of clause)

Clause 10-3 SERVICE CONTRACT ACT OF 1965 (Jul 13)(BPI 10.4.4)

(a) Definitions. As used in this clause-
"Act" means the Service Contract Act of 1965 (41 U.S.C. 6701-6707, et seq.).

"Contractor" when used in any subcontract, shall include the subcontractor, except in the term "BPA Prime Contractor."

"Service employee" means any person engaged in the performance of this contract other than any person employed in a bona fide executive, administrative, or professional capacity, as these terms are defined in Part 541 of Title 29, Code of Federal Regulations, as revised. It includes all service persons regardless of any contractual relationship that may be alleged to exist between a Contractor or subcontractor and such persons.

(b) Applicability. This contract is subject to the following provisions and to all other applicable provisions of the Act and regulations of the Secretary of Labor (29 CFR Part 4). This clause does not apply to contracts or subcontracts administratively exempted by the Secretary of Labor or exempted by 41 U.S.C. 6702, as interpreted in Subpart C of 29 CFR Part 4.

(c) Compensation.

(1) Each service employee employed in the performance of this contract by the Contractor or any subcontractor shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor, or authorized representative, as specified in any wage determination attached to this contract.

(2)

(i) If a wage determination is attached to this contract, the Contractor shall classify any class of service employee not listed therein which is to be employed under the contract (i.e., the work to be performed is not performed by any classification listed in the wage determination) so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination. Such conformed class of employees shall be paid the monetary wages and furnished the fringe benefits which are determined pursuant to the procedures in this paragraph (c).

(ii) This conforming procedure shall be initiated by the Contractor prior to the performance of contract work by the unlisted class of employee. The Contractor shall submit Standard Form (SF) 1444, Request for Authorization of Additional Classification and Rate, to the Contracting Officer (CO) no later than 30 days after the unlisted class of employee performs any contract work. The CO shall review the proposed classification and rate and promptly submit the completed SF 1444 (which must include information regarding the agreement or disagreement of the employees' authorized representatives or the employees themselves together with the agency recommendation), and all pertinent information to the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. The Wage and Hour Division will approve, modify, or disapprove the action or render a final determination in the event of disagreement within 30 days of receipt or will notify the CO within 30 days of receipt that additional time is necessary.

(iii) The final determination of the conformance action by the Wage and Hour Division shall be transmitted to the Contracting Officer who shall promptly notify the Contractor of the action taken. Each affected employee shall be furnished by the Contractor with a written copy of such determination or it shall be posted as a part of the wage determination.

(iv) Establishing rates.

(A) The process of establishing wage and fringe benefit rates that bear a reasonable relationship to those listed in a wage determination cannot be reduced to any single formula. The approach used may vary from wage determination to wage determination, depending upon the circumstances. Standard wage and salary administration practices which rank various job classifications by pay grade pursuant to point schemes or other job factors may, for example, be relied upon. Guidance may also be obtained from the way different jobs are rated under Federal pay systems (Federal Wage Board Pay System and the General Schedule) or from other wage determinations issued in the same locality. Basic to the establishment of any conformable wage rate(s) is the concept that a pay relationship should be maintained between job classifications based on the skill required and the duties performed.

(B) In the case of a contract modification, an exercise of an option or extension of an existing contract, or in any other case where a contract succeeds a contract under which the classification in question was previously conformed pursuant to paragraph (c) of this clause, a new conformed wage rate and fringe benefits may be assigned to such conformed classification by indexing (i.e., adjusting) the previous conformed rate and fringe benefits by an amount equal to the average (mean) percentage increase (or decrease, where appropriate) between the wages and fringe benefits specified for all classifications to be used on the contract which are listed in the current wage determination, and those specified for the corresponding classifications in the previously applicable wage determination. Where conforming actions are accomplished in accordance with this paragraph prior to the performance of contract work by the unlisted class of employees, the Contractor shall advise the CO of the action taken, but the other procedures in paragraph (c)(2)(ii) of this section need not be followed.

(C) No employee engaged in performing work on this contract shall in any event be paid less than the currently applicable minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended.

(v) The wage rate and fringe benefits finally determined under this subparagraph (c)(2) of this clause shall be paid to all employees performing in the classification from the first day on which contract work is performed by them in the classification. Failure to pay the unlisted employees the compensation agreed upon by the interested parties and/or finally determined by the Wage and Hour Division retroactive to the date such class of employees commenced contract work shall be a violation of the Act and this contract.

(vi) Upon discovery of failure to comply with subparagraph (c)(2) of this clause, the Wage and Hour Division shall make a final determination of conformed classification, wage rate, and/or fringe benefits, which shall be retroactive to the date such class or classes of employees commenced contract work.

(3) Adjustment of compensation. If the term of this contract is more than one year, the minimum monetary wages and fringe benefits required to be paid or furnished thereunder to service employees under this contract shall be subject to adjustment after one year and not less often than once every two years, under wage determinations issued by the Wage and Hour Division.

(d) Obligation to furnish fringe benefits. The Contractor or subcontractor may discharge the obligation to furnish fringe benefits specified in the attachment or determined under subparagraph (c)(2) of this clause by furnishing equivalent combinations of bona fide fringe benefits, or by making equivalent or differential cash payments only in accordance with Subpart D of 29 CFR Part 4.

(e) Minimum wage. In the absence of a wage determination for this contract, neither the Contractor nor any subcontractor under this contract shall pay any person performing work under this contract (regardless of whether the person is a service employee) less than the minimum wage specified by

section 6(a)(1) of the Fair Labor Standards Act of 1938. Nothing in this clause shall relieve the Contractor or any subcontractor of any other obligation under law or contract for the payment of a higher wage to any employee.

(f) Successor contracts. If this contract succeeds a contract subject to the Act under which substantially the same services were furnished in the same locality, and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, in the absence of the wage determination for this contract setting forth such collectively bargained wage rates and fringe benefits, neither the Contractor nor any subcontractor under this contract shall pay any service employee performing any of the contract work (regardless of whether or not such employee was employed under the predecessor contract), less than the wages and fringe benefits provided for in such collective bargaining agreements, to which such employee would have been entitled if employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for under such agreement. No contractor or subcontractor under this contract may be relieved of the foregoing obligation unless the limitations of 29 CFR Part 4.1b(b) apply or unless the Secretary of Labor or the Secretary's authorized representative finds, after a hearing as provided in 29 CFR Part 4.10, that the wages and/or fringe benefits provided for in such agreement are substantially at variance with those which prevail for services of a character similar in the locality, or determines, as provided in 29 CFR Part 4.11, that the collective bargaining agreement applicable to service employees employed under the predecessor contract was not entered into as a result of arm's-length negotiations. Where it is found in accordance with the review procedures provided in 29 CFR 4.10 and/or 4.11 and Parts 6 and 8 that some or all of the wages and/or fringe benefits contained in a predecessor Contractor's collective bargaining agreement are substantially at variance with those which prevail for similar services in the locality, and/or that the collective bargaining agreement applicable to service employees employed under the predecessor contract was not entered into as a result of arm's-length negotiations, the Department will issue a new or revised wage determination setting forth the applicable wage rates and fringe benefits. Such determination shall be made part of the contract or subcontract, in accordance with the decision of the Administrator, the Administrative Law Judge, or the Administrative Review Board, as the case may be, irrespective of whether such issuance occurs prior to or after the award of a contract or subcontract (53 Comp. Gen. 401 (1973)). In the case of a wage determination issued solely as a result of a finding of substantial variance, such determination shall be effective as of the date of the final administrative decision.

(g) Notification to employees. The Contractor and any subcontractor under this contract shall notify each service employee commencing work on this contract of the minimum monetary wage and any fringe benefits required to be paid pursuant to this contract, or shall post the wage determination attached to this contract. The poster provided by the Department of Labor (Publication WH 1313) shall be posted in a prominent and accessible place at the worksite. Failure to comply with this requirement is a violation of section 2(a)(4) of the Act and of this contract.

(h) Safe and sanitary working conditions. The Contractor or subcontractor shall not permit any part of the services called for by this contract to be performed in buildings or surroundings or under working conditions provided by or under the control or supervision of the Contractor or subcontractor which are unsanitary, hazardous, or dangerous to the health and safety of the service employees. The Contractor or subcontractor shall comply with the safety and health standards applied under 29 CFR Part 1925.

(i) Records.

(1) The Contractor and each subcontractor performing work subject to the Act shall make and maintain for three years from the completion of the work, and make them available for inspection and transcription by authorized representatives of the Wage and Hour Division, Employment Standards Administration, a record of the following:

(i) For each employee subject to the Act:

(A) Name, address and social security number;

(B) Correct work classification or classifications, rate or rates of monetary wages paid and fringe benefits provided, rate or rates of payment in lieu of fringe benefits and total daily and weekly compensation;

(C) Daily and weekly hours worked by each employee; and

(D) Any deductions, rebates, or refunds from the total daily or weekly compensation of each employee.

(ii) For those classes of service employees not included in any wage determination attached to this contract, wage rates or fringe benefits determined by the interested parties or by the Administrator or authorized representative under the terms of paragraph (iii) of this clause. A copy of the report required by subdivision (c)(2)(iv)(B) of this clause will fulfill this requirement.

(C) Any list of the predecessor Contractor's employees which had been furnished to the Contractor as prescribed by paragraph (n) of this clause.

(2) The Contractor shall also make available a copy of this contract for inspection or transcription by authorized representatives of the Wage and Hour Division.

(3) Failure to make and maintain or to make available these records for inspection and transcription shall be a violation of the regulations and this contract, and in the case of failure to produce these records, the CO, upon direction of the Department of Labor and notification of the Contractor, shall take action to cause suspension of any further payment or advance of funds until the violation ceases.

(4) The Contractor shall permit authorized representatives of the Wage and Hour Division to conduct interviews with employees at the worksite during normal working hours.

(j) Pay periods. The Contractor shall unconditionally pay to each employee subject to the Act all wages due free and clear and without subsequent deduction (except as otherwise provided by law or regulations, 29 CFR Part 4), rebate, or kickback on any account. These payments shall be made no later than one pay period following the end of the regular pay period in which the wages were earned or accrued. A pay period under this Act may not be of any duration longer than semi-monthly.

(k) Withholding of payments and termination of contract. The CO shall withhold or cause to be withheld from the BPA prime contractor under this or any other Government contract with the prime contractor such sums as an appropriate official of the Department of Labor requests, or such sums as the CO decides may be necessary to pay underpaid employees employed by the Contractor or subcontractor. In the event of failure to pay any employees subject to the Act all or part of the wages or fringe benefits due under the Act, the CO may, after authorization or by direction of the Department of Labor and written notification to the Contractor, take action to cause suspension of any further payment or advance of funds until such violations have ceased. Additionally, any failure to comply with the requirements of this clause may be grounds for termination of the right to proceed with the contract work. In such event, the BPA may enter into other contracts or arrangements for completion of the work, charging the Contractor in default with any additional cost.

(l) Subcontracts. The Contractor agrees to include this clause in all subcontracts subject to the Act.

(m) Collective bargaining agreements applicable to service employees. If wages to be paid or fringe benefits to be furnished any service employees employed by the BPA prime contractor or any subcontractor under the contract are provided for in a collective bargaining agreement which is or will be effective during any period in which the contract is being performed, the BPA prime contractor shall report such fact to the CO, together with full information as to the application and accrual of such wages and fringe benefits, including any prospective increases, to service employees engaged in work on the contract, and a copy of the collective bargaining agreement. Such report shall be made upon commencing performance on the contract, in the case of collective bargaining agreements effective at such time, and in the case of such agreements or provisions or amendments thereof effective at a later time during the period of contract performance, such agreements shall be reported promptly after negotiation thereof.

(n) Seniority Lists. Not less than ten days prior to completion of any contract being performed at a BPA facility where service employees may be retained in the performance of the succeeding contract and subject to a wage determination which contains vacation or other benefit provisions based upon length of service with a contractor (predecessor) or successor (29 CFR Part 4.173), the incumbent prime contractor shall furnish to the CO a certified list of the names of all service employees on the Contractor's or subcontractor's payroll during the last month of contract performance. Such list shall also contain anniversary dates of employment on the contract either with the current or predecessor contractors of each such service employee. The CO shall provide this list to the successor contractor at the commencement of the succeeding contract.

(o) Rulings and interpretations. Rulings and interpretations of the Act are contained in 29 CFR Part 4.

(p) Contractor's certification.

(1) By entering into this contract, the Contractor (and officials thereof) certifies that neither it (nor he or she) nor any person or firm who has a substantial interest in Contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of the sanctions imposed under section 5 of the Act.
(2) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract under section 5 of the Act.
(3) The penalty for making false statements is prescribed in the U.S. Criminal Code. 18 U.S.C. 1001.

(q) Variations, tolerances and exemptions involving employment. Notwithstanding any of the provisions in paragraphs (b) through (o) of this clause, the following employees may be employed in accordance with the following variations, tolerances, and exemptions, which the Secretary of Labor, pursuant to section 4(b) of the Act prior to its amendment by Pub. L. 92-473, found to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business.

(1) Apprentices, student-learners, and workers whose earning capacity is impaired by age, physical or mental deficiency, or injury may be employed at wages lower than the minimum wages otherwise required by section 2(a)(1) or 2(b)(1) of the Act without diminishing any fringe benefits or cash payments in lieu thereof required under section 2(a)(2) of the Act, in accordance with the conditions and procedures prescribed for the employment of apprentices, student-learners, handicapped persons, and handicapped clients of sheltered workshops under section 14 of the Fair Labor Standards Act of 1938, in the regulations issued by the Administrator (29 CFR Parts 520, 521, 524, and 525).

(2) The Administrator will issue certificates under the Act for the employment of apprentices, student-learners, handicapped persons, or handicapped clients of sheltered workshops not subject to the Fair Labor Standards Act of 1938, or subject to different minimum rates of pay under the two acts, authorizing appropriate rates of minimum wages (but without changing requirements concerning fringe benefits or supplementary cash payments in lieu thereof), applying procedures prescribed by the applicable regulations issued under the Fair Labor Standards Act of 1938 (29 CFR Parts 520, 521, 524, and 525).

(3) The Administrator will also withdraw, annul, or cancel such certificates in accordance with the regulations in 29 CFR Parts 525 and 528.

(r) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they perform when they are employed and individually registered in a bona fide apprenticeship program registered with a State Apprenticeship Agency recognized by the U.S. Department of Labor, or if no such recognized agency exists in a State, under a program registered with the Office of Apprenticeship Training, Employer, and Labor Services (OATELS) U.S. Department of Labor. Any employee who is not registered as an apprentice in an approved program shall be paid the wage rate and fringe benefits contained in the applicable wage determination for the journeyman classification of work actually performed. The wage rates paid apprentices shall not be less than the wage rate for their level of progress set forth in the registered program, expressed as the appropriate percentage of the journeyman's rate contained in the applicable wage determination. The allowable ratio of apprentices to

journeymen employed on the contract work in any craft classification shall not be greater than the ratio permitted to the Contractor as to his entire work force under the registered program.

(s) Tips. An employee engaged in an occupation in which the employee customarily and regularly receives more than $30 a month in tips may have the amount of these tips credited by the employer against the minimum wage required by section 2(a)(1) or section 2(b)(1) of the Act, in accordance with section 3(m) of the Fair Labor Standards Act and regulations, 29 CFR Part 531. However, the amount of the credit shall not exceed $1.34 per hour beginning January 1, 1981. To use this provision—

(1) The employer must inform tipped employees about this tip credit allowance before the credit is utilized;
(2) The employees must be allowed to retain all tips (individually or through a pooling arrangement and regardless of whether the employer elects to take a credit for tips received):
(3) The employer must be able to show by records that the employee receives at least the applicable Service Contract Act minimum wage through the combination of direct wages and tip credit; and
(4) The use of such tip credit must have been permitted under any predecessor collective bargaining agreement applicable by virtue of section 4(c) of the Act.

(t) Disputes concerning labor standards. The U.S. Department of Labor has set forth in 29 CFR Parts 4, 6, and 8 procedures for resolving disputes concerning labor standards requirements. Such disputes shall be resolved in accordance with those procedures and not the Disputes clause of this contract. Disputes concerning labor standards requirements within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the U. S. Department of Labor, or the employees or their representatives.

(End of clause)

Clause 10-4 LABOR STANDARDS -- PRICE ADJUSTMENT (Oct 93)(BPI 10.4.4)

(a) The Contractor warrants that the prices in this contract do not include any allowance for any contingency to cover increased costs for which adjustment is provided under paragraph (d) below.

(b) The minimum monetary wages and fringe benefits required to be paid or furnished to service employees under this contract as set forth in the wage determination, shall be subject to adjustment if (1) the period of performance of this contract exceeds two years, (2) the contract contains option provisions specifying that a differing wage determination shall apply thereto, (3) an amendment to the Fair Labor Standards Act is enacted revising the minimum wage rate, (4) a contract modification significantly changes the nature of the work, or, (5) the Department of Labor otherwise directs.

(c) The contract price or contract unit priced labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with the new rates, or the decrease is voluntarily made by the Contractor.

(d) Any such adjustment shall be limited to increases or decreases in wages and fringe benefits as described in paragraph (c) of this clause, and the accompanying increases or decreases in social security and unemployment taxes and workers' compensation insurance, but shall not otherwise include any amount for general and administrative costs, material costs, overhead, or profit. (For example, the prior year wage determination required a minimum wage rate of $4.00 per hour. The Contractor chose to pay $4.10. The new wage determination increases the minimum rate to $4.50 per hour. Even if the Contractor voluntarily increases the rate to $4.75 per hour, the allowable price adjustment is $.40 per hour.)

(e) The Contractor shall notify the Contracting Officer (CO) of any increase claimed under this clause within 30 days after receiving a new wage determination unless this notification period is extended in writing by the CO. The Contractor shall promptly notify the CO of any decrease under this clause, but nothing in the clause shall preclude the BPA from asserting a claim within the period permitted by law. The notice shall contain a statement of the amount claimed and any relevant supporting data, including

payroll records that the CO may reasonably require. Upon agreement of the parties, the contract price or contract unit price labor rates shall be modified in writing. The Contractor shall continue performance pending agreement on, or determination of, any such adjustment and its effective date.

(f) The CO or an authorized representative shall have access to and the right to examine any pertinent books, documents, papers and records of the Contractor until the expiration of 3 years after final payment under the contract.

(End of clause)

Clause 10-5 WAGE DETERMINATION (Mar 10) (BPI 10.4.4)
The wage determination(s) referred to in the Clause 10-3, Service Contract Act, are incorporated into the contract, and are identified as follows:

Decision Number: Date:
Last Modifications Number: Date:

(End of clause)

Clause 10-6 NOTIFICATION OF EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT (Jul 13) (BPI 10.3.1)
(a) During the term of this contract, the contractor agrees to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. The notice shall include the information contained in the notice published by the Secretary of Labor in the Federal Register (Secretary's Notice).

(b) The contractor will comply with all provisions of the Secretary's Notice, and related rules, regulations, and orders of the Secretary of Labor.

(c) In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor maybe declared ineligible for future Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order 13496. Such other sanctions or remedies may be imposed as are provided in Executive Order 13496, or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

(d) The contractor will include the provisions of paragraphs (a) through (c) above in every subcontract entered into in connection with this contract (unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 3 of Executive Order 13496 of January 30, 2009, so that such provision will be binding upon each subcontractor. The contractor will take such action with respect to any such contract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for non compliance: Provided, however, that if the contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(End of Clause)

Clause 10-7 DAVIS-BACON ACT (Sep 98) (BPI 10.5.5)
(a) All laborers and mechanics employed or working upon the site of the work will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage

determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the Contractor and such laborers and mechanics. Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (d) of this clause; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period are deemed to be constructively made or incurred during such period. Such laborers and mechanics shall be paid not less than the appropriate wage rate and fringe benefits in the wage determination for the classification of work actually performed, without regard to skill, except as provided in the clause entitled "Apprentices, Trainees, and Helpers." Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein; provided, that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classifications and wage rates conformed under paragraph (b) of this clause) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the Contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(b) Additional wage classifications.

(1) The CO shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The CO shall approve an additional classification, and wage rate and fringe benefits therefore, only when all the following criteria have been met:

(A) Except with respect to helpers as defined in 29 CFR 5.2(n)(4), the work to be performed by the classification requested is not performed by a classification in the wage determination.

(B) The classification is utilized in the area by the construction industry.

(C) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(D) With respect to helpers, such classification prevails in the area in which the work is performed.

(2) If the Contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the CO agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the CO to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210. The Administrator or an authorized representative will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the CO or will notify the CO within the 30-day period that additional time is necessary.

(3) In the event the Contractor, the laborers or mechanics to be employed in the classification, or their representatives, and the CO do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the CO shall refer the questions, including the views of all interested parties and the recommendation of the CO, to the Administrator of the Wage and Hour Division for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the CO or will notify the CO within the 30-day period that additional time is necessary.

(4) The wage rate (including fringe benefits, where appropriate) determined pursuant to subparagraphs (b)(2) or (b)(3) of this clause shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification. Pending approval of the wage rate classification by the Wage and Hour Division per (b)(2) or (b)(3), the CO may unilaterally modify the contract to incorporate wage rates for interim use, as determined by the CO pursuant to (b)(1) of this clause. Whenever payment of such interim wage rate is made as prescribed by the CO pursuant to (b)(1), and the paid wage rate materially differs from the wage rate approved by the Wage and Hour Division pursuant to subparagraphs (b)(2) or (b)(3) of this clause, the CO shall make an equitable adjustment (upward or downward) in the contract price. The amount of the adjustment shall be the difference between the sum of interim wage rate paid and the wage rate approved by the Wage and Hour Division.

(c) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the Contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(d) If the Contractor does not make payments to a trustee or other third person, the Contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program; provided that the Secretary of Labor has found, upon the written request of the Contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the Contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(e) The Contractor shall comply with the requirements of the Copeland ("Anti-Kickback") Act, as amended, (18 U.S.C. 874 and 40 U.S.C. 3145) and its implementing regulations (29 CFR Part 3), which require reasonable procedures in place to prevent and detect unlawful practices to induce or intimidate employees to accept lessor compensation than they are entitled to under a contract of employment.

(f) Disputes concerning labor standards. The U.S. Department of Labor has set forth in 29 CFR Parts 5, 6, and 7 procedures for resolving disputes concerning labor standards requirements. Such disputes shall be resolved in accordance with those procedures and not the Disputes clause of this contract. Disputes within the meaning of this clause include disputes between the Contractor (or any of its subcontractors) and the contracting agency, the U. S. Department of Labor, or the employees or their representatives.

(End of clause)

Clause 10-8 WITHHOLDING -- LABOR VIOLATIONS (Oct 93) (BPI 10.5.5)
The CO may withhold, or cause to be withheld, from the Contractor under this contract, or any other Federal contract with the same Prime Contractor, as much of the otherwise due payments, advances, or guarantee of funds, as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the Contractor or any subcontractor the full amount of wages and fringe benefits required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed, or working on the site of the work, all or part of the wages required by the contract, the CO may, after written notice to the Contractor, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(End of clause)

Clause 10-9 PAYROLLS AND BASIC RECORDS (Oct 93) (BPI 10.5.5)
(a) Payrolls and basic records relating thereto shall be maintained by the Contractor during the course of the work and preserved for a period of 3 years thereafter for all laborers and mechanics working at the site of the work. Such records shall contain the name, address and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made, and actual wages paid. Whenever the Secretary of Labor has found under paragraph (d) of the clause entitled "Davis-Bacon Act" that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the Contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(b)

(1) Submission of payroll records to the CO is not required under this contract unless specifically requested by the CO. Providing the payrolls, when requested, shall be prompt, and shall not be considered a change to the contract. The payrolls submitted shall set out accurately and completely all of the information required to be maintained under paragraph (a) of this clause for the periods identified by the CO. This information may be submitted in any form desired. Optional Form WH-347 (Federal Stock Number 029-005-00014-1) is available for this purpose and may be purchased from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. The Prime Contractor is responsible for the submission of copies of payrolls by all subcontractors.

(2) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the Contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify

(A) That the payroll for the payroll period contains the information required to be maintained under paragraph (a) of this clause and that such information is correct and complete;

(B) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in the Regulations, 29 CFR Part 3; and

(C) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(3) The submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (b)(2) of this clause.

(4) The falsification of any of the above certifications in this clause may subject the Contractor or subcontractor to civil or criminal prosecution under Section 1001 of Title 18 and Section 3729 of Title 31 of the United States Code.

(c) The Contractor or subcontractor shall make the records required under paragraph (a) of this clause available for inspection, copying, or transcription by the CO or authorized representatives of the CO or the Department of Labor. The Contractor or subcontractor shall permit the CO or representatives of the CO or the Department of Labor to interview employees during working hours on the job. If the Contractor or subcontractor fails to submit required records or to make them available, the CO may, after written notice to the Contractor, take such action as may be necessary to cause the suspension of any further payment. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

(End of clause)

Clause 10-10 APPRENTICES, TRAINEES AND HELPERS (Jul 94)(BPI 10.5.5)

(a) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the Contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated in this paragraph, shall be paid not less than the applicable wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio

permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the Contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the DOL determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the Contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(b) Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed in the wage determination unless the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate in the wage determination which provides for less than full fringe benefits for apprentices.

Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate in the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the Contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(c) Helpers. Helpers will be permitted to work on a project if the helper classification is specified on an applicable wage determination or is approved pursuant to the conformance procedures set forth in paragraph (b) of the Davis Bacon Act clause. The allowable ratio of helpers to journeymen employed by the Contractor or subcontractor on the job site shall not be greater than two helpers for every three journeymen (in other words, not more than 40% of the total number of journeymen and helpers in each contractor's, or in each subcontractor's own workforce employed on the job site). Any worker listed on a payroll at a helper wage rate, who is not a helper as defined in 29 CFR 5.2(n)(4), shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any helper performing work on the job site in excess of the ratio permitted shall be paid not less than the applicable journeymen's (or laborer's, where appropriate) wage rate on the wage determination for the work actually performed.

(d) Equal employment opportunity. The utilization of apprentices, trainees, helpers and journeymen under this clause shall be in conformity with the equal employment opportunity requirements of Executive Order 11246 and 29 CFR Part 30.

(End of clause)

Clause 10-11 SUBCONTRACTS (LABOR STANDARDS) (Jul 13)(BPI 10.5.5)
The Contractor or subcontractor shall include in any subcontracts the clauses entitled "Davis-Bacon Act," "Apprentices, Trainees and Helpers," "Payrolls and Basic Records," "Withholding -- Labor Violations," "Subcontracts (Labor Standards)," "Certification of Eligibility," and "Davis-Bacon Act Wage Rates." The Contractor shall include a clause requiring its subcontractors to include these clauses in any lower-tier subcontracts. The Prime Contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with all the contract clauses cited in this paragraph.

(End of clause)

Clause 10-12 CERTIFICATION OF ELIGIBILITY (Oct 93) (BPI 10.5.5)
(a) By entering into this contract, the Contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the Contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(b) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(c) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(End of clause)

Clause 10-13 DAVIS-BACON ACT WAGE RATES (Mar 10) (BPI 10.5.5)
The wage determination(s) referred to in the clause at 10-7, Davis-Bacon Act, are incorporated into the contract, and are identified as follows:

Decision Number:	Date:
Last Modifications Number:	Date:

(End of clause)

Clause 10-14 APPROVAL OF WAGE RATES (Jul 13) (BPI 10.5.5)
All straight time wage rates and overtime rates based thereon, for laborers and mechanics engaged in work under this contract must be submitted for approval by the CO or their representative expressly designated for this purpose, if the straight time wages exceed the rates for corresponding classifications contained in the applicable Davis-Bacon Act minimum wage determination included in the contract. Any amount paid by the Contractor to any laborer or mechanic in excess of the approved wage rate shall be at the expense of the Contractor and shall not be reimbursed by the BPA . If the BPA refuses to authorize the use of overtime, the Contractor is not released from the obligation to pay employees at the required overtime rates for any overtime actually worked.

(End of clause)

Clause 10-15 PREAWARD ON-SITE EQUAL OPPORTUNITY COMPLIANCE REVIEW (Sep 98)(BPI 10.6.4)

An award in the amount of $10 million or more will not be made under this solicitation unless the offeror and each of its known first-tier subcontractors (to whom it intends to award a subcontract of $10 million or more) are found, on the basis of a compliance review, to be able to comply with paragraph (a)(1) of Clause 10-1, Nondiscrimination and Affirmative Action, of this solicitation.

(End of clause)

Clause 10-16 AFFIRMATIVE ACTION COMPLIANCE REQUIREMENTS FOR CONSTRUCTION (Jul 13) (BPI 10.6.4)

(a) Definitions. "Employer identification number," as used in this clause, means the Federal Social Security number used on the employer's quarterly federal tax return, U.S. Treasury Department Form 941.

"Minority," as used in this clause, means--

(1) Black (all persons having origins in any of the black African racial groups not of Hispanic origin);

(2) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish culture or origin, regardless of race);

(3) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and

(4) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

(b) If the Contractor, or a subcontractor at any tier, subcontracts a portion of the work involving any construction trade, each such subcontract in excess of $35,000 shall include this clause, including the goals for minority and female participation stated herein.

(c) The goals for minority and female participation, expressed in percentage terms for the Contractor's aggregate work force in each trade on all construction work in the covered area, are as follows:

Goals for minority participation _____ (CO insert goals)

Goals for female participation _____ (CO insert goals)

Compliance with the goals will be measured against the total work hours performed.

(d) The Contractor shall provide written notification to the Office of Federal Contract Compliance Programs (OFCCP) area office within 10 working days following award of any construction subcontract in excess of $35,000 at any tier for construction work under the contract resulting from this solicitation. The notification shall list the --

(1) Name, address, and telephone number of the subcontractor;
(2) Employer identification number of the subcontractor;
(3) Estimated dollar amount of the subcontract;
(4) Estimated starting and completion dates of the subcontract; and
(5) Geographical area in which the subcontract is to be performed.

(e) The Contractor shall implement the affirmative action procedures in subparagraphs (f)(1) through (7) of this clause. The goals stated in this contract are expressed as percentages of the total hours of employment and training of minority and female utilization that the Contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. If the contractor performs construction work in a geographical area located outside of the covered area, it shall apply the goals established for the geographical area where that work is actually performed. The Contractor is expected to make substantially uniform progress toward its goals in each craft.

(f) The contractor shall take affirmative action steps at least as extensive as the following:

(1) Ensure a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities where the Contractor's employees are assigned to work. The Contractor, if possible, will assign two or more women to each construction project. The Contractor shall ensure that foremen, superintendents, and other onsite supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at these sites or facilities.

(2) Immediately notify the OFCCP area office when the union or unions, with which the Contractor has a collective bargaining agreement, has not referred back to the Contractor a minority or woman sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.
(3) Develop on-the-job training opportunities and/or participate in training programs for the area that expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under subparagraph (f)(2) above.
(4) Review, at least annually, the Contractor's equal employment policy and affirmative action obligations with all employees having responsibility for hiring, assignment, layoff, termination, or other employment decisions. Conduct reviews of this policy with all onsite supervisory personnel prior to initiation of construction work at a job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.
(5) Disseminate the Contractor's equal employment policy externally by including it in any advertising in the news media, specifically including minority and female news media. Provide written notification to, and discuss this policy with, other Contractors and subcontractors with which the Contractor does or anticipates doing business.
(6) Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities. Encourage these employees to seek or to prepare for, through appropriate training, etc., opportunities for promotion.
(7) Maintain a record of solicitations for subcontracts for minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

(g) The Contractor is encouraged to participate in voluntary associations that may assist in fulfilling one or more of the affirmative action obligations contained in subparagraphs (f)(1) through (7) The efforts of a contractor association, joint contractor-union, contractor-community, or similar group of which the contractor is a member and participant, may be useful in achieving one or more of its obligations under subparagraphs (f)(1) through (7).

(h) A single goal for minorities and a separate single goal for women shall be established. The Contractor is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, the Contractor may be in violation of Executive Order 11246, as amended, if a particular group is employed in a substantially disparate manner.

(i) The contractor shall not use goals or affirmative action standards to discriminate against any person because of race, color, religion, sex, or national origin.

(j) The Contractor shall not enter into any subcontract with any person or firm debarred from Government contracts under Executive Order 11246, as amended.

(k) The Contractor shall carry out such sanctions and penalties for violation of this clause and of the Nondiscrimination and Affirmative Action clause, including suspension, termination, and cancellation of existing subcontracts, as may be imposed or ordered under Executive Order 11246, as amended, and its implementing regulations, by the OFCCP. Any failure to carry out these sanctions and penalties as ordered shall be a violation of this clause and Executive Order 11246, as amended.

Nothing contained herein shall be construed as a limitation upon the application of other laws that establish different standards of compliance.

(End of clause)

Clause 10-17 EQUAL OPPORTUNITY PREAWARD CLEARANCE OF SUBCONTRACTS (Sep 98) (BPI 10.6.4)

Notwithstanding the clause of this contract entitled "Subcontracts," the Contractor shall not enter into a first-tier subcontract for an estimated or actual amount of $10 million or more without obtaining in writing from the CO a clearance that the proposed subcontractor is in compliance with equal opportunity requirements and therefore is eligible for award.

(End of clause)

Clause 10-18 EMPLOYMENT ELIGIBILITY VERIFICATION (Jul 13) (BPI 10.7.3)

(a) "Employee assigned to the contract," as used in this clause, means an employee who was hired after November 6, 1986, who is directly performing work, in the United States, under a contract that is required to include the clause as prescribed by 10.7.3. An employee is not considered to be directly performing work under a contract if the employee—

(1) Normally performs support work, such as indirect or overhead functions; and
(2) Does not perform any substantial duties applicable to the contract.

(b) E-Verify enrollment and verification requirements.

(1) If the Contractor is not enrolled as a Federal Contractor in E-Verify at the time of the contract award, the Contractor shall:

(A) Enroll. Enroll as a Federal Contractor in the E-Verify program within 30 calendar days of contract award;

(B) Verify all new employees. Within 90 calendar days of enrollment in the E-Verify program, begin to use E-Verify to initiate verification of employment eligibility of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph (a) (3) of this section); and

(C) Verify employees assigned to the contract. For each employee assigned to the contract, initiate verification within 90 calendar days after date of enrollment or within 30 calendar days of the employee's assignment to the contract, whichever date is later (but see paragraph (a)(4) of this section).

(2) If the Contractor is enrolled as a Federal Contractor in E-Verify at time of contract award, the Contractor shall use E-Verify to initiate verification of employment eligibility of—

(A) All new employees.

(i) Enrolled 90 calendar days or more. The Contractor shall initiate verification of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract within 3 business days after the date of hire (but see paragraph (a)(3) of this section); or

(ii) Enrolled less than 90 calendar days. Within 90 calendar days after enrollment as a Federal Contractor in E-Verify, the Contractor shall initiate verification of all new hires of the Contractor, who are working in the United States, whether or not assigned to the contract, within 3 business days after the date of hire (but see paragraph)(3) of this section); or

(B) Employees assigned to the contract. For each employee assigned to the contract, the Contractor shall initiate verification within 90 calendar days after date of contract award or within 30 days after assignment to the contract, whichever date is later (but see paragraph (4) of this section).

(3) If the Contractor is an institution of higher education; a state or local government, or the government of a federally recognized Indian tribe; or a surety performing under a takeover agreement entered into with a federal agency pursuant to a performance bond, the Contractor may choose to verify only employees assigned to the contract. The Contractor shall follow the applicable verification requirements at (a)(1) or (a)(2), respectively, except that any requirement for verification of new employees applies only to new employees assigned to the contract.

(4) Option to verify employment eligibility of all employees. The Contractor may elect to verify all existing employees hired after November 6, 1986, rather than just those employees assigned to the contract. The Contractor shall initiate verification for each existing employee working in the United States who was hired after November 6, 1986, within 180 calendar days of—

(A) Enrollment in the E-Verify program; or
(B) Notification to E-Verify Operations of the Contractor's decision to exercise this option, using the contact information provided in the E-Verify program Memorandum of Understanding (MOU).

(5) The Contractor shall comply, for the period of performance of this contract, with the requirement of the E-Verify program MOU.

(A) The Department of Homeland Security (DHS) or the Social Security Administration (SSA) may terminate the Contractor's MOU and deny access to the E-Verify system in accordance with the terms of the MOU. In such case, the Contractor will be referred to a suspension or debarment official.
(B) During the period between termination of the MOU and a decision by the suspension or debarment official whether to suspend or debar, the Contractor is excused from its obligations under paragraph (b) of this clause. If the suspension or debarment official determines not to suspend or debar the Contractor, then the Contractor must reenroll in E-Verify.

(c) Web site. Information on registration for and use of the E-Verify program can be obtained via the Internet at the Department of Homeland Security Web site: http://www.dhs.gov/E-Verify.

(d) Individuals previously verified. The Contractor is not required by this clause to perform additional employment verification using E-Verify for any employee—

(1) Whose employment eligibility was previously verified by the Contractor through the E-Verify program;
(2) Who has been granted and holds an active U.S. Government security clearance for access to confidential, secret, or top secret information in accordance with the National Industrial Security Program Operating Manual; or
(3) Who has undergone a completed background investigation and been issued credentials pursuant to Homeland Security Presidential Directive (HSPD) -12, Policy for a Common Identification Standard for Federal Employees and Contractors.

(e) Subcontracts. The contractor shall include the requirements of this clause, including this paragraph (d) (appropriately modified for identification of the parties), in each subcontract that—

(1) Is for:
(A) Services other than commercial services that are part of the purchase of a commercial-off-the-shelf (COTS) item, performed by the COTS provider and are normally provided for that COTS item;
(B) Construction.

(2) Has a value of more than $3,000; and
(3) Includes work performed in the United States.

(End of Clause)

Clause 10-19 EQUAL OPPORTUNITY FOR VETERANS (Aug 13) (BPI 10.8.5)

(a) The Contractor shall not discriminate against any employee or applicant for employment because the individual is a disabled veteran, recently separated veteran, other protected veterans, or Armed Forces service medal veteran, regarding any position for which the employee or applicant for employment is qualified. The Contractor shall take affirmative action to employ, advance in employment, and otherwise treat qualified individuals, including qualified disabled veterans, without discrimination based upon their status as a disabled veteran, recently separated veteran, Armed Forces service medal veteran, and other protected veteran in all employment practices including the following:

(1) Recruitment, advertising, and job application procedures.
(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring.
(3) Rate of pay or any other form of compensation and changes in compensation.
(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists.
(5) Leaves of absence, sick leave, or any other leave.

(6) Fringe benefits available by virtue of employment, whether or not administered by the Contractor.
(7) Selection and financial support for training, including apprenticeship, and on-the-job training under 38 U.S.C. 3687, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training.
(8) Activities sponsored by the Contractor including social or recreational programs.
(9) Any other term, condition, or privilege of employment.

(b) The Contractor shall comply with the rules, regulations, and relevant orders of the Secretary of Labor issued under the Vietnam Era Veterans' Readjustment Assistance Act of 1972 (the Act), as amended (38 U.S.C. 4211 and 4212).

(c) The Department of Labor's regulations require contractors with 50 or more employees and a contract of $100,000 or more to have an affirmative action program for veterans. See 41 CFR Part 60-300, Subpart C for affirmative action program requirements.

(d) Listing openings.
(1) The Contractor shall immediately list all employment openings that exist at the time of the execution of this contract and those which occur during the performance of this contract, including those not generated by this contract, and including those occurring at an establishment of the Contractor other than the one where the contract is being performed, but excluding those of independently operated corporate affiliates, at an appropriate employment service delivery system where the opening occurs. Listing employment openings with the State workforce agency job bank or with the local employment service delivery system where the opening occurs shall satisfy the requirement to list jobs with the appropriate employment service delivery system.
(2) The Contractor shall make the listing of employment openings with the appropriate employment service delivery system at least concurrently with using any other recruitment source or effort and shall involve the normal obligations of placing a bona fide job order, including accepting referrals of veterans and nonveterans. This listing of employment openings does not require hiring any particular job applicant or hiring from any particular group of job applicants and is not intended to relieve the Contractor from any requirements of Executive orders or regulations concerning nondiscrimination in employment.
(3) Whenever the Contractor becomes contractually bound to the listing terms of this clause, it shall advise the State workforce agency in each State where it has establishments of the name and location of each hiring location in the State. As long as the Contractor is contractually bound to these terms and has so advised the State agency, it need not advise the State agency of subsequent contracts. The Contractor may advise the State agency when it is no longer bound by this contract clause.

(e) Applicability. This clause does not apply to the listing of employment openings that occur and are filled outside the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

(f) Postings.
(1) The Contractor shall post employment notices in conspicuous places that are available to employees and applicants for employment.
(2) The employment notices shall—
(A) State the rights of applicants and employees as well as the Contractor's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants who are disabled veterans, recently separated veterans, Armed Forces service medal veterans, and other protected veterans; and
(B) Be in a form prescribed by the Director, Office of Federal Contract Compliance Programs, and provided by or through the Contracting Officer.
(3) The Contractor shall ensure that applicants or employees who are disabled veterans are informed of the contents of the notice (e.g., the Contractor may have the notice read to a visually disabled veteran, or may lower the posted notice so that it can be read by a person in a wheelchair).

(4) The Contractor shall notify each labor union or representative of workers with which it has a collective bargaining agreement, or other contract understanding, that the Contractor is bound by the terms of the Act and is committed to take affirmative action to employ, and advance in employment, qualified disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans.

(g) Noncompliance. If the Contractor does not comply with the requirements of this clause, the Government may take appropriate actions under the rules, regulations, and relevant orders of the Secretary of Labor. This includes implementing any sanctions imposed on a contractor by the Department of Labor for violations of this clause . These sanctions (see 41 CFR 60-300.66) may include—

(1) Withholding progress payments;
(2) Termination or suspension of the contract; or
(3) Debarment of the contractor.

(h) Subcontracts. The Contractor shall insert the terms of this clause in subcontracts of $100,000 or more unless exempted by rules, regulations, or orders of the Secretary of Labor. The Contractor shall act as specified by the Director, Office of Federal Contract Compliance Programs, to enforce the terms, including action for noncompliance.

(End of clause)

Clause 10-20 EMPLOYMENT REPORTS ON VETERANS (Aug 13) (BPI 10.8.5)

(a) The Contractor shall report annually, as required by the Secretary of Labor, on—
(1) The total number of employees in the contractor's workforce, by job category and hiring location, who are disabled veterans, other protected veterans, Armed Forces service medal veterans, and recently separated veterans.
(2) The total number of new employees hired during the period covered by the report, and of the total, the number of disabled veterans, other protected veterans, Armed Forces service medal veterans, and recently separated veterans; and
(3) The maximum number and minimum number of employees of the Contractor or subcontractor at each hiring location during the period covered by the report.
(b) The Contractor shall report using DOL Form VETS-100A, entitled "Federal Contractor Veterans' Employment Report (VETS-100A Report)."
(c) The Contractor shall submit VETS-100A Reports no later than September 30 of each year.
(d) The report shall include total new hires, and maximum and minimum number of employees, during the most recent 12–month period preceding the ending date selected for the report. Contractors may select an ending date—
(1) As of the end of any pay period between July 1 and August 31 of the year the report is due; or
(2) As of December 31, if the Contractor has prior written approval from the Equal Employment Opportunity Commission to do so for purposes of submitting the Employer Information Report EEO-1 (Standard Form 100).
(e) The number of veterans reported must be based on data known to the contractor when completing the VETS-100A. The contractor's knowledge of veterans status may be obtained in a variety of ways, including an invitation to applicants to self-identify (in accordance with 41 CFR 60-300.42), voluntary self-disclosure by employees, or actual knowledge of veteran status by the contractor. This paragraph does not relieve an employer of liability for discrimination under 38 U.S.C. 4212.
(f) The Contractor shall insert the terms of this clause in subcontracts of $100,000 or more unless exempted by rules, regulations, or orders of the Secretary of Labor.

(End of clause)

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11.1 USE OF SOURCES.
POLICY: BPA shall generally satisfy requirements for supplies and services from or through the sources and publications listed in 11.1.1 through 11.1.6 in descending order of priority before using commercial sources for supplies and services.

11.1.1 Excess property.
POLICY: BPA shall use excess property in fulfilling its requirements and those of its cost-reimbursement suppliers when BPA inventories are not available, and it is cost effective to utilize excess property. Excess personal property is any personal property under the control of a Federal agency that is not required for its needs.

11.1.2 GSA stock items.
POLICY: GSA is a non-mandatory source of supply for items listed in the GSA Supply Catalog. Unless the stock items are the best buy, price and other factors (including the time and effort to do so) considered, purchases shall be made in the open market.

11.1.3 Federal Supply Schedules.
(a) ***POLICY:*** Federal Supply Schedule (FSS) contracts are not required sources of supply for BPA. Unless a FSS contractor offers the best buy, price and other factors considered, acquisitions shall be made in the open market.

(b) ***INFORMATION:*** The GSA Federal Supply Schedule program provides Federal agencies with a simplified process for obtaining commonly used supplies and services at prices associated with volume buying.

(c) ***INFORMATION:*** Copies of schedules may be obtained by completing and mailing GSA Form 457, FSS Publications Mailing List Application, to the GSA, Centralized Mailing Lists Services (7CAFL), 4900 Hemphill Street, P. O. Box 6477, Fort Worth, Texas 76115, telephone number (817) 978-5215. Copies of GSA Form 457 and the GSA publication titled "GSA Supply Catalog" (which includes a listing of schedules and information on the use of schedules) may also be obtained from that address, or through the on-line GSA FSS Publications Ordering service available at its Internet address: http://www.gsa.gov/ggscatalog.

11.1.4 Federal Prison Industries.
(a) ***INFORMATION:*** Federal Prison Industries, Inc. (FPI), also referred to as UNICOR, is a self-supporting, wholly owned Government corporation of the District of Columbia. It provides training and employment for prisoners confined in Federal correctional institutions through the sale of its products and services to Government agencies. An on-line catalog may be accessed through the UNICOR Internet homepage address at http://www.unicor.gov/.

(b) ***POLICY:*** BPA shall purchase required supplies of the classes listed in the Schedule of Products made in Federal Penal and Correctional Institutions at prices not to exceed current market prices. COs may elect not to utilize UNICOR products if they are concerned about employee safety, or if BPA employees may be subjected to significant harassment during inspection activities.

(c) ***POLICY:*** BPA is encouraged to use the facilities of FPI to the maximum extent practicable in purchasing (1) supplies that are not listed in the Schedule, but that are of a type manufactured in Federal penal and correctional institutions, and (2) services that are listed in the Schedule.

(d) ***INFORMATION:*** The following list includes some of the items that BPA purchases from UNICOR. However, if quality or service problems are encountered, deviations may be obtained from the HCA.

(1) Printed and Embossed metal signs.
(2) Steel shelving.
(3) Furniture.
(4) Grounding cables.

11.1.5 Purchases from the Blind and other Severely Handicapped.

(a) ***POLICY:*** BPA is not subject to the Javits-Wagner-O'Day Act (41 U.S.C. § 8501-8506). However, as a matter of policy, BPA implements the spirit of the Act whenever BPA's best buy objective can be met through AbilityOne sources.

(b) ***INFORMATION:*** The program implementing the Javits-Wagner-O'Day Act is called AbilityOne. Points of contact and a list of available products and services are provided at the following Internet site: www.abilityone.com. Often GSA stocks these products. COs may place orders directly to GSA for these products.

11.1.6 Defense Logistics Agency.

POLICY: The Defense Logistics Agency (DLA) is responsible for ensuring that Federal agencies are supplied with their fuel requirements. However, it may not always be to BPA's advantage to utilize DLA contracts in filling its fuel needs, as COs may be able to obtain better prices and services through local competition. COs may obtain fuels through normal competitive purchasing procedures on the open market or through DLA as deemed appropriate. The HCA has authorized an exemption from FPMR-101-26.602, which requires use of DLA contracts.

11.2 UTILITY SERVICES.

11.2.1 Definitions.

INFORMATION: As used in this part and elsewhere in the BPI:

"Commercial utility services" are those utility services, both regulated and unregulated, acquired without obligation to BPA except for services received, for which a written, bilateral agreement or contract with unique terms is neither required by the utility nor reasonably necessary for sound business reasons. This includes ordering, receiving, modifying, terminating, and paying at pre-established rates in the manner commonly used by the utility in its normal course of business dealings with similar customers and transactions.

"Utility services" are services such as the furnishing of electricity, telephone, gas, water, steam and sewerage that are available to the general public and performed by governmental entities or private companies. Utility services are ordinarily subject to governmental regulation. The term also includes services such as removal or disposal of garbage, rubbish, and trash that are performed on a contractual basis, which may or may not be subject to government or public regulation.

11.2.2 Acquisition of Utility Services.

POLICY: Unless otherwise included in a lease or other established contract by or on behalf of BPA, utility services shall be acquired, to the maximum practicable extent, as "commercial utility services." Commercial utility services shall be acquired by program personnel responsible for ordering or arranging such services. If a bilateral agreement or contract with unique terms is necessary, then a CO with appropriate service authority shall execute the agreement. See Part 2.3.3.2.

11.2.3 Coordination of utility service requirements.
INFORMATION:

Certain utility services require coordination, and in some cases, ordering by other BPA organizations.

11.2.3.1 GSA-owned facilities.
GSA generally acquires all utility services for GSA-owned facilities. When GSA designates BPA as the facility manager of a GSA-owned facility, BPA may acquire utility services. All requests for utility services in such facilities shall be directed to the program office responsible for management of the facility.

11.2.3.2 BPA-owned facilities.
Acquisition of utility services for BPA-owned facilities shall generally be accomplished by the program office.

11.2.3.3 BPA leased facilities.
BPA's Real Property Services is responsible for all leasing of facilities, office, and special purpose. A lease may include some or all utility services for the facility. Requests for utility services at BPA leased facilities shall be coordinated with Real Property Services. Those utility services not acquired by Real Property Services as a part of a lease shall generally be accomplished by the program office.

11.2.3.4 GSA Federal Telecommunications Service (FTS) long distance service.
Telecommunication Services is responsible for coordination and order placement of GSA Federal Telecommunications Service (FTS) circuits and calling cards. Requests for acquisition of such services shall be directed to Telecommunication Services.

11.3 PUBLICIZING BPA'S PURCHASING PLANS.
(a) ***POLICY:*** Buying offices shall, at least annually, publicize a summary of the types of goods or services that it plans to purchase in the following twelve month period. Publishing shall be in a manner which will advise the market of BPA's requirements.

(b) ***INFORMATION:*** This annual publication is in accordance with 16 U.S.C. § 832g, which requires BPA to provide public notice of its anticipated requirements in order to offer an opportunity for competition. Additional publicizing of specific transactions may be made by any suitable method that provides potential suppliers a reasonable opportunity to present information concerning their goods, services, and capacity to the CO. Suitable methods of publicizing BPA's planned purchases include, but are not limited to:

(1) Supplier fairs;
(2) Advertisements in local newspapers or trade publications;
(3) Written announcements mailed to potential suppliers and displayed in public areas; and
(4) Internet websites, when the use of a website has been authorized for use by the HCA and Sourcing Services Manager or their designated representative and the website has been pre-approved by the OCIO. Internet websites may not be used to publicize BPA needs for IT hardware, software, or services, or other critical and sensitive goods or services.

11.4 MARKET INFORMATION.
(a) ***POLICY:*** The CO shall ensure that sufficient information is obtained to determine the optimal combination of quality, price, delivery and source reliability necessary for a business-like source selection decision.

(b) ***INFORMATION:*** Market information is data which is collected so that the purchasing team may become familiar with the products, services, and suppliers, including the quality, price and delivery and dependability of the firms in the markets in which they are purchasing. The information is used to understand the commodity and service markets and to select qualified sources. There are two basic types of market information:

(1) General information, which is obtained through review of publications, routine contacts with suppliers, attendance at trade fairs, and other informal means; and
(2) Specific information, which is obtained for a specific transaction though direct contacts with suppliers.

(c) ***INFORMATION:*** Methods of obtaining market knowledge include:
(1) Attending supplier presentations;
(2) Supplier visits to BPA sites;
(3) Visits to supplier locations;
(4) Professional organization meetings, conferences and training sessions;
(5) Publications reviews;
(6) Library research;
(7) Discussions with other organizations buyers;
(8) Attendance at trade and industry shows and presentations;
(9) Internal BPA sources, such as program technical staff, subject matter experts, contract oversight staff, materials management staff, etc.; and
(10) Supplier performance and information file.

(d) ***INFORMATION:*** COs should encourage sales representatives to make presentations to BPA contracting and program personnel, or otherwise provide information concerning supplies or services for which BPA has, or will have, a significant requirement. Firms that have previously submitted information should be evaluated during the market research process for a specific product or service that they regularly sell, unless the number of such firms would render such consideration impractical. Such presentations shall normally be limited to announced time frames to make the best use of BPA's time.

(e) ***PROCEDURE:*** COs may use Standard Form 330, Architect-Engineer Qualification, Parts I and II, to obtain market information for architect-engineering and related services.

(f) ***INFORMATION:*** The time and expense devoted to obtaining market information shall be commensurate with the value to BPA of the supplies or services being procured.

11.4.1 Draft Specifications.
(a) ***POLICY:*** The use of draft specifications is encouraged to provide potential suppliers the opportunity to respond with their recommendations for approaching the purchase in the most economical fashion to meet BPA's needs.

(b) ***PROCEDURE:*** The CO, in coordination with the program office, may submit draft specifications for a needed product or service to potential suppliers. A key element in this process is scheduling enough time to issue draft specifications in advance of the actual solicitation of offers. This should improve the quality of the specification by making it reflect actual market and competitive conditions, and shorten the period of time needed between the issuance of the solicitation and the award of the contract. Responses received are for BPA's information only. BPA is under no obligation to respond to commenting firms concerning their submissions.

(c) ***INFORMATION:*** COs and program offices should be alert to the possible creation of an organizational conflict of interest (see 3.4) if potential suppliers suggest specification changes which only they are able to meet.

11.4.2 Supplier Development.
(a) ***POLICY:*** It is in BPA's interest to have a strong supplier base. The use of developmental contracts is encouraged to help strengthen the supplier base.

(b) ***INFORMATION:*** COs may, for valid business purposes, or to test the capabilities of new or preference program suppliers, reserve a portion of specific requirements for such businesses. Doing so may result in multiple contracts; one for the majority of the requirement, and the others for a small portion of the requirement. Such a strategy should be planned with the participation of the requesting office.

11.4.3 Protecting Agency Critical Information.
(a) ***POLICY***: It is BPA policy to protect agency Critical Information (CI). Contracting Officers, in cooperation with the requisitioning organization, may obtain written assurance from prospective offerors that any CI provided to the offeror during the market research phase, solicitation of offers, or subsequent contract performance, will be safeguarded.

(b) ***INFORMATION:*** Critical Information, as defined in BPAM 1080, must be safeguarded against loss, misuse, compromise, unauthorized access, or modification, by the originating organization and any other BPA organization that has a business need to distribute the information. Contractors who must have access to CI- in order to effectively respond to a request for quotes or offers, or during contract performance- may be asked to affirm in writing that they will comply with BPA policy and procedures to safeguard CI. Such affirmation may be obtained through a non-disclosure agreement (NDA), according to either the requisitioner's or Supply Chain Services' organizational Operations Security Plans. Unless information is specifically unmarked as CI at a later date, the requirements for protection and non-disclosure obligation should be deemed permanent.

(c) ***PROCEDURE:*** If an NDA disclosing BPA's CI is required and has not already been signed by prospective offerors during the market research phase, the Contracting Officer shall contact OGC for guidance prior to sending an NDA to prospective offerors. An NDA may be executed prior to issuing a solicitation or executing a contract, as appropriate. The specific nature of the information and any program specific instructions shall be identified in the NDA. OGC shall approve the NDA prior to execution.

(d) ***PROCEDURE:*** The CO's warranted authority does not include the authority to sign an NDA where BPA's CI is being provided to the contractor. NDAs protecting BPA's CI are filed and maintained by the Office of General Counsel. See BPI 17.6.2 for procedures regarding BPA's protection of contractor information.

(e) ***PROCEDURE:*** COs shall coordinate with the requisitioning organization and OGC to provide disposition instructions to the successful contractor throughout the market research, solicitation, and contract performance, and post contract completion. Disposition instructions after contract completion shall be commensurate with the originating office's determination of the continuing sensitive or critical nature of the information.

(f) ***PROCEDURE:*** In the event of a Contractor breach of the NDA, the Contractor shall contact the CO, per the NDA. The CO shall immediately notify the BPA Security and IT organizations to identify and initiate prompt remedial action.

11.5 CONTRACTING OFFICER ASSESSMENT OF RISK.
INFORMATION:

(a) The CO is responsible for assessing the various risks involved in proposed contracts when considering the type of solicitation technique to use. When the CO prepares a contract or a solicitation, the CO is in essence apportioning the risks of the contract performance between BPA and the supplier. If more of the risk is borne by the supplier, the contract price will include some unspecified allowance for the assumption of the risk. If more of the risk is borne by BPA, the initial price may decrease, but the costs associated with poor performance will increase if the supplier's performance is inadequate. The CO must attempt to balance the risk so that neither party bears a disproportionate share of the risk while at the same time attempting to keep BPA's total cost reasonable. The CO should consider factors such as

those shown below when planning the purchasing strategy. The CO may also utilize a strategy panel to assist with the assessment of risk.

(1) Should this contract be a fixed-price or a cost type contract?
(2) What is the degree of confidence in the quality of the technical requirements?
(3) Should bonds be required of the supplier?
(4) Is the product or service commercially available, or is this a BPA specification?
(5) Should insurance be required of the contractor?
(6) Are hazardous materials or wastes involved or generated?
(7) Are work or safety hazards identified and all necessary safety requirements described in the statement of work? (See BPI 15.2)
(8) Is a system of records on individuals involved in the statement of work?
(9) How experienced in the effort are the potential suppliers?
(10) Are patents or copyrightable material likely to be developed?
(11) Are there potential organizational conflicts of interest?
(12) Does this contract involve a combination of supply, service, and construction work?
(13) Should liquidated damages be required?
(14) What is BPA's ability to forecast resources and or costs with confidence?
(15) Is performance on a federal site or reservation?
(16) What is the possibility of work needing to be suspended?
(17) Have we experienced late performance, excessive rework or delays with similar work?
(18) Is there a history of changes or differing site conditions with similar work?
(19) Are there specific environmental concerns?
(20) Is the use of recycled materials possible?
(21) What is the appropriate FOB location?
(22) What are the property requirements (BPA furnished, contractor acquired, contractor property system reviews, insurance requirements for property, etc.)?
(23) What is the appropriate evaluation basis for the award decision: lowest price technically acceptable or using a tradeoff analysis?
(24) What are the appropriate factors for the specific procurement?

(b) The CO should consider the opportunity to provide either or both negative and positive incentives in contracts. Positive incentives include bonuses for earlier delivery or increased quality, while negative incentives include deductions from the contract price for late delivery, incomplete shipments, or lower than desired quality. When such incentives are used, the CO should ensure that the supplier clearly understands the potential impacts.

11.6 COMPETITION.
POLICY:

(a) It is BPA's policy to obtain meaningful competition in its purchases. Competition is a term used to describe the interaction of suppliers in a marketplace when they are attempting to maximize their position. While the comparison of competing firms is a major tool for the improvement of quality in relation to cost, BPA's standard for competition is to obtain meaningful competition, not full and open competition. Meaningful competition means the comparison, on a transaction-by-transaction basis, of offers for products or services from two or more firms that the CO determines, in his/her sole judgment, will provide BPA the best buy, as elsewhere defined in BPI 1.1. After reviewing the marketplace to determine the firms best qualified to meet BPA's needs, the products or services of two or more firms are compared to assess the relative merits of awarding a contract to meet a particular BPA requirement.

(b) While the assessment of competing firms is an important tool, it should not be expanded beyond the point where a payback in terms of time and expense is reasonably foreseeable. Such comparison does not necessarily require direct contact, provided the information required to make the comparison is available from sources such as recent competition, the marketplace, or others. Therefore, COs shall compare only that number of qualified firms which is sufficient to balance time and expense with the benefit sought in a particular contract.

11.7 NONCOMPETITIVE TRANSACTIONS.

POLICY: This section identifies the documentation requirements for certain transactions which are permitted without competition as required under BPI 11.6 Competition. While documentation requirements for noncompetitive transactions vary from those of competitive procurements, the transactions identified in BPI 11.7.1 and 11.7.2 require that price reasonableness be addressed either in the Document of Award Decision (DAD), Record of Modification (ROM) or the official file, as appropriate to the subject procurement (See BPI 12.5.2 Analysis of Price, Estimated Cost and Total Cost).

11.7.1 Purchases not requiring competitive consideration.

11.7.1.1 No Written Explanation or Citation Required.

POLICY: The following authorities and conditions permit purchases without competition. No written explanation for procuring without competition is required for the following:

(a) Purchases less than $10,000;

(b) Subscriptions to periodicals (under $10,000);

(c) Federal Prison Industries (UNICOR)--18 U.S.C. § 4124;

(d) Qualified AbilityOne (see 11.1.5) Nonprofit Agencies for the Blind or other Severely Handicapped--41 U.S.C. § 8501-8506;

(e) Government Printing and Binding--44 U.S.C. § 501-504, § 1111;

(f) Purchasing from other Federal agencies, including 8(a) contracts awarded to the SBA, and its contracts with specific firms; or

(g) When acquiring utility services, circumstances may dictate that only one contractor can furnish the services; or when the contemplated contract is for construction of a part of a utility system and the utility company itself elects to work on the system. (See 11.2).

11.7.1.2 Citation only Required.

POLICY: The following authorities and conditions permit purchasing from specific sources. A written citation of the appropriate BPI reference from this subpart and other essential identifying data shall be documented through a “Memorandum to Official File” with the subject matter and relevant BPI citation in the title as set forth in BPI 12.8.2 to clearly indicate the reason for the source selection.

(a) Repair parts, accessories, supplemental equipment or services required for supplies or services previously furnished or contracted for which are available from only one contractor.

(b) Required by law or Executive Order.

(c) The entity has the responsibility to manage the property or resource to be affected by the services performed.

(d) Contracting directly with firms certified as eligible under the SBA 8(a) program.

(e) BPA standard items, when a Business Line Vice President or equivalent level manager has determined in writing that BPA must standardize the use of the item, and that determination is available for review by the HCA.

(f) Agreements with nonprofit research organizations such as the Electric Power Research Institute (EPRI) may be made without supporting written explanation for the following purposes. However, a written citation of the appropriate BPI reference from this section and other essential identifying data shall be documented as set forth in BPI 12.8.2 by the CO to clearly indicate the reason for the unique source purchase, noting one or more of the following:

(1) Projects where the organization provides co funding to cover a portion of the direct project (subcontract) costs;
(2) Extensions of and additions to existing or planned projects;
(3) Work to be performed by test centers, including testing and other services normally provided to members by these facilities;
(4) Training conducted by the organization or its contractor(s) related to its own technologies or software;
(5) Agreements for BPA to serve as a "host" utility for a research project; and/or
(6) Agreements for other purposes will require an explanation.

11.7.1.3 Explanation required.
POLICY: The following situations permit purchase without competitive consideration, but the official file shall be documented as identified in BPI 12.8.2 for each instance below:

(a) Establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center. The written explanation shall include identification of the source, a discussion of how the transaction will develop or maintain an essential capability, and why the source is considered to be an essential capability; or

(b) When other parties have offered BPA an opportunity to participate in specific projects on a cost - sharing basis, and the sponsor has arranged for a substantial portion of the required funding for the entire project. A copy of the proposal and the total project budget shall be attached to the PR. In addition, a memorandum stating the total cost of the project and the approved BPA share and the benefits which will accrue to BPA as a result of participation in the project is also required. This exemption does not apply to projects which are initiated by BPA.

11.7.2 Unique Source Purchasing.
(a) ***INFORMATION:*** Unique source purchasing is the purchasing of supplies or services from the only feasible source which can meet BPA's requirements. When using unique sources, no other sources need be considered.

(b) ***POLICY:*** The CO is responsible for including an explanation of the nature of the unique source, and why other sources were not considered, in the official file as set forth in BPI 12.8.2.

11.8 SELECTING FIRMS TO SOLICIT.
(a) ***POLICY:*** BPA will normally solicit offers only from suppliers who, in the judgment of the CO, have the capability and willingness to perform the contract in a manner which will provide the best buy for BPA. However, this alone does not ensure that a firm will be solicited for a specific purchase. BPA's or other parties' experience with the firm's quality, safety record, delivery and completeness of effort should be given major consideration, as these are indicators of capabilities and the willingness to perform.

(b) ***POLICY:*** The list of potential suppliers for a particular supply/service should be no larger than necessary, in the CO's judgment, to obtain a meaningful level of competition among qualified suppliers. The complexity of the process used to select firms to be solicited will be determined by the complexity of the supply/service being sought. It could range from simple assessment of the market by the CO and the decision to solicit from one firm, to a pre-solicitation questionnaire sent to a large number of firms. The CO should select the least costly administrative procedure which can achieve the best buy.

(c) ***POLICY:*** BPA will do business with responsible and reputable firms and individuals. COs must obtain HCA approval prior to soliciting or awarding a contract to any firm or individual listed on the Excluded Parties List System (EPLS). Firms and individuals who are delinquent on a Federal debt, or have been debarred or suspended by the Federal Government are identified in the EPLS. COs shall check this website www.sam.gov to verify prospective offeror's EPLS status upon initial award and all subsequent awards. COs shall include evidence of verification as identified in BPI 12.8.2. See Part 26 for purchase card holder instructions.

(d) ***PROCEDURE:*** Potential supplier's capabilities should generally be determined prior to solicitation, and may be accomplished by considering information obtained from (1) data on hand, including records on file and knowledge of purchasing and quality assurance personnel, (2) prospective suppliers, including financial information, production records, personnel records, use of questionnaires, and on-site inspection of facilities, (3) previous customers, (4) commercial sources such as banks, financial agencies, credit agencies, suppliers, and trade associations, and (5) publications such as credit ratings, trade and financial journals, and business directories. For purchases which are significant either in dollar value or in the critical nature of the requirement, information as to current workload and financial capacity should be verified.

(e) ***PROCEDURE:*** A brief description of the potential offerors considered shall be included in the Document of Award Decision. See BPI 12.8.2.

11.8.1 Clause Usage Prescription.

COs shall include Clause 11-7 Subcontracts with Debarred or Suspended Entities in solicitations and contracts where the contract value exceeds $30,000. Clause 11-7 shall be included in intergovernmental contracts, except those with federal agencies. For commercial acquisitions, Clause 11-7 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-20.

11.9 REQUESTS FOR QUOTATIONS.
PROCEDURE:

(a) A request for quotations (RFQ) is a solicitation which may be used to obtain information on prices and availability of goods and services. The RFQ is generally used when the CO expects to place an order as a result of the information received, but does not wish to bind the supplier at the time the quotation is received. It is generally useful for commercial goods and services, but may also be used for other goods and services. All of the terms and conditions to be included in any purchase which may result from the RFQ are to be included in the RFQ. Purchases resulting from RFQs may be placed by any purchasing method approved by Part 12.

(b) An RFQ may be either oral or written. BPA's Request for Quotations form may be used when issuing written RFQs.

11.10 REQUESTS FOR OFFERS.
PROCEDURE: Requests for Offers (RFO) solicit requests for offers to sell; responses to RFOs constitute offers from suppliers that the CO may accept and create a binding contract without further discussion. The order may be placed and documented in any manner of placing awards described in Part 12. This method will typically be used when the market controls the price and quality and the CO desires an offer from the supplier. The requirement may require some amount of discussion to clearly communicate BPA's needs. The CO must discuss all aspects of the transaction, including quality assurance, warranty, payment (see 22.6) and other significant aspects of the transaction that would be included in a written RFO.

11.10.1 Oral Requests for Offers.
PROCEDURE:

(a) An oral request for offers (RFO) may be used. The acceptance of the offer to sell generally will be made orally after evaluation of the information provided.

(b) Oral RFOs are made by placing telephone calls or making personal visits to potential suppliers. No written solicitation document is produced. Purchase descriptions are communicated orally. Oral RFOs will generally be used when BPA is able to accept products and contract terms and conditions which are common in the market place. Oral solicitations are most commonly used when the CO understands the market, but must verify some aspect of the transaction, such as availability, price, near term market changes, or anticipated technical advances.

(c) Transactions exceeding $500,000 shall be approved by the HCA before using this technique.

11.10.2 Written Requests for Offers.
PROCEDURE:

(a) When oral RFOs are not practical because of the complexity of the purchase description or BPA-required terms and conditions, written RFOs may be used for obtaining information from potential suppliers. Situations where a written solicitation is appropriate include: requirements where the work or services are complex, the specificity of the requirement is not clear, high dollar values are involved, and the items are unique or substantially modified from commercially available substitutes. RFOs may be issued on BPA's Request for Offers and Award form, and be accompanied by the purchase description and additional clauses which the CO believes are essential to adequately communicate BPA's needs and requirements. Amendments may be made using BPA's Amendment to Solicitation form.

(b) For those purchases where it is impractical to expect BPA to award without negotiations, the RFO shall request only the level of detail necessary for BPA to quickly determine which offer presents the most potential for obtaining the best buy in fulfilling BPA's needs. In instances where the supplier's capabilities, approach or alternative approaches are of paramount importance in awarding the contract, the CO should provide instructions in the solicitation informing the offeror to address such concerns. It is important that the offeror be provided sufficient detail to be informed that it is requested to not only address their proposed solution to our requirement and their strengths as a firm in being able to provide a high quality solution to our requirement, but also to address those specific areas of importance to BPA.

11.10.2.1 Clause Usage Prescriptions.
PROCEDURE:

(a) The CO shall obtain the information required by Clause 11-1 Type of Business Organization during the solicitation process unless it was previously obtained and has been verified by the CO to be accurately recorded in the vendor file. This information may be necessary to determine whether the contractor will be required to obtain and provide its Taxpayer Identification Number (TIN) as a condition of payment (see 4.1.2 and 22.6). If written solicitations are issued to suppliers known to be domestic, paragraph (b) may be omitted, and the (a) designation removed from paragraph (a).

(b) COs shall insert a clause similar to Clause 11-2 Instructions to Offerors-Competitive Acquisition in written solicitations for supplies, construction and/or services. Clause 11-2 must contain at a minimum: 1) a business proposal requirement, to assess the price/cost evaluation factor; and 2) a technical proposal requirement, to assess all non-price/cost evaluation factors. Non-price/cost evaluation factors may include past performance, quality, specifications of the products or services, and any other unique or distinguishing BPA requirement to differentiate between offers. If a solicitation is being issued pursuant to BPI Part 28 Acquisition of Commercial Items and Services, the CO shall revise Clause 11-2 to

address/delete references to past performance, as appropriate to the subject procurement, including (b)(3) and (c)(4).

(c) When using Clause 11-2 Instructions to Offerors-Competitive Acquisition, the CO shall include either Clause 11-3 Award Decision -- Lowest Price Technically Acceptable or Clause 11-4 Award Decision -- Tradeoff.

11.10.2.2 Executive summaries of requests for offers.
POLICY: Requests for offers for a complex requirement should be accompanied by an executive summary. The purpose of the executive summary is to summarize the salient parts of the purchase and communicate important information.

11.11 PREPARING SOLICITATIONS.
(a) ***POLICY:*** COs shall furnish appropriate information concerning a proposed purchase to solicited suppliers in a manner such that undue competitive advantage to one or more firms is not provided.

(b) ***POLICY:*** BPA will minimize the use of solicitations requiring elaborate proposals.

(c) ***PROCEDURE:*** COs should generally use simple processes with few terms and conditions when purchasing commercial products and services. COs generally should not add BPA-unique inspection, testing or warranty requirements to purchases of commercial goods and services.

11.11.1 Evaluation Factors.
(a) ***INFORMATION:***
(1) Offerors should consider all of BPA's requirements, as communicated through the statement of work or the specifications, as being important. This should encourage suppliers to emphasize how their firm can best meet BPA's needs rather than structuring an offer geared to predefined, rigid evaluation factors. Clause 11-2 Instructions to Offerors-Competitive Acquisition, advises the supplier of this approach. The approach in this paragraph is preferred over those described elsewhere in this subpart.
(2) BPA seeks to determine the "best buy" for the agency by selecting offers on the basis of lowest price technically acceptable or on the basis of a tradeoff analysis. The solicitation shall identify the basis upon which the award shall be made. The award selection will be based on an assessment of the evaluation factors as identified in the solicitation.
(3) For awards made on a lowest price technically acceptable basis, the evaluation factors are evaluated against the stated minimum standard for acceptability and given a pass/no pass rating. Those offers meeting the minimum standard for acceptability are then evaluated for lowest price. There is no comparative rating or ranking of offers against each other (e.g. - good, better, or best). The award is made to the offer representing the lowest price technically acceptable offer. If the CO determines there is a need to award to other than the lowest price technically acceptable offer, the solicitation must be cancelled and reissued as a tradeoff so that the price may be traded off against the non-price evaluation factors.
(4) For awards made on a tradeoff basis, the listed evaluation factors are traded off with pricing when the lowest price technically acceptable offer may not represent the "best buy" for the agency. Under a tradeoff, the non-price factors may be traded for pricing consideration when the result will better benefit the procurement goal.

(b) ***POLICY:***
(1) BPA shall award contracts based on stated evaluation factors and shall evaluate consistent with the method of evaluation identified in the solicitation.
(2) The CO, requisitioner, and other key technical personnel shall jointly identify unique or significant evaluation factors for the supplies or services being purchased prior to the issuance of the solicitation. The distinguishing evaluation factors shall be identified in the solicitation. Evaluation factors should be crafted so as to maximize the value of supplier creativity in responding to BPA's requirements, while ensuring that BPA obtains the quality and timeliness of goods or services it requires at reasonable

total costs. Evaluation sub-factors may be utilized where offerors can only be distinguished from each other at that level of scrutiny. Specific numerical weights for evaluation factors shall not be published, nor shall the rating for evaluation factors for individual offers be disclosed.

(3) The solicitation shall identify the evaluation factors upon which the analysis shall be conducted. Additionally, the solicitation shall identify whether the award will be made to the offer with the lowest price meeting the standards of the technical non-price evaluation factor(s), or via tradeoff to the offer representing the best buy as identified by the evaluation factors and pricing. If other significant evaluation factors are discovered after the solicitation is issued, the CO shall amend the solicitation accordingly. Solicitations issued without evaluation factors or the award basis identified must be approved in advance by the HCA.

(4) For solicitations of commercial acquisitions, the evaluation factors need not be more detailed than technical (capability of the item offered to meet the agency need), price and past performance. Technical capability may be evaluated by how well the proposed products meet BPA's requirement instead of predetermined subfactors. Solicitations for commercial items do not have to contain subfactors for technical capability when the solicitation adequately describes the item's intended use. A technical evaluation would normally include examination of such things as product literature, product samples (if requested), technical features and warranty provisions.

(c) ***PROCEDURE:*** The CO shall document the evaluation factors as identified in BPI 11.11.1(b) in addition to the importance of pricing relative to the non-pricing evaluation factors.

11.11.1.1 Lowest Price Technically Acceptable Offer.

(a) ***INFORMATION:***

(1) Under a lowest price technically acceptable procurement, offers are evaluated against the stated minimum standard for acceptability and given a pass/no pass rating. Those offers meeting the minimum standard for acceptability are then evaluated for lowest price. There is no comparative rating or ranking of offers against each other (e.g. - good, better, or best). The award is made to the offer representing the lowest price amongst technically acceptable offers. If the CO determines there is a need to award to other than the lowest priced technically acceptable offer, the CO shall so note in the official file, canceling the solicitation and reissuing as an award with a tradeoff basis, identifying the importance of price for the tradeoff analysis.

(2) Evaluation factors to be scored on a pass/no pass basis may include: total cost to BPA, technical and management features, relative quality and adaptability of supplies and services, the offeror's financial responsibility, skill, experience, record of business integrity and business honesty, ability to furnish repairs and maintenance services, the time of delivery or performance offered, past performance (including safety record), and whether the offeror has complied with the specifications or demonstrated capability to perform the statement of work.

(b) ***POLICY:***

(1) For awards based on technically acceptable lowest price evaluation, the evaluation factors shall be identified in the solicitation. Should review of the proposals of BPA program needs raise relevant new issues, BPA will notify offerors as appropriate, and amend the solicitation as necessary. Since price is never ranked, it shall not be included as an evaluation factor.

(2) Tradeoffs are not permitted when an award is made based on a lowest price technically acceptable selection. The CO shall determine, prior to solicitation issuance, the basis for the contract award and identify the evaluation factors to be utilized. The solicitation may not be amended to change the basis of award from lowest price technically acceptable to tradeoff.

(3) Past performance shall be addressed as an evaluation factor. If the CO determines that past performance is not an appropriate evaluation factor for the acquisition, the CO shall so note the reasons for this determination in the official file, as identified in BPI 12.8.2. Where past performance is included as an evaluation factor, the solicitation shall state the general approach for evaluating past performance. See BPI 12.5.7(c) for evaluations of past performance for commercial acquisitions.

11.11.1.1.1 Reverse Auction

(a) ***INFORMATION:*** The CO and Requisitioner may collaboratively determine that purchase of certain commercial goods or services is well suited to utilizing a reverse auction technique for acquiring pricing information. A reverse auction is an award decision based on the technically acceptable lowest priced offer. The CO prequalifies offerors selected for participation through utilization of the evaluation factors while the lowest pricing is then determined through the reverse auction process, where offerors participate in a real-time bidding process to indicate their best pricing.

(b) ***POLICY:*** COs may conduct reverse auctions to obtain a portion or all of suppliers' pricing information, as approved by the Tier II Purchasing Managers and the HCA. Electronic reverse auctions shall be conducted only through auction service providers that have been approved for use by the Tier II Purchasing Managers and the HCA.

(c) ***PROCEDURE:*** COs shall document as identified in BPI 12.8.2 the process for determining the lowest price through the reverse auction method employed.

11.11.1.1.1.1 Clause Usage Prescriptions.
PROCEDURE:

(a) COs shall include a clause similar to Clause 11-3 Award Decision -- Lowest Price Technically Acceptable in all written solicitations where the basis for award is the lowest price technically acceptable offer. COs shall identify the evaluation factors by listing them in the clause, including only the quantity necessary to adequately determine technically acceptable offers.

(b) COs shall include Clause 11-3.1 Reverse Auction when procuring commercial items utilizing a reverse auction technique. When using Clause 11-3.1, COs shall include Clause 11-3 Award Decision -- Lowest Price Technically Acceptable. COs shall not combine into one procurement reverse auction requirements and non-reverse auction requirements.

11.11.1.2 Tradeoff Analysis.

(a) ***INFORMATION:***

(1) Under a tradeoff analysis procurement, offers are evaluated against the identified factors and ranked according to which offer represents the best buy to BPA, as described in BPI 1.1(c). A tradeoff may be utilized when it may not be in BPA's best interest to award to the lowest price technically acceptable offer. If the CO determines that the best buy is also the lowest priced technically acceptable offer, the award may be made to the lowest priced technically acceptable offer.

(2) Evaluation factors may include such factors as total cost to BPA, technical and management features, relative quality and adaptability of supplies and services, the offeror's financial responsibility, skill, experience, record of business integrity and business honesty, ability to furnish repairs and maintenance services, the time of delivery or performance offered, past performance (including safety record), and whether the offeror has complied with the specifications or demonstrated capability to perform the statement of work.

(b) ***POLICY:***

(1) For awards based on a tradeoff evaluation, the evaluation factors shall be identified, with pricing included as an evaluation factor to be traded with other evaluation factors. Additionally, the importance of pricing, as being equal to, more important than, or less important than other evaluation factors, shall be identified in the solicitation.

(2) COs shall use the tradeoff analysis when it is in BPA's best interest to consider awarding to other than the lowest price offer. COs may tradeoff between price/cost and technical (non-price/cost) attributes, or may elect to award to an offeror without a tradeoff analysis, when the offer represents both the lowest evaluated price/cost and the highest technical/management offer. Price or cost must be included as an evaluation factor in order to be traded with non-price technical factors.

(3) COs shall identify whether all evaluation factors, other than cost or price, when combined, are:
(A) Significantly more important than price/cost;
(B) Approximately equal to price/cost; or
(C) Significantly less important than price/cost.

(4) Past performance shall be addressed as an evaluation factor. If the CO determines that past performance is not an appropriate evaluation factor for the acquisition, the CO shall so note the reasons for this determination in the official file as identified in BPI 12.8.2. Where past performance is included as an evaluation factor, the solicitation shall state the general approach for evaluating past performance. See BPI 12.5.7(c) for evaluations of past performance for commercial acquisitions.

11.11.1.2.1 Innovative Approaches.

(a) ***INFORMATION:*** BPA encourages proposals offering innovative, cost-effective approaches to meeting BPA's requirements from a technical, work performance, delivery, pricing or other standpoint which produce an improved result for BPA. Where innovative approaches will be accepted in response to a solicitation, the solicitation will so state. Offerors should clearly identify their offer as being submitted as an innovative approach pursuant to the appropriate clause in the solicitation.

(b) ***POLICY:***

(1) COs may encourage innovative alternate approaches to addressing BPA's requirements by including Clause 11-4.1 in the solicitation. When innovative approaches are received, COs shall protect such approaches in the same manner as other offers pursuant to BPI 12.1 Receipt of Offers.

(2) Innovative approaches shall be evaluated under a tradeoff analysis.

(3) BPA is not obligated to evaluate submissions of innovative approaches absent an invitation for such submissions in the solicitation.

(c) ***PROCEDURE:*** COs shall document as identified in BPI 12.8.2 the process for determining that the innovative approach was the best buy through the tradeoff process and analysis.

11.11.1.2.1.1 Clause Usage Prescriptions.

PROCEDURES:

(a) COs shall include a clause similar to 11-4 Award Decision -- Tradeoff in all written solicitations where the basis for award will not be the lowest price technically acceptable offer. The award will be determined by a tradeoff analysis of the combined evaluation factors against the price. COs shall identify the evaluation factors by listing them in Clause 11-4, including only the quantity necessary to adequately distinguish between offers. COs must include price/cost as an evaluation factor in order to perform the tradeoff analysis. The CO shall also identify the importance of price/cost as being equal to, greater than, or less than important than the combined evaluation factors.

(b) COs shall include a clause similar to Clause 11-4.1 Innovative Approaches in solicitations when encouraging the submission of innovative, cost-effective approaches to meeting BPA's requirements. When using Clause 11-4.1, COs shall include Clause 11-4 Award Decision -- Tradeoff, identifying the importance of pricing in the tradeoff analysis for an innovative approach.

11.11.2 Additional Copies of Solicitations.

POLICY: At times, the CO may receive a request for a solicitation after the sources to be solicited have already been identified. Solicitations shall be furnished upon request. If the CO is unfamiliar with the requester's qualifications and there is not sufficient time to perform an evaluation without compensating benefit to BPA, the requester shall be advised that the solicitation is furnished for information only and that an offer is not solicited. If an offer is received from such firm, the CO is not obligated to consider it unless such action would be in the best interests of BPA (See 12.1.3). The reasons for not considering an offer shall be noted in the file. Offers from sources which were not solicited but who are known to be qualified may be considered for award at the discretion of the CO.

11.11.3 Pre-proposal Conferences.
(a) ***INFORMATION:*** A pre-proposal conference may be held to brief prospective offerors. These conferences may be used in complex purchases to explain or clarify complicated specifications and requirements.

(b) ***PROCEDURE:*** The CO shall decide if a pre-proposal conference is required and make the necessary arrangements, including:
(1) Giving all firms who received the solicitation adequate notice of the time, place, nature, and scope of the conference;
(2) Requesting firms to submit written questions in advance. Prepared answers can then be delivered during the conference; and/or
(3) Arranging for technical and legal personnel to attend the conference, if appropriate.

(c) ***PROCEDURE:*** The CO or a designated representative shall conduct the pre-proposal conference, furnish all prospective offerors identical information concerning the proposed purchase, make a record of the conference for the official file, and promptly furnish a copy of that record to all prospective offerors. Conferees shall be advised that --
(1) Remarks and explanations at the conference shall not qualify the terms of the RFO; and
(2) Terms of the RFO remain unchanged as a result of the pre-proposal conference unless amended in writing.

11.11.4 Site Tours and Inspections.
PROCEDURE: When work is to be performed on a BPA site, the CO should make appropriate arrangements for prospective offerors to inspect the work site and to have the opportunity to examine data available to the BPA that may provide information concerning the performance of the work. Such data may include samples, logs, records, and plans of the work area including information regarding any utilities or Government supplies or services to be furnished during the contract. If it is not feasible for offerors to inspect the site or examine the data on their own, the CO should designate an individual who will show the site or data to the offerors.

11.11.4.1 Clause Usage Prescriptions.
PROCEDURE: If the CO determines that a guided site visit is not necessary, a clause similar to that at 11-5 Inspection of Premises, may be used. If the contract requires performance on BPA rights-of-way, use the clause with its Alternate I. If the CO determines that a guided site visit is necessary, a clause similar to that at 11-6 Site Tour, may be used. If the contract requires performance on BPA rights-of-way, use the clause with its Alternate I.

11.12 CHANGES IN REQUIREMENTS BEFORE RECEIPT OF OFFERS.
POLICY: When BPA modifies its requirements before receipt of offers, the CO shall notify the potential suppliers of the change via an amendment to the solicitation. Where notification of changed requirements is given verbally, the CO shall document the changed requirement in writing and include documentation of supplier notification in the official file as identified in BPI 12.8.2.

11.13 DISCLOSURE OF INFORMATION.
POLICY:

(a) Discussions with prospective suppliers regarding a potential purchase and the transmission of technical or other information prior to beginning the solicitation process may be conducted by purchasing or technical personnel. Such personnel shall not furnish any information to a potential contractor, which alone or together with other information would be prejudicial to others. Information that is not prejudicial to others may be furnished upon request. However, when information is furnished to one prospective supplier, it should also be furnished to other known prospective suppliers when it is believed that they do not have access to the information.

(b) During the solicitation process only the CO or others specifically authorized by the CO shall transmit technical or other information and conduct discussions with prospective suppliers. Information shall not be furnished to a prospective contractor if, alone or together with other information, it may afford the prospective contractor an advantage over others. However, general information that is not prejudicial to others may be furnished upon request.

11.14 MANAGEMENT REVIEW OF SOLICITATIONS.
POLICY:

(a) COs shall seek Chief Supply Chain Officer review of certain solicitations and contracts prior to issuance to offerors. The Chief Supply Chain Officer, or designee who possesses a CO Certificate of Appointment at or above the level held by the manager, shall conduct the management review. These reviews will be performed if the solicitation or contract meets one or more of the following conditions:

(1) The solicitation or contract value is greater than $5 million.
(2) The purchase is deemed a high-risk acquisition, in terms of performance, delivery, dollars, or unique contract terms.
(3) The purchase is deemed mission critical by the Requisitioner, Project Manager, Sourcing Services Manager, Chief Supply Chain Officer, or Administrator.

(b) The review manager shall consider the key elements of the purchase and ensure that the contents of the solicitation address those issues. If the manager finds that the solicitation or contract is lacking critical content to ensure the best buy objective and reduce risk to BPA, the manager shall advise to the CO as to how the issues should be addressed. The review and subsequent guidance may be in any written format, and placed in the file.

11.50 TEXT OF CLAUSES.
The following clauses are referred to in BPI Part 11:

Clause 11-1 TYPE OF BUSINESS ORGANIZATION 17
Clause 11-2 INSTRUCTIONS TO OFFERORS-COMPETITIVE ACQUISITION 18
Clause 11-3 AWARD DECISION -- LOWEST PRICE TECHNICIALLY ACCEPTABLE
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Clause 11-3.1 REVERSE AUCTION 21
Clause 11-4 AWARD DECISION -- TRADEOFF 21
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Clause 11-7 SUBCONTRACTING WITH DEBARRED OR SUSPENDED ENTITIES23

Clause 11-1 TYPE OF BUSINESS ORGANIZATION (Sep 02)(BPI 11.10.2.1)

The offeror, by checking the applicable box, represents that-

(a) It operates as / / a corporation incorporated under the laws of the State of _____,
/ / an individual, / / a partnership, / / a nonprofit organization, or / / a joint venture; or

(b) It is a / / local, / / state, / / federally recognized Indian tribe, or / / other governmental entity, (*describe* _____); or

(c) If the offeror is a foreign entity, it operates as / / an individual, / / a partnership,
/ / a nonprofit organization, / / a joint venture, or / / a corporation, registered for business
in _____ (country) and / / does / / does not have an office or fiscal paying agent in the United States; or

(d) It is / / a type of business organization not otherwise listed above (*describe* _____).

(End of clause)

Clause 11-2 INSTRUCTIONS TO OFFERORS-COMPETITIVE ACQUISITION (Jul 13)(BPI 11.10.2.1)

(a) Submission of Offers.

(1) Offers shall be valid for a minimum of ___(CO fill in) days from the date offers are due.

(2) All offers and resultant contracts are subject to the conditions set forth in this solicitation and the BPI. By submission of this offer, the offeror agrees to be bound to the Protest procedures specified in the BPI in BPI 21.3.

(3) BPA may reject late offers. BPA reserves the right to not consider proposals from potential offerors other than those solicited by the CO.

(4) Offerors shall submit their proposals in a timely manner, using either electronic format or hard copy, as identified in the solicitation cover letter. The CO may disqualify offers which do not include the materials as set forth below, or which fail to adhere to any content restrictions herein.

(b) Required materials. Offerors shall submit the following materials subject to the formatting, content, and restrictions set forth below.

(1) **Business/Pricing Proposal:** (CO to insert page limit, formatting requirements, electronic or hard copy/number of copies, etc) Offeror shall submit a Business Proposal that shall show all price/cost proposed to fulfill the requirements of the solicitation. The Business Proposal shall provide the price/cost information which shall be used to assess whether the price/cost proposed is fair and reasonable. Price/cost shall be addressed only in this Business Proposal section, and in any transition/phase-out proposals if applicable, and nowhere else.

(A) Completed and signed Request for Offers and Awards (Attachment 4 of the RFO/RFQ).

(B) Completed Representations and Certifications (Attachment 2 of the RFO/RFQ).

(C) The offeror's price/cost proposal shall consist of a completed Schedule as it appears in Attachment 3, Unit 1 of the RFO/RFQ draft contract. Offeror shall copy, complete and submit the Schedule as its pricing submission under this Business Proposal requirement.

(D) The offeror's price/cost proposal shall also address the following areas and include the documents below: (CO fill-in: CO shall individually list any applicable pricing tables, worksheets, or charts required to be submitted with the offer and shall identify them as attachments to the RFO/RFQ to assist suppliers in submitting the required information in a uniform format.)

i. Pricing for option years, if Clause 7-54 Pricing for Option Years has been included in the draft contract (Attachment 3). The pricing proposal shall include pricing for three (CO to modify) 1-year extensions of this contract. BPA shall have the unilateral right to exercise pre-priced options to extend the contract for additional years pursuant to Clause 7-7 Performance Period and Options of the Schedule.

ii. _____

iii. _____

(2) **Technical/Management (Non-Price/Cost) Proposal** (CO to insert page limit, formatting requirements, electronic or hard copies, etc)

The technical/management proposal shall include the following items, which will be evaluated against the non-price/cost evaluation factors identified in the Award Decision clause, Clause 11-3 or Clause 11-4 as applicable, identified in this Attachment 1 to the RFO/RFQ. No reference to specific costs shall be made in the technical proposal.

(A) Materials addressing offeror's ability to provide the quality and specifications of the products or services as identified in the Statement of Work or requirements document. Unnecessarily elaborate proposals, brochures or other presentations beyond those sufficient to present a complete and effective response to this solicitation are not desired and may be construed as an indication of the offeror's lack of cost consciousness. Elaborate art work, letters of commendation, expensive paper and bindings, and expensive visual and other presentations are neither necessary nor wanted. Additionally, copies of BPA provided materials are not needed.

(B) Special Instructions: (CO shall identify any specific non-price/cost areas to be addressed in the technical proposal. If none, delete this #2)

i. _____

ii. _____

iii. Staffing-Key Personnel Resumes (2 page maximum; failure to adhere to this restriction shall disqualify all resumes from consideration.)

(3) Past Performance. Past Performance Reference Form is included as an attachment to this RFO/RFQ. Offeror shall identify itself in its transmittal cover letter as 1) having relevant experience with BPA; 2) having relevant non-BPA experience; or 3) having no relevant experience. Relevant experience is defined as having more than one year experience within the three years prior to proposal submission (CO to modify as appropriate to the RFO/RFQ). Offeror shall send a copy of the Past Performance Reference Form to Offeror's references, instructing the recipient to forward the completed form to the CO at the address identified on the face sheet of the reference form.

No submission is required for firms having no relevant experience. However, in the proposal transmittal letter, the offeror shall attest to the fact that neither the firm nor its principals possess experience relevant to the RFO/RFQ requirements and that no proposal section on Past Performance was included in the proposal submission. See section (2)(d)(3) of this attachment for evaluation of offerors without relevant experience.

(c) Evaluation of Offers.

(1) Evaluation Team. Proposals shall be reviewed by a panel of evaluators, if appropriate, or by the Contracting Officer as the source selection official. Each proposal shall be evaluated in accordance with the evaluation factors as identified in the Award Decision clause, Clause 11-3 or Clause 11-4 as applicable, included in this Attachment 1 to the RFO/RFQ. BPA may award a contract on the basis of initial proposals received, without negotiations or any opportunity for oral presentations. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint. Note that all scoring by an evaluation team is considered advisory only, and is not binding on the Contracting Officer.

(2) Business Proposal.

(A) The Price/Cost Proposal shall be evaluated to determine the reasonableness of the offerors' proposed price/cost. The offerors' price/cost proposal shall be evaluated using price analysis as well as cost analysis, if appropriate. See BPI 12.5.2. Cost/price must be reasonable and will not be scored.

(B) Where the Business Proposal includes pricing for option years, BPA shall evaluate offers for award purposes by adding the total costs for all options to the total costs for the basic requirement. Evaluation of options shall not obligate BPA to exercise the options. In evaluating the total year costs, to include base year plus all option years, BPA will place more weight on the base year costs due to the uncertainty of award of option years.

(3) Technical Proposal.

(A) Lowest Price Technically Acceptable. The evaluation factors as identified in the RFO/RFQ are evaluated against the stated minimum standard for acceptability and given a pass/no pass rating. Those offers meeting the minimum standard for acceptability are then evaluated for lowest price. The award shall be made to the offer representing the lowest price technically acceptable offer.

(B) Tradeoff. Under a tradeoff procurement, the non-price evaluation factors may be traded for pricing resulting in a best buy for BPA which is not the lowest price technically acceptable offer. The CO may award, without a tradeoff analysis, to the lowest price technically acceptable offer under a tradeoff procurement, if after evaluation, that offer represents both the lowest evaluated price and the highest technical/management offer.

(4) Past Performance.

(A) BPA focuses on information that demonstrates quality of performance relative to the complexity of the procurement under consideration. The offeror's references will assist BPA in collecting this information. Submission of past performance references utilizing the attached Past Performance Reference Form is required. References other than those identified by the offeror may be used by BPA. All such information may be used in the evaluation of the offeror's past performance.

(B) BPA reserves the right not to contact all the references provided by the offeror. Names of individuals providing reference information about an offeror's past performance shall not be disclosed.

(C) A firm without a record of relevant past performance and past effectiveness shall not be evaluated favorably or unfavorably for this category.

(d) Selection for Award.

(1) Award shall be made to the offeror who has submitted an offer which provides the best buy to BPA as evaluated in accordance with the basis identified in the Award Decision clause, Clause 11-3 or Clause 11-4 as applicable, included in this Attachment 1 to the RFO/RFQ.

(2) Unsuccessful offerors must request a debriefing within three calendar days of receipt of notification of elimination from consideration, or of award notice, per BPI 12.8.3.

(End of Clause)

Clause 11-3 AWARD DECISION -- LOWEST PRICE TECHNICIALLY ACCEPTABLE (JUN 11) (BPI 11.11.1.1.1.1)

(a) BPA is seeking offers that provide the best combination of attributes in order to select the "best buy" offer. BPA shall determine which offer represents the best buy based on evaluation of the identified evaluation factors and identification of the lowest price technically acceptable offer. The evaluation factors to determine minimum technical acceptability are identified below:

(1) _____(CO fill-in)_____

(2) _____(CO fill-in)_____

(3) _____(CO fill-in)_____

(b) BPA may award a contract on the basis of initial offers received, without discussions. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

(c) A written award or acceptance of offer mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer shall result in a binding contract without further action by either party.

(End of Clause)

Clause 11-3.1 REVERSE AUCTION (Jun 12)(BPI 11.11.1.1.1)

(a) BPA shall receive offers under this procurement utilizing a reverse auction, as described within the attached Statement of Work or specification document. Offerors selected for participation in the reverse auction shall be pre-qualified by BPA utilizing the evaluation factors identified in Clause 11-3 Award Decision-Lowest Price Technically Acceptable. Lowest price shall be determined utilizing a reverse auction method as determined by BPA.

(b) All offers and resultant contracts are subject to the conditions set forth in this solicitation and the BPI. By submission of an offer, the offeror agrees to be bound by the pricing auction procedures of the (CO fill-in name of auction service provider), and to the Protest procedures specified in the BPI. BPA agrees to be bound by the pricing auction procedures of the (CO fill-in name of auction service provider) for those items specified in the Schedule included as Attachment 3, Unit 1 of this RFO/RFQ.

(c) BPA may reject late offers. BPA reserves the right to not consider proposals from potential suppliers other than those solicited by the CO.

(End of Clause)

Clause 11-4 AWARD DECISION -- TRADEOFF (Jun 12)(BPI 11.11.1.2.1.1)

(a) BPA is seeking offers that provide the best combination of attributes in order to select the "best buy" offer. BPA shall determine which offer represents the best buy based on a tradeoff analysis between price and the evaluation factors identified below.

(1) Price/Cost

(2) _____(CO fill-in) _____

(3) _____ (CO fill-in) _____

(b) In the tradeoff analysis, the combination of all of the above identified non-price evaluation factors are, relative to price:

(CO must check one)

_____ (1) Significantly more important than cost or price;

_____ (2) Approximately equal to cost or price; or

_____ (3) Significantly less important than cost or price.

(c) BPA may conduct a tradeoff analysis and may select other than the lowest price offer.

(d) BPA may award a contract on the basis of initial offers received, without negotiations. Therefore, each initial offer should contain the offeror's best terms from a cost or price and technical standpoint.

(e) A written award or acceptance of offer mailed or otherwise furnished to the successful offeror within the time for acceptance specified in the offer may result in a binding contract without further action by either party.

(End of Clause)

Clause 11-4.1 INNOVATIVE APPROACHES (Jun 12)(BPI 11.11.1.2.1.1)

BPA encourages proposals offering innovative, cost-effective approaches to meeting BPA's requirements from a technical, work performance, delivery, pricing or other standpoint which produce an improved result for BPA. The offeror should detail the strengths which it possesses, and explain how they will be applied to the proposed contract in order to provide a high quality, cost-effective solution to BPA's requirements. In making an award decision, innovative approaches shall be evaluated under a tradeoff analysis.

(End of Clause)

Clause 11-5 INSPECTION OF PREMISES (Sep 98)(BPI 11.11.4.1)

Interested offerors should visit the site where the work is to be performed to ascertain the nature and location of services to be performed and the conditions which can affect the services or safe performance or the cost thereof. Failure to do so will not relieve offerors from responsibility for estimating properly the difficulty or cost of successfully performing the services. No formal tour/site visit is contemplated. Questions pertaining to the site should be addressed to:

(Name), Contracting Officer
(Address)
(City, State, ZIP)
(Phone)

(End of Clause)

Alternate I (Oct 93)
Land rights obtained by BPA do not include permission to enter the property prior to the start of work. Offerors entering the property or adjacent property are liable for any suits or claims that may result from such entry.

(End of Alternate I)

Clause 11-6 SITE TOUR (Sep 98) (BPI 11.11.4.1)
Interested offerors should visit the site where the work is to be performed to ascertain the nature and location of services to be performed and the conditions which can affect the services or safe performance or the cost thereof. Failure to do so will not relieve offerors from responsibility for estimating properly the difficulty or cost of successfully performing the services. A formal tourZ and site visit is scheduled for (enter day, date, and time of tour). Contact the contracting officer identified below to register for this tour.

(Name), Contracting Officer
(Address)
(City, State, ZIP)
(Phone)

(End of Clause)

Alternate I (Oct 93)
Land rights obtained by BPA do not include permission to enter the property prior to the start of work. Offerors entering the property or adjacent property are liable for any suits or claims that may result from such entry.

(End of Alternate I)

Clause 11-7 SUBCONTRACTING WITH DEBARRED OR SUSPENDED ENTITIES (Jul 13) (BPI 11.8.1; BPI 25.1.1)

(a) "Commercially available off-the-shelf (COTS) item," as used in this clause means any item of supply (including construction material) that is:

(i) A commercial item (as defined in BPI 1.8);
(ii) Sold in substantial quantities in the commercial marketplace; and
(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace.

(b) The Government suspends or debars Contractors to protect the Government's interests. Other than a subcontract for a commercially available off-the-shelf item, the Contractor shall not enter into any subcontract in excess of $30,000 with a Contractor that is debarred or suspended by any executive agency unless there is a compelling reason to do so.

(c) The Contractor shall require each proposed subcontractor whose subcontract will exceed $30,000, other than a subcontractor providing a commercially available off-the-shelf item, to disclose to the Contractor, in writing, whether as of the time of award of the subcontract, the subcontractor, or its principals, is or is not debarred or suspended by the Federal Government.

(d) Contractor shall notify the Contracting Officer, in writing, before entering into a subcontract with a party (other than a subcontractor providing a commercially available off-the-shelf item) that is debarred or suspended (see www.sam.gov).

(e) Subcontracts. Unless this is a contract for the acquisition of commercial items, the Contractor shall include the requirements of this clause, including this paragraph (e) (appropriately modified for the identification of the parties), in each subcontract that exceed $30,000 in value and is not a subcontract for commercially available off-the-shelf items.

(End of Clause)

PART 12 SOURCE SELECTION AND AWARD

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12.1 RECEIPT OF OFFERS.

12.1.1 Handling of Offers.

POLICY: Offers shall not be opened in public. All offers shall be marked with the date and time of receipt. Offers shall be handled confidentially and in compliance with BPA's Standards of Conduct and Business Practices per BPI 3.1.2 and Appendix 3-A, Section 3. See also BPI 17.6.2.1.1, Contractor Information.

12.1.1.1 Clause Usage Prescriptions.

PROCEDURE: COs shall include Clause 17-21 Nondisclosure for RFO/RFQ in solicitations.

12.1.2 Late Offers.

(a) ***POLICY:*** Offers are considered late if they are received after the date and time specified for receipt by the CO, regardless of the reason. COs are not required to consider late offers, but may do so if there is a good business reason for doing so. For example, a late offer may be considered where:

(1) The late offer provides significant technical or cost advantages to BPA, or
(2) The late offer is important to ensure a competitive negotiation environment.

(b) ***PROCEDURE:*** COs shall briefly document the disposition of late offers as identified in BPI 12.8.2.

12.1.3 Offers from Unsolicited Sources.

(a) ***INFORMATION:*** An offer from an unsolicited source is an offer:

An offer from an unsolicited source is distinguished from an unsolicited proposal by the fact that the offeror is responding to a known BPA requirement but was not invited by BPA to submit an offer. See BPI 12.2 for information regarding unsolicited proposals.

(b) ***POLICY:*** The CO has the authority and discretion, based on good business judgment, to decide whether to consider an offer from an unsolicited source. The CO is not required to open or review such unsolicited offers prior to making his/her decision. The CO shall document the disposition of the offer as identified in BPI 12.8.2.

12.2 UNSOLICITED PROPOSALS.

12.2.1 General.

(a) ***INFORMATION:*** An unsolicited proposal is a written proposal submitted by an offeror:

(1) Which was not submitted in response to a known BPA requirement (i.e., where BPA is not already planning to purchase the type of supply or service offered in the unsolicited proposal), and
(2) Which was not solicited by BPA.

Advertising material or commercial product offerings are not considered unsolicited proposals. An unsolicited proposal is distinguished from an "offer from an unsolicited source" by the fact that the offeror is not responding to a known BPA requirement. See BPI 12.1.3 for additional information.

(b) ***POLICY:*** BPA encourages submission of unsolicited proposals which offer unique or particularly innovative ideas which support BPA's mission.

(c) ***PROCEDURE:*** Except where specific procedures are described in this subpart, requests for contracts based on unsolicited proposals shall be processed in accordance with applicable portions of the BPI.

12.2.2 Advance Guidance.

POLICY: BPA encourages potential offerors of unsolicited proposals to make preliminary contacts with subject matter specialists before expending extensive effort on a detailed unsolicited proposal. Appendix 12-A, "How to Submit an Unsolicited Proposal," provides additional guidance to offerors. This is the BPA implementation of DOE Order 542.2.

12.2.3 Receipt and Initial Handling.
PROCEDURE: Any office receiving an unsolicited proposal shall immediately send it to Supply Chain Services – NSS, c/o Supplier Diversity Program (SDP) Manager', who serves as a clearinghouse for all unsolicited proposals received by BPA. The SDP manager shall log in the proposal, acknowledge receipt of the proposal to the proposer, and send copies to the subject matter specialist (program office) and designated CO in Supply Chain Services. The SDP manager shall either attach the following or print on the face page of the proposal:

> UNSOLICITED PROPOSAL -- CONTENTS SHALL NOT BE DISCLOSED OUTSIDE BPA AND SHALL NOT BE USED FOR PURPOSES OTHER THAN EVALUATION.

12.2.4 Evaluation and Negotiation.
(a) ***POLICY:*** Unsolicited Proposals may not be accepted unless they meet all of the following criteria:
(1) The proposal must not be within the scope of a pending solicitation, and
(2) The proposal must be unique or propose a particularly innovative idea which was originated by the offeror, or the offeror must have unique qualifications, and
(3) The proposal's basic concept must be acceptable to the subject matter specialist, both technically and from a budget standpoint, and
(4) Potential organizational conflicts of interest, if any, must be resolved (see BPI 3.4.2).

(b) ***PROCEDURE:*** The subject matter specialist and CO shall review the unsolicited proposal to determine whether it meets the above criteria. Proposals which do not meet these criteria shall be either rejected without further consideration or competitively negotiated along with other qualified offerors.
(1) If the CO's and subject matter specialist's initial review concludes the proposal should be rejected, they shall notify the offeror verbally and send a brief explanation to the Procurement Analyst which explains the reasons for rejection and date the offeror was verbally notified. The Procurement Analyst shall notify the offeror in writing of such.
(2) If the CO's and subject matter specialist's initial review concludes that the proposal is either acceptable as submitted or has high potential of being acceptable after negotiations, they shall document as identified in BPI 12.8.2 the basis for making award without considering other offerors' qualifications. Such documentation shall include:
(A) An explanation of the unique or particularly innovative aspects of the proposal, or
(B) An explanation of the offeror's unique qualifications.
(3) The subject matter specialist shall submit a purchase requisition and other documentation to the CO. The CO and subject matter specialist shall negotiate details and other terms and conditions with the offeror. BPA retains the right to reject any unsolicited proposal at any time prior to award. The Procurement Analyst shall be notified of final disposition of the unsolicited proposal.

12.3 CHANGES IN REQUIREMENTS AFTER RECEIPT OF OFFERS.

(a) ***INFORMATION:*** See BPI 11.12 for changes in requirements before receipt of offers.

(b) ***POLICY:*** If there are substantial changes in BPA's requirements after offers are received, the CO may reconsider any offers previously eliminated. The CO shall notify such offerors of the changes only if the changes would materially improve their potential for award. The solicitation need not be canceled.

(c) ***POLICY:*** COs may encourage innovative alternate approaches to addressing BPA's requirements by including Clause 11-4.1 Innovative Approaches. (See BPI 11.11.1.2.1). When innovative approaches are received, COs will generally protect such approaches in the same manner as other offers as set forth in BPI 12.1 Receipt of Offers.

12.4 EVALUATION TEAMS.
12.4.1 Establishment of Evaluation Teams.
(a) ***POLICY:*** The CO will typically evaluate simple, low risk purchases without extensive involvement by program staff. A team will evaluate more complex purchases.

(b) ***POLICY:*** When an evaluation team is used, it shall include both the CO (or representative) and technical personnel. It may also include non-BPA evaluators in non-voting roles if appropriate.

(c) ***PROCEDURE:*** The CO shall designate the team for purchases where the CO identifies areas of expertise which must be addressed in the evaluation process. COs shall file a copy of the evaluation team designation letter in the official file as identified in BPI 12.8.2.

(d) ***POLICY:*** The CO may appoint a contractor employee to serve as a technical expert on an evaluation team. Technical experts are non-voting members of the evaluation team and are prohibited from assigning proposal strengths, weaknesses, deficiencies or a proposal evaluation rating. Prior to appointing a contractor employee as a technical expert the CO must address and mitigate any potential conflict of interest.

12.4.2 Conduct of Evaluation Teams.

(a) ***POLICY:*** Although the CO is responsible for final source selection and best buy determination, and technical personnel are responsible for the technical requirements, all parties shall work as a team to ensure BPA obtains the best buy.

(b) ***POLICY:*** Offerors shall be treated fairly. The actions and decisions of the evaluation team shall be based on good business judgment.

(c) ***POLICY:*** Unless publicly available or otherwise available under the Freedom of Information Act, information submitted by offerors shall be used for evaluation only and shall not be disclosed outside BPA without the offeror's approval.

(d) ***POLICY:*** Communications between offerors and BPA shall only be done through the CO or a designee.

(e) ***POLICY:*** Members of evaluation teams and technical advisors shall comply with the Standards of Conduct Regarding Purchasing and Assistance policies described in BPI 3.1 and Appendix 3-A. This includes, but is not limited to:

(1) Avoiding conflicts of interest or the appearance of such,
(2) Prohibitions against soliciting or accepting items of value from contractors,
(3) Maintaining confidentiality throughout the purchasing process.

(f) ***PROCEDURE:*** The CO shall inform all evaluation team members and technical advisors of the above policies prior to beginning evaluation of offers.

12.4.3 Non-Disclosure Agreements for Evaluation Team Members

(a) The CO shall determine if a NDA is required for the evaluation team members. In general NDAs are required when the proposal instructions require the offeror to provide proprietary information in the proposal. NDAs are not required for procurement of commercial items and services where the evaluation is based on publically available information. If the CO determines a NDA is required the NDAs must be signed by the evaluation team members prior to receipt of any proposal information or source selection materials. Evaluation team members may sign the NDA using any method of electronic or digital signature that provides evidence of their consent. If the CO determines that an employee NDA is required the CO is prohibited from providing any proposal information or source selection materials to an evaluation team member that does not consent and sign the non-disclosure agreement.

(b) The Whistleblower Protection Enhancement Act of 2012 (WPEA) PL 112-199 established additional protections for federal employees. The CO shall include the following text without any revision in all employee NDAs, however the CO is permitted to add additional content to the NDA provided such content does not alter the intent of the text:

For Federal employees, these provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to: (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling.

12.5 EVALUATION PROCESS.
12.5.1 General.
POLICY:

(a) BPA will be responsive to the supplier community by evaluating proposals in a fair and timely manner. The costs to both industry and BPA of conducting the purchasing process shall be minimized.

(b) During evaluation process, only the evaluation factors as identified in the solicitation shall be utilized.

(c) The basis for the award decision shall be either lowest price technically acceptable or a tradeoff as identified for the subject procurement through the use of either Clause 11-3 Award Decision -- Lowest Price Technically Acceptable or Clause 11-4 Award Decision -- Tradeoff. Any changes in the basis for award decision shall be in accordance with BPI 11.11.1.2(b)(3).

(d) The evaluation shall be performed by the CO, as the source selection official, or by a designated evaluation team pursuant to BPI 12.4. References in this subsection to the “evaluation team” shall mean either the CO, acting as the source selection official, or to the evaluation team, as appropriate to the subject procurement.

(e) The evaluation team shall identify and document the methodology for rating each evaluation factor, describing the target performance level that an offer must achieve in order to meet the factor or subfactor. Should the methodology change during the evaluation process, the same methodology shall be applied to all proposals, as appropriate.

(f) The entire proposal (technical and price/cost) shall typically be provided to all team members for their consideration.

(1) Lowest Price Technically Acceptable Awards: For award decisions based on the lowest price technically acceptable offer, the evaluation team shall evaluate individual offers against the identified non-price evaluation factors, utilizing the established methodology per BPI 12.5.1(e) to determine if the offer meets the stated standard. The CO, or evaluation team, shall not rank the offers (e.g. - good, better, best) and evaluation factors shall not be traded off for procurements awarded under lowest price technically acceptable basis.

(2) Tradeoff Awards: For award decisions based on a tradeoff analysis, the evaluation team shall evaluate individual offers against the identified evaluation factors, utilizing the established methodology per BPI 12.5.1(e) to determine if the offer meets the stated standard. After evaluating the individual offers against the evaluation factors, the offers shall be rated or ranked against each other, with the evaluation team documenting their tradeoff analysis and process, detailing the importance of pricing relative to non-price technical factor traded, and identifying how the tradeoff furthers the procurement objective.

(g) The team may consider all information available, including information outside the written proposal.

(h) The team need not review each proposal in the same level of detail if upon initial evaluation the offer is found to be inaccurate, erroneous, fails to address stated evaluation factors or is missing required information. The CO shall identify deficient offers in the Document of Award Decision, identifying the

offeror and the respective deficiencies in sufficient detail to identify the specific requirements and/or factors not adequately addressed in the offer.

(i) The team shall determine which offer has the highest potential for representing a “best buy” to BPA. (See BPI 1.1(c) for discussion of "best buy.")

(j) The team shall document the basis or rationale for key decisions made by the team. Documentation shall be prepared as described in BPI 12.8.2 Documentation Requirements.

12.5.2 Analysis of Price, Estimated Cost, and Total Cost.
(a) ***INFORMATION:*** The objective of price/cost analysis is to determine reasonableness of the offeror's proposed price/estimated costs. Analysis of "total cost" means analysis of the proposed purchase price plus costs incurred by BPA which are not otherwise reflected by the offeror's price or cost proposal. Examples include: probable total operational costs, probable administrative costs for foreign factory inspection trips, frequency and costs of preventative maintenance, probable frequency of repairs or down-time of equipment offered, learning curve costs, added contract administration costs due to probable contract administration problems, etc.

(b) ***POLICY:*** Price reasonableness shall be addressed and documented in all procurements regardless of the associated competition and documentation requirements. While price may be the determining factor for award in some instances, with the exception of a lowest price technically acceptable procurement, per BPI 12.6.1, comparison of offers shall not be limited to price alone. Price shall be the determining factor once technical acceptability has been determined in procurements for which the award basis is the lowest price technically acceptable offer. For procurements based on a tradeoff, the CO shall consider total cost and shall document the nature and extent of the comparison process in a manner which clearly explains the reasons for award.

(c) ***PROCEDURE:*** The analysis of price, estimated cost and total cost shall be documented in the official file as identified in BPI 12.8.2. The offeror's price/cost proposal shall be analyzed by using price analysis as well as cost analysis, if appropriate. The CO shall perform cost analysis where price reasonableness cannot be determined through price analysis alone. The total costs to BPA shall also be considered when there is an obvious and significant variation between the total cost of offerors' proposals. For example, the administrative costs for BPA to conduct factory inspections should only be considered if the competing offerors are located in different geographic regions. For purposes of evaluation, such costs which can be reasonably quantified may be added to the offeror's proposed price. Costs which cannot be reasonably quantified shall be considered subjectively with the technical aspects of the offeror's proposal. Analysis of total costs should be kept as simple as possible and should be documented only when there is a significant variation between offeror's proposals.

(d) ***PROCEDURE:*** For awards which do not required a DAD or ROM, price reasonableness shall be addressed by documenting evidence of pricing in the official file.

(e) ***PROCEDURE:*** Where an internal BPA estimate has been prepared and the proposed price/estimated cost is significantly lower than the BPA estimate, the CO shall verify that both the offeror and the BPA estimator adequately understand the scope of work.

(f) ***INFORMATION:*** When appropriate, proposed prices may be compared to similar types of work and adjusted for differences in circumstances. Rough yardsticks may also be used, such as cost per square meter for structures, cost per lineal meter for utilities, and cost per cubic meter of excavation or concrete.

12.5.3 Analysis of Profit.
POLICY:

(a) Profit analysis only applies to purchases subject to cost analysis. The objective of profit analysis is to determine reasonable profit, not necessarily to eliminate profit. Profit should be based on factors including current market conditions, the level of risk inherent in performance, the type of contract, the amount of capital invested by the contractor, etc.

(b) Profit is not allowed for contracts with non-profit organizations, educational institutions, tribes, and local governments. However, a "development" fee is allowed if this is the offeror's established practice and if the purpose of the fee is to develop future business (i.e., it is not distributed to officers or employees as remuneration, or used to reimburse the organization for costs not otherwise allowable under applicable cost principles.

12.5.4 Cost and Pricing Information.
(a) ***INFORMATION:*** The CO may require offerors to submit detailed cost or pricing information in order to better understand their proposal or to determine reasonableness of price or cost estimates. BPA's Price/Cost Proposal form may be used if appropriate.

(b) ***POLICY:*** Although offerors are not required to certify their cost/pricing information, BPA retains the right to reduce the contract price if the data originally submitted is later determined to not be accurate, complete, and current at the time of final price agreement.

12.5.4.1 Clause Usage Prescriptions.
PROCEDURE: The CO may include Clause 12-2 Price Reduction For Inaccurate Cost or Pricing Information, in solicitations and contracts for which they want the right to readjust the contract price if contract cost/price information, including information submitted for modifications or by subcontractors, is inaccurate. Clause 12-2 shall not be included in solicitations and contracts for the acquisition of commercial items and services.

12.5.5 Accounting System Reviews.
(a) ***POLICY:*** BPA's Internal Audit staff may advise the evaluation team regarding the adequacy of accounting systems for cost-type contracts and estimated costs of the offers being considered. CO's shall consider including BPA's Internal Audit staff as advisors to the evaluation team.

(b) ***PROCEDURE:*** The following factors shall be considered in deciding whether to conduct an accounting system review:

(1) The proposed contract is a cost-type contract and the proposed contractor has not previously performed a cost type contract for BPA.
(2) The offeror has had prior cost-type contracts which surfaced significant accounting system problems or questioned significant costs.
(3) Cost reimbursement contracts where the offeror is an individual or a closely held corporation.
(4) The market under which the offeror operates is not typically subject to accounting for their costs (e.g., advertising industry)
(5) Time and Materials contracts where a substantial amount of equipment, travel or subcontract costs is expected.

12.5.6 Advance Agreements.
(a) ***POLICY:*** Advance agreements on particular costs may be incorporated into contracts where it is difficult to determine actual costs after award or where limits on specific elements of cost are desirable.

(b) ***INFORMATION:*** Although advance agreements are most common for cost-reimbursement type contracts, they may be used for fixed price and time and materials contracts which include elements of cost type contracts. The purpose of such agreements is to minimize contract administration costs and the

risk of dispute with contractors. Advance agreements avoid the possible disallowance of costs based on a subjective judgment of unreasonableness or non-allocability of costs. Examples include:

(1) Salaries (personnel costs) for contracts with individuals or closely held corporations.
(2) General and Administrative expenses.

12.5.7 Analysis of Past Performance.
PROCEDURE:

Past performance shall be evaluated in accordance with the solicitation's past performance evaluation scheme. However, BPA is not obligated to review all past performance references that are received from the offerors' references.

(b) The CO shall document the basis for the past performance evaluation. BPA shall not downgrade an offer based on a lack of past performance information. Offerors without relevant past performance must receive a "neutral" rating.

(c) For acquisitions of commercial items and services under $150,000, evaluation of past performance may be based on one or more of the following:

1. The CO's knowledge of and previous experience with the supply or service being acquired;
2. Customer surveys, and past performance questionnaire replies;
3. The Governmentwide Past Performance Information Retrieval System (PPIRS) at www.ppirs.gov; or
4. Any other reasonable basis.

12.6 SOURCE SELECTION.

(a) ***POLICY:*** The CO's award decision shall be based on an assessment of the proposals against the evaluation factors identified in the solicitation. While the CO may utilize information and analyses provided by the evaluation team or others, the award decision shall represent the CO's independent judgment. The award decision will be documented in the official file as identified in BPI 12.8.2, and shall include the justification for any business judgments and tradeoffs made or relied upon by the CO.

(b) ***POLICY:*** The CO will generally select only the top-ranked firm for final negotiations. For award decisions based on lowest price technically acceptable offers, BPA shall negotiate only with the offeror which, after evaluation of all offers, represents the lowest price technically acceptable offer. For award decisions based on a tradeoff analysis, the CO may communicate with more than one firm in order to obtain enough information to narrow the field of competition. In the case of closely ranked offers, BPA may negotiate with more than one firm concurrently. However, this practice is generally discouraged in order to minimize administrative costs for offerors and BPA.

(c) ***PROCEDURE:*** Based on the quality of offers received and BPA's objectives, the evaluation team may develop different source selection strategies prior to the selection of the final source(s) for negotiation. For example,

(1) Two firms without past BPA experience may be awarded small orders for identical training services to give BPA an opportunity to evaluate their performance. Based on that performance, a large contract might be made to one of the firms without soliciting new offers.
(2) BPA might award 90% of its power circuit breaker orders to the top-ranked firm and 10% to the second-ranked firm, in order to avoid over dependence on a single source and/or to develop the capabilities of a second source.
(3) One firm is selected for final negotiations and award. This should be the most common source selection strategy because it reduces administrative costs and takes advantage of economies of scale.

(d) ***POLICY:*** If negotiations with the selected firm are unsuccessful, the CO may close negotiations and initiate negotiations with one or more other offerors.

12.6.1 Lowest Price Technically Acceptable Source Selection.
(a) ***INFORMATION:*** The lowest price technically acceptable source selection process is appropriate when the "best buy" to BPA is expected to result from the selection of the technically acceptable offer with the lowest evaluated price to the agency.

(b) ***POLICY:*** BPA shall utilize lowest price technically acceptable source selection in contracts with well-defined requirements, where cost/price plays a dominant role in the selection process, and where risk of unsuccessful performance is minimal. When utilizing a lowest price technically acceptable source selection, a tradeoff analysis is not permitted.

(c) ***PROCEDURE:*** The CO shall specify in the solicitation if the award will be made on the basis of the lowest price technically acceptable offer. The CO shall determine, without ranking, which offers meet or exceed the evaluation standards as set forth in BPI 12.5.1(e). The CO shall then identify which of the acceptable offers represents the lowest offered price.

(d) ***PROCEDURE:*** The CO shall document in the DAD the evaluation of each offer against the non-price evaluation factors. The CO shall also document in the DAD the standard per BPI 12.5.1(e) for determining how offers meet the threshold for technical acceptability for each evaluation factor. The CO shall also document the least price determination for each award as identified in BPI 12.8.2.

12.6.2 Tradeoff Analysis Source Selection.
(a) ***INFORMATION:*** The less definitive the solicitation requirements or the greater the performance risk, the larger the role that the technical evaluation or past performance is likely to play in the source selection process. A comprehensive tradeoff analysis provides the CO the means to justify why awarding to an offeror with other than the lowest price or highest technically rated proposal is the best buy for BPA.

(b) ***POLICY:*** BPA will utilize a tradeoff analysis when the best buy to BPA may not be the lowest price technically acceptable offer. The CO shall trade pricing with the technical (non-price) factors identified in the solicitation, noting the offerors' strengths, weaknesses, risks, the relative differences between the offers and how the specific tradeoff of identified evaluation factors furthers the goals of the procurement.

(c) ***PROCEDURE:*** A tradeoff analysis:
(1) is not required when the CO determines that best buy would be the lowest price technically acceptable offer. When a tradeoff analysis is not required, the CO must document this determination in the DAD.
(2) is required when it is in the best interest of BPA to award to other than the highest technically rated lowest price offer. The CO must include an explanation in the DAD either justifying the additional expense, or reduction in technical or management expertise, when considered against the non-price factors and the procurement goal.

(d) ***PROCEDURE:*** In the tradeoff analysis, the CO shall document in the DAD:
(1) The strengths, weaknesses, and risks associated with each offer in accordance with the evaluation standards in BPI 12.5.1(e);
(2) The ranking of the offers, relative to each other, addressing the relative differences between the offers and risks associated with each other; and
(3) The tradeoff analysis, addressing the evaluation factors being traded off, the rationale for the tradeoff, and how the tradeoff result furthers the goals of the procurement.

12.7 NEGOTIATION.

(a) ***INFORMATION:*** "Negotiation" is the process of discussing with offerors their proposals, terms, conditions, price, BPA specifications, and other requirements. The objective of negotiations is to establish a clear understanding of both parties' positions and reach contractual agreement.

(b) ***POLICY:*** Emphasis shall be placed on person-to-person negotiations which lead to close understanding between BPA and the offeror. This does not preclude written agendas for discussions or written questions and answers to items of negotiation. Following negotiations, the CO shall ensure that the written contract accurately reflects the agreement between the parties

(c) ***POLICY:*** Although detailed negotiations will typically be concentrated after source selection, the CO may negotiate, resolve mistakes, or obtain clarifying information at any time. For example, selected offerors may be asked to provide an oral presentation at any time the CO feels it would be helpful. BPA has no obligation to negotiate with all firms.

(d) ***POLICY:*** Under no circumstances will BPA:
(1) Favor one offeror over another; (2) Reveal an offeror's technical solution, unique or innovative approach, or any information that would compromise an offeror's intellectual property; or
(3) Reveal an offeror's price information without that offeror's permission.

(e) ***POLICY*:** Auctioning techniques (i.e. creating an auction-like atmosphere which encourages a price "bidding war" between competing contracts) are allowed only when a Strategy Panel or the Tier II Purchasing Manager (or designee), and the HCA have determined that business conditions exist such that a reverse auction is the optimum means for acquiring pricing information from the identified technically acceptable offerors. A reverse auction shall not be used to acquire technical, performance, or other business information. See BPI 11.11.1.1.1.

12.8 ADMINISTRATIVE REQUIREMENTS.

12.8.1 Contract Award Forms.

(a) ***POLICY:*** COs shall award contracts and issue releases for orders under master contracts using BPA's electronically generated forms.

(b) ***INFORMATION:*** Purchase orders may be an appropriate method to document a contractual agreement, regardless of dollar value. A purchase order does not require the signature of the contractor, i.e., it is an offer from BPA which becomes a binding contract upon commencement of performance by the contractor. A contract with signatures of both parties should be used for situations where it is important that both parties demonstrate their firm agreement to the contract terms before work begins.

(c) ***POLICY:*** Although purchase orders typically include a standard set of terms and conditions, the CO may vary those terms as allowed by particular clause prescriptions.

12.8.2 Documentation Requirements.

(a) ***INFORMATION:*** BPA's obligation to its ratepayers requires that BPA funding be used in a manner that will ensure the best buy or best value to the agency. Documentation in the official file evidences Supply Chain Services' efforts to fulfill this responsibility.

The official file is the agency record which contains all of the relevant documentation associated with a procurement action. The level and content of documentation is dependent upon a number of factors, including contract value, complexity and risk. Some procurement activities may be addressed via a Memorandum to File, while others require more explanation in either a Document of Award Decision (DAD) for new awards or a Record of Modification (ROM) for award modifications.

An award is any contract action in which BPA is committing funds, which includes initial contract awards, modifications, extensions, and releases. Either a DAD or a ROM is required for all awards, unless an exception is available under the BPI.

(b) ***POLICY:***

(1) All of the relevant documents associated with a procurement action shall be filed in the official file. Where a form or format is not readily available to evidence the action taken, a "Memorandum to Official File" with the subject matter and relevant BPI citation in the title may be used. Per BPI 4.2.1, the level of required documentation to explain a decision is that which is necessary to explain the action to an independent third party with no knowledge of the item/service procured.

A DAD or a ROM is required in the official file for all awards which obligate BPA funds unless an exception is available in the BPI. BPI 12.8.2(c)(2)(B) and (C) identify the required content in a DAD and ROM. Any conflict in stated requirement between BPI 12.8.2 and elsewhere in the BPI shall be resolved with deference to the requirements set forth in this BPI 12.8.2.

(c) ***PROCEDURE:***

(1) Awards under $10,000:

(A) A Document of Award Decision (DAD) is not required except for awards which, without documentation, would appear unreasonable to an independent third party with no knowledge of the item/service procured.

(B) Where a DAD or ROM is not required: The requirement to address price reasonableness under BPI 12.5.2 is required and may be met by filing evidence of pricing in the official file such as quotes or pricing received, copies of price lists, etc.

(2) Awards of $10,000 or more:

(A) A DAD or a ROM shall be completed for awards of $10,000 or more.

(B) A DAD shall include, as applicable to each award:

(i) Competition: A description of the market research and selection of offerors to receive the solicitation in addition to any exemptions from the competition requirement (See BPI 11.7.1.2 or 11.7.1.3; for unique source justification, see BPI 11.7.2), as applicable.

(ii) Evaluation: A description of the evaluation process, including an identification of evaluation factors, relative importance of pricing, evaluation methodology and scoring criteria (see BPI 11.5 and 11.11.1).

(iii) Price/Cost Analysis (see BPI 12.5.2).

For awards to the lowest price technically acceptable offer, the documentation requirement for price analysis may be met by including evidence of pricing in the official file such as quotes or pricing received, and price lists, Where a DAD or ROM is required, the CO shall reference the location of pricing documentation in the DAD/ROM. If there is reason to believe that an independent third party would question the reasonableness of the award basis, the CO must explain the decision in the DAD/ROM or memo to file.

For awards based on a tradeoff analysis, price/cost analysis must be addressed in the DAD/ROM.

(iv) Best Buy Analysis: A description of the analysis resulting in the best buy determination to include (see BPI 11.11.1.1 or 11.11.1.2):

a. The relative strengths and weaknesses of the offers in accordance with the evaluation standards (see BPI 12.5.1(e)).

b. The reasons for the elimination of offers.

c. For those awards resulting from a tradeoff analysis (see BPI 11.11.1.2):

1. The ranking of the offers, relative to each other, addressing the relative differences between the offers and risks associated with each offer; and

2. The tradeoff analysis addressing evaluation factors being traded off, the rationale for the tradeoff, and how the tradeoff result furthers the goals of the procurement. (see BPI 11.11.1.2)

(v) Cross references to other supporting documentation, if applicable;

(vi) Contracting Officer signature, per BPI 2.2.

(C) A ROM shall include, as applicable to each award:

(i) Rationale for the change;

(ii) Price/Cost Analysis (see BPI 12.5.2);

(iii) Discussion of performance if contractor's performance impacted the schedule;
(iv) Cross-references to other supporting documentation, if applicable; and
(v) Contracting Officer signature, per BPI 2.2.

(D) The level of detail in the DAD or the ROM may be scalable based on the degree of risk associated with the award. The documents may be brief for simple actions where BPA's risk is low. Complex purchases shall be documented in greater detail. See BPI 4.2, Contract Files, for additional information.

(3) Modifications outside the scope of the contract are, for the purposes of this subpart, new awards and are subject to the requirements of BPI 12.8.2(b) above.

(d) ***POLICY:*** The following documentation matrix identifies the required locations for documentation and related topics for contract award and administration. Documentation that is appropriate for "Reference in DAD or ROM" is that information which is already included in the Official File, but that the CO is not required to restate in its entirety within either the DAD or ROM.

Topic	**DAD**	**Official File**	**Reference in DAD or ROM**	**ROM**
CONTRACT AWARD:				
Background of procurement	x			x
Requisition Discussion	x			x
Unique Source Justification from Program Office; BPI 11.7.1.2, BPI 11.7.1.3		x		
Market Research: - Competitive: Selection of Firms Solicited; BPI 11.4 & 11.8	x	x		x
- - or- - Non-competitive: Summary of Unique Source by CO; BPI 11.7	x	x		x
Chronology of Solicitation a. Solicitation issue date b. Pre-proposal conference date c. Solicitation amendments		x	x	
Pre-negotiation Objectives and Negotiations		x	x	
Negotiations/Clarifications/Discussions		x	x	
ARRA Applicability			x	
Topic	**DAD**	**Official File**	**Reference in DAD or ROM**	**ROM**
Strategy Panel; BPI 6.15		x	x	
Subcontracting Plan; BPI 8.3		x		
EPLS verification; BPI 11.8		x	x	
Pre-Award Clearance; BPI 10.6.3		x		
Pre-proposal Conference Records; BPI 11.11.3		x		
Evaluation Factors and Weights; BPI 11.11.1(c)	x			
Scoring Methodology/Rating Scheme;	x			
Basis of Award Decision; BPI 11.11.1(c)	x			
Late Offers; BPI 12.1.2		x		
Evaluation Team Designation Memorandum; BPI 12.4.1		x	x	
Evaluation Team Report: BPI 12.5 -Summary of Scores and Ratings -Logic and rationale to arrive at ratings -what is proposed -what is the effect of what is proposed -how does it relate to the evaluation factors		x	x	

-strengths, weaknesses, deficiencies -clarifications				
Price/Cost Analysis; BPI 12.5.2	x	x	x	
Source Selection Analysis and Conclusion; BPI 12.6 -Concise comprehensive summary of evaluation of proposal -Concise summary of price/cost analysis -Comparative assessment of proposals as basis for award -Best Buy Analysis	x			
Debriefing; BPI 12.8.4		x		
Waivers for Deviations; BPI 1.7, 4.9		x		
Review for Legal Sufficiency; BPI 4.3		x		
Organizational Conflicts of Interest; BPI 3.4		x		
Solicitation and all amendments; BPI 4.2.1(b)		x		
Fully executed award document (contract, release, purchase order, any modifications thereto); BPI 4.2.1(b)		x		
Fully executed DAD; BPI 12.8.2(b)		x		
Fully executed ROM: BPI 12.8.2(b)		x		
RELATED MATTERS:				
Pre-Protest Resolution; BPI 21.2.3		x		
Unsolicited Proposals; BPI 12.2		x		
Offers from Unsolicited Sources; BPI 12.1.3		x		
Disputes; BPI 21.3		x		
Ratifications; BPI 2.4		x		
Audit Resolution and Follow-up; BPI 13.5		x		
Remedy for US Flag Vessel; BPI 14.15.2		x		
Source Code Escrow Agreements; BPI 17.6.5.1		x		
Providing Motor Vehicles; BPI 19.8		x		
Alternate Methods for Disposal of Materials; BPI 19.11		x		
Terminations and Settlements; BPI 20		x		
Nondisclosure Agreements Protecting Contractor Info		x		
Nondisclosure Agreements Protecting BPA Information				OGC file
EFT Payment Alternates; BPI 22.6		x		

12.8.3 Notification to Unsuccessful Offerors.
POLICY:

(a) Unsuccessful offerors shall be notified as soon as reasonably possible that their offer is no longer being considered. The notification may be made orally and shall include a general explanation of the reasons for elimination.

(b) For contracts over $50,000, unsuccessful offerors shall also be notified at the time of award of the name of the successful offeror, total contract price, date of award.

(c) This policy does not apply to transactions where notification to unsuccessful offerors is not a common business practice. However, COs shall consider the benefits of full and open communication with all of BPA's suppliers when making the decision regarding notification.

12.8.4 Debriefings and Release of Related Information.
(a) ***INFORMATION:*** Debriefings are an important method of helping offerors to understand the basis for BPA's decisions. Developing good long-term relationships with contractors includes treating offerors who are not selected for award with respect, and with the knowledge that they may become an important

supplier at some future date. In this sense, debriefings should be considered to be more a CO's "obligation" than an offeror's "right." Debriefings shall be considered to be negotiations which will, in part, determine BPA's future supplier base. For this reason they shall receive commensurate preparation.

(b) ***POLICY:*** To the maximum extent practicable, the CO shall debrief unsuccessful offerors within ten calendar days of receipt of offeror's debriefing request. Unsuccessful offerors must request a debriefing within three calendar days of receipt of award notice under BPI 12.8.3(b). The relative merits of competitors' proposals shall not be revealed. If requested, information that is clearly available under the Freedom of Information Act shall be released.

(c) ***PROCEDURE:*** The CO shall document debriefings in the official file and shall include any supporting materials used for the debriefing in the official file.

12.8.4.1 Debriefing Request.
PROCEDURE: COs shall include Clause 12-1 Debriefing Request in all solicitations.

12.8.5 Protests.
INFORMATION: See BPI subpart 21.2.

12.8.6 Discovery of Mistakes After Award.
POLICY: If the Contractor alleges a mistake in their offer after award and requests that the contract be modified in a way that could have affected the award decision, the CO shall consult with the HCA before modifying the contract.

12.8.7 Disposal of Proposals.
POLICY: All copies of unsuccessful proposals shall be returned to the CO following evaluation. Unsuccessful proposals shall be retained in accordance with the Information Governance and Lifecycle Management policy as set forth in the BPAM.

12.8.8 Examination of Records.
POLICY: BPA reserves the right to review an offeror's pertinent records for contracts whose payment provisions are cost-based, including cost-based modifications to fixed price contracts.

12.8.8.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include Clause 12-3 Examination of Records, in all cost reimbursement or time & materials contracts over $100,000 or in modifications over $100,000 for any type of contract where cost analysis is required to determine the reasonableness of the amount of the modification. Clause 12-3 shall not be included in solicitations and contracts for the acquisition of commercial items and services; the requirement is addressed in Clause 28-20.

12.8.9 Reserved.
12.8.10 Contract Clauses for Commercial Acquisitions. The BPI prescribes the use of commercial terms and conditions for the acquisition of commercial items and services. The policy, clause usage prescriptions and clause text can be found in BPI Part 28 Acquisition of Commercial Items and Services.

12.8.10.1 Clause Usage Prescriptions.
(a) Reserved.
(b) ***PROCEDURE:*** The CO shall include Clause 12-5 Delivery Or Performance, in solicitations and contracts under $50,000 and in solicitations and contracts of any dollar amount for commercial supplies or commercial services.

12.50 TEXT OF CLAUSES.
The following clauses are referred to in BPI Part 12:

Clause 12-1 DEBRIEFING REQUEST 15

Clause 12-2 PRICE REDUCTION FOR INACCURATE COST OR PRICING INFORMATION 15
Clause 12-3 EXAMINATION OF RECORDS 16
Clause 12-4 RESERVED. 16
Clause 12-5 DELIVERY OR PERFORMANCE 16

Clause 12-1 DEBRIEFING REQUEST (JUN 12) (BPI 12.8.4.1)

Unsuccessful offerors shall request a debriefing within three calendar days of receipt of notice of contract award.

(End of Clause)

Clause 12-2 PRICE REDUCTION FOR INACCURATE COST OR PRICING INFORMATION (Jul 13)(12.5.4.1)

BPA retains the right to reduce the contract price, including profit or fee, if the cost or pricing information submitted by the contractor was not complete, accurate, and current at the time of final price agreement. This right applies to the contract as awarded, to any subsequent modifications, and to any data submitted by subcontractors.

(End of Clause)

Clause 12-3 EXAMINATION OF RECORDS (Jul 13)(BPI 12.8.8.1)

(a) The contractor shall keep accurate and complete accounting records in support of all cost-based billings to BPA in accordance with generally accepted accounting principles and practices. The Comptroller General of the United States, the Contracting Officer, or their representatives, shall have the right to examine, audit, and reproduce any of the Contractor's pertinent records involving transactions related to this contract or any subcontract hereunder. Records includes, but is not limited to, books, documents, and other information regardless of form (e.g., machine readable data) or type (e.g. data bases, applications software, data base management software, utilities, etc.) including computations and projections related to proposing, negotiating, pricing, subcontracting, modifying or performing the contract. The purpose of such examination shall be to determine the accuracy, completeness, and currency of costs charged under the contract and/or to verify cost or pricing information submitted to BPA.

(b) Such documents shall be available for three (3) years after final payment or, in the case of termination, three (3) years from the date of any final termination settlement. Records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims have been disposed of.

(c) The contractor shall insert a clause containing all the terms of this clause, including this paragraph (c), in other than fixed price subcontracts over $100,000, altering the clause as necessary to identify the contracting parties and the Contracting Officer under the prime contract.

(End of Clause)

Clause 12-4 RESERVED.

Clause 12-5 DELIVERY OR PERFORMANCE (Jul 13)(12.8.10.1)

The place of delivery or performance shall be as specified and time is of the essence.
BPA reserves the right to reject shipments that:
1) Are not properly labeled with BPA purchase order or contract number; and
2) Do not contain a complete itemized packing slip.

(End of clause)

PART 13 COST PRINCIPLES AND AUDIT CONSIDERATIONS

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13.1 FIXED-PRICE CONTRACTS.

POLICY: When the CO deems it necessary to use cost data as described in 12.5.2, or for other purposes, the applicable subpart of Part 13 shall be used as a basis for evaluation of those costs. However, application of cost principles to fixed-price contracts and subcontracts shall not be construed as a requirement to negotiate agreements on individual elements of cost in arriving at agreement on the total price. The final price accepted by the parties reflects agreement on the total price. Further, notwithstanding the mandatory use of cost principles, the objective will continue to be the negotiation of prices that are fair and reasonable, cost and other factors considered.

13.2 COST PRINCIPLES.

POLICY: BPA will generally follow Federal contract cost principles as a matter of policy. However, those cost principles may be modified by the HCA on a class or individual basis if necessary for valid business purposes. Class deviations will be documented in the BPI; individual deviations will be documented in the contract file.

13.2.1 Contracts With Commercial Organizations.

(a) ***INFORMATION:*** This category includes all contracts and contract modifications for supplies, services or experimental, developmental or research work on the basis of costs negotiated with organizations other than educational institutions (see 13.2.3), State and local governments (see 13.2.3), and nonprofit organizations (see 13.2.4).

(b) ***POLICY:***

(1) The cost principles and procedures in Appendix 13-A, Contract Cost Principles for Commercial Organizations, shall be used in pricing negotiated supply, service, construction, experimental, developmental, and research contracts and contract modifications with commercial organizations whenever cost analysis is performed.

(2) In addition, the CO shall incorporate the cost principles and procedures in Appendix 13-A by reference in contracts with commercial organizations as the basis for:

(A) Determining reimbursable costs under cost-reimbursement contracts (and cost reimbursement subcontracts under these contracts) performed by commercial organizations, and the cost-reimbursement portion of time and materials contracts, except when material is priced on a basis other than at cost;

(B) Negotiating indirect cost rates;

(C) Proposing, negotiating, or determining costs under terminated contracts;

(D) Pricing changes and other contract modifications.

13.2.2 Contracts With Educational Institutions.

POLICY: 2 CFR Part 220, Cost Principles for Educational Institutions (OMB Circular A-21), provides principles for determining the costs applicable to research and development, training, and other work performed by educational institutions under contracts with the Government. The CO shall incorporate the cost principles and procedures in 2 CFR Part 220 by reference in cost--reimbursement contracts with educational institutions as the basis for --

(a) Determining reimbursable costs under the contract and cost-reimbursement subcontracts thereunder performed by educational institutions;

(b) Negotiating indirect cost rates;

(c) Settling costs of terminated contracts; and

(d) Evaluating costs when negotiating fixed-price contracts.

13.2.3 Contracts With State and Local Governmental Organizations.
POLICY: 2 CFR Part 225, Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A-87), sets forth the principles for determining the allowable costs of contracts and subcontracts with State, local and federally-recognized Indian tribal governments. These principles are for cost determination and are not intended to identify the circumstances or dictate the extent of Federal and State or local participation in financing a particular contract. The CO shall incorporate the cost principles and procedures of 2 CFR Part 225 by reference in cost-reimbursement contracts with State, local and federally-recognized Indian tribal governments.

13.2.4 Contracts With Nonprofit Organizations.
POLICY: 2 CFR Part 230, Cost Principles for Non-Profit Organization (OMB Circular A-122), sets forth principles for determining the costs applicable to work performed by nonprofit organizations under contracts (also applies to grants and other agreements) with the Government. A nonprofit organization is defined as a business entity organized and operated exclusively for charitable, scientific, or educational purposes, of which no part of the net earnings inure to the benefit of any private shareholder or individual, and which are exempt from Federal income taxation under section 501 of the Internal Revenue Code. The CO shall incorporate the cost principles and procedures of 2 CFR Part 230 by reference in cost reimbursement contracts with nonprofit- organizations.

13.3 CONTRACT AUDIT SERVICES.
INFORMATION:

(a) Effective purchasing and contract management sometimes requires that the CO seek the services of professional auditors. Such services are available primarily from BPA's Internal Audit office. However, audit services for a non-Federal contractor (entity) is typically provided by the audit office of the Federal agency assigned single audit responsibilities, as per the Single Audit Act of 1984 (as amended).Audit services may also be provided by the DOE Inspector General and through cross-servicing agreements.with the Defense Contract Audit Agency and the Health and Human Services Inspector General.

(b) The primary areas of potential audit support include:
(1) Accounting system reviews (12.5.5).
(2) Evaluation of costs or prices of proposed contracts or contract modifications (12.5.2)
(3) Review of contractor invoices where necessary to support cost allowability determinations.
(4) Interim and close-out audits of costs incurred on cost-type contracts (cost-reimbursement, time-and-materials, and labor-hours contracts) (4.2.2)
(5) Reviews to establish billing rates for indirect costs and final indirect cost rates.
(6) Review of claims for contract price or other relief (20.4.4), or of contractor settlement proposals in terminations (20.4.4.2).

13.4 AUDIT OF NON-FEDERAL ORGANIZATIONS.
INFORMATION:

(a) OMB Circular A-133, “Audits of States, Local Governments, and Non-Profit Organizations,” is the implementation of the Single Audit Act of 1984 (Pub. L. 98-502), as amended. It applies to contracts and intergovernmental contracts entered into by BPA with all non-Federal organizations (state and local

governments, institutions of higher education, federally recognized Indian tribes, and other nonprofit organizations), whether they are direct recipients of BPA awards, or are subrecipients expending BPA awards received from a pass-through entity (a recipient or another subrecipient). The circular does not apply to non-U.S. based organizations, either directly as a recipient or indirectly as a subrecipient. This circular rescinds Circular A-128, “Audits of State and Local Governments,” dated April 12, 1985, and supersedes the prior Circular A-133, “Audits of Institutions of Higher Education and Other Non-Profit Institutions,” dated April 22, 1996. This amended circular is effective for all audits of fiscal years beginning after June 30, 1996, except for allowances to minimize disruption in existing contracts for audit services, the effective date for which is June 30, 1998.

(b) Under A-133, non-Federal organizations that expend $500,000 or more in a year in Federal awards are required to have a single or program-specific audit for that year. Recipients receiving less than $500,000 a year in Federal awards are exempt from the Federal audit requirement for that year, with some exceptions noted in the circular. However, the organization must make its records available for review or audit by appropriate officials of the Federal agency, pass-through entity, and the Government Accountability Office (GAO).

(c) The description of "state" in A-133 includes multi-state, regional or interstate entities that have governmental functions and any Indian Tribe that is recognized by the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(d) OMB Circular A-133 implements the The Single Audit Act (as amended) to provides that an audit made in accordance with the circular shall be in lieu of any financial or financial compliance audit required under individual Federal assistance programs. To the extent that a single audit provides Federal agencies with information and assurances they need to carry out their overall responsibility, they shall rely upon and use such information. The circular retains the concept of a cognizant Federal agency to oversee the audits performed. The circular does not limit the authority of Federal agencies to make or contract for additional audits and evaluations of Federal financial assistance programs. Any additional audits required to carry out responsibilities under Federal law and regulation should be planned and carried out in such a way as to avoid duplication.

13.5 AUDIT RESOLUTION, FOLLOW-UP AND SETTLEMENT.

(a) ***INFORMATION:*** The CO may request that an audit be performed in order to administer the financial aspects of contract. Audit reports pertaining to a specific contract may also be received as a result of program audits initiated by the Office of the Inspector General or other cognizant audit activity. Based on a review of the audit findings and recommendations, the CO generally reviews the amount of contract costs questioned, recommends costs to be disallowed, the corrective actions required, then settles such determinations with the contractor. The audit resolution and implementation policies and procedures contained herein are in consonance with the independent decision-making of the CO and the advisory role of the auditor.

(b) ***POLICY:*** The CO shall determine the action to be taken on each audit recommendation within two months of the receipt of the audit report. Disposition in this context means that the CO has determined what action is to be taken, and has initiated that action. The action need not be completed within the six-month period; however the accepted audit recommendations shall be implemented expeditiously. Audit resolution decisions, actions and settlements shall be documented in the official file.

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14.1 CONTRACT MANAGEMENT.

POLICY: Contracts shall be managed to insure that BPA receives a specific product or service in a timely manner. Situations occasionally arise where the insistence upon strict compliance with contractual requirements may not be in the best interests of BPA. In certain circumstances, a relaxation of the contractual requirements, with or without consideration from the contractor, may be in the best interest of BPA. If such a situation arises, the CO shall document the circumstances in the official file. If the CO intends to substantially alter the obligations of the parties without consideration, the CO shall obtain the concurrence of the HCA prior to execution.

14.2 BASIC RESPONSIBILITY FOR CONTRACT ADMINISTRATION.

(a) ***POLICY:*** COs are responsible for administering contracts covered by the BPI. This is accomplished through a team effort with the program office, working through CORs and COTRs.

(b) ***POLICY:*** The CO shall only designate as COTR those personnel who have been formally trained and certified as a COTR.

(c) ***INFORMATION:*** General information concerning the technical administration of contracts may be found in BPI Appendix 14-A, Contracting Officer's Technical Representative's Guide for Contract Administration.

14.3 ASSIGNMENT OF CONTRACT ADMINISTRATION.

14.3.1 Designation of Contracting Officer's Representatives.

POLICY: The CO shall advise the Contractor in writing at the time of initial assignment and whenever a change is made in the CO, COR, or COTR on a contract. COTRs shall notify the Contractors and the CO in writing at the time of initial assignment and whenever a change is made in the field inspector(s) on a contract.

14.3.2 Clause Usage Prescriptions.

PROCEDURE:

(a) The CO may include a clause similar to Clause 14-1, Contracting Officer's Representatives - Construction Contracts, in construction solicitations and contracts in lieu of clause 14-2, Contract Administration Representatives, if desired.

(b) The CO shall include a clause similar to Clause 14-2, Contract Administration Representatives, in solicitations and contracts, including IGCs, which require the involvement of representatives of the CO.

14.4 BASIC CONTRACT ADMINISTRATION CLAUSES.

14.4.1 Order of Precedence Clause.

INFORMATION: It is generally helpful to include an Order Of Precedence clause in contracts to assist the parties in case of inconsistencies. As a general rule of contract law, specific terms take precedence over general terms and "custom" terms take precedence over pre-printed terms.

14.4.1.1 Clause Usage Prescriptions.

PROCEDURE: The CO shall include a clause similar to Clause 14-3, Order of Precedence, shall be included in all solicitations and contracts over $50,000.. COs should modify the clause to meet the needs of a particular purchase. If the contractor's proposal is incorporated into the contract, the clause shall be modified to identify its place in the order of precedence. Clause 14-3 shall not be included in solicitations and contracts for commercial acquisitions.

14.4.2 Other Rights at Law Clause.

INFORMATION. In order to preserve BPA's rights under the common law, a clause similar to those used by commercial organizations is provided.

14.4.2.1 Clause Usage Prescriptions.

PROCEDURE: The CO shall include Clause 14-4, Other Rights at Law, in solicitations and contracts for noncommercial procurements. .

14.5 COMMUNICATIONS WITH SUPPLIERS.

(a) ***INFORMATION:*** COs are encouraged to establish close working relationships with suppliers and representatives of the CO so that the supplier and BPA personnel are working on the contract as a team. Post award orientation, either through personal, telephone, or written correspondence, is one means to continue the teamwork begun during the negotiation phase. COs shall conduct a post-award orientation at the beginning of each new award, with the exception of Releases under a Master contract for which an orientation has already been conducted or purchases that are commercial, low dollar, and repetitive.

(b) Continuing communications are also essential to ensure that the teamwork continues on the contract. Such communications have among their objectives:

(1) to be sure persons working on the contract understand the objectives of the contract;
(2) to identify and address any potential problem areas or scheduling difficulties before they have an adverse impact on either BPA or the contractor; and
(3) to ensure that the persons involved in the project are approaching it with a common goal.

(c) Such communications should occur:

(1) Whenever either party detects a problem

(2) Prior to and following significant milestones
(3) Routinely throughout the life of the contract effort, even though no problems have been encountered.

14.5.1 Relationships with Suppliers.
POLICY: BPA supports the development of close working relationships with its suppliers. Such relationships are less adversarial, and produce a better value product. The objective of such relationships is to jointly execute projects in a supportive and cooperative manner. BPA shall administer contracts with the objective of developing positive long-term relationships (See subpart 7.2.1.) Such relationships are typically referred to as partnering, strategic alliances, supplier management, and other similar terms.

14.5.2 Protecting Agency Critical Information.
POLICY: COs and COTRs shall take necessary steps to control and protect Critical Information (CI) that is distributed to contractors during contract performance, and after contract completion, including but not limited to daily or other regular communications by telephone, letter, e-mail, or fax, when issuing change orders or negotiating modifications, conducting site visits and inspections, etc. See BPI 11.4.3.

14.5.3 Clause Usage Prescriptions.
PROCEDURE: The CO may include Clause 14-19, Post Award Orientation, in solicitations and contracts when a post award orientation is appropriate.

14.6 VARIATION IN QUANTITY.
(a) ***PROCEDURE:*** COs should consider using a variation in quantity clause in circumstances where quantities of work required by the contract are estimated, where manufacturing or packaging processes common in the industry do not result in exact quantities being produced, or similar circumstances. Typically, such clauses are used only in fixed-price type contracts with unit-priced items.

(b) ***POLICY:*** Variation in quantity clauses shall not be used in place of options to acquire additional quantities based on possible future requirements. They are to be used to determine pricing for BPA's known requirements that may vary from those stated in the contract because of manufacturing processes or existing physical conditions. They are not to be used to price new requirements.

14.6.1 Supply Contracts.
INFORMATION: Variation in quantity clauses provide that BPA may accept a variation of quantity in the items called for if the variation is caused by packaging or manufacturing processes typical in the industry. Variations are permissible as either increases or decreases from the stated quantity, and are typically stated as percentages. No standard percentages are prescribed -- they should be developed jointly between the contractor and BPA during the negotiation process, taking into consideration the commercial practices applied to the specific product or service.

14.6.1.1 Clause Usage Prescriptions.
PROCEDURE: The CO may include a clause similar to 14-5, Variation in Quantity - Supply Contracts, in solicitations and contracts where the CO believes it would be useful. The CO may modify or delete paragraph (b) as appropriate to the purchase.

14.6.2 Service and Construction Contracts.
INFORMATION: Some types of service contracts (e.g. brush cutting, window cleaning) and construction contracts may provide for variation in estimated quantities of unit price items. When the variation between the estimated quantity and the actual quantity of an item exceeds the established range, BPA and the contractor, at the request of either, will negotiate for a revised unit price for the units of work actually performed outside the established range.

14.6.2.1 Clause Usage Prescriptions.
PROCEDURE: The CO may include a clause similar to 14-6, Variation in Estimated Quantity -- Service and Construction Contracts, in solicitations and contracts where the CO believes it would be useful. The

standard variation is 10% for services contracts and 25% for construction contracts. However, the CO may change the standard variation if desirable.

14.7 USE OF GOVERNMENT SUPPLY SOURCES BY SUPPLIERS.
POLICY. COs may authorize contractors to use Government supply sources if supplies or services are required by a contract. Generally this would be most useful in cost-reimbursement contracts, but it may also be useful in other types of contracts. COs should weigh the incremental cost of such authorization and use of the Government supply system against the potential savings before providing the authorization. Such supply sources include:

(a) General Services Administration

(b) Department of Defense

(c) Department of Veterans Affairs

(d) Federal Supply Schedules

(e) Interagency Fleet Management System

(f) US Bureau of Reclamation

(g) US Corps of Engineers

14.8 USE OF DOE EXCESS EQUIPMENT.
INFORMATION: BPA cost reimbursement contractors may make use of excess BPA or other Federal Agency equipment if this would be a good business decision. Upon written request by the contractor and approval by the CO, the Property Management functional group in Supply Chain Services will arrange for such property.

14.9 BPA CONSENT TO SUBCONTRACT.
(a) ***INFORMATION:*** Consent to subcontract can be addressed at two levels. The first level involves the approval of the action of subcontracting itself. The second level involves the review and approval of the qualifications of a specific subcontractor proposed to be used for a specific activity.

(b) ***INFORMATION:*** Consent to subcontract is normally useful in the following types of situations:
(1) The work to be subcontracted is complex.
(2) The dollar value of the subcontracted effort is substantial.
(3) BPA's interest is not protected by competition among subcontractors.
(4) Environmentally sensitive issues are involved.
(5) Hazardous materials are involved.
(6) The initial contract award was based upon the proposed subcontractor's capabilities.

This list is not an all-inclusive one. There may be other circumstances which would make it prudent to impose the restriction to require BPA approval before subcontracting a portion of the contract. The decision to require subcontracting approval is at the discretion of the CO.

(c) ***POLICY:*** BPA approval of the use of specific subcontractors is also optional at the discretion of the CO. A review of the qualifications and approval of proposed subcontractors should be required when BPA considers the contract effort to be sensitive and desires stricter accountability.

14.9.1 Clause Usage Prescriptions.
PROCEDURE: The CO may include a clause similar to 14-7, Subcontracts, in solicitations and contracts where it is determined that consent to subcontract is required. Use the clause with its Alternate I when the effort to be subcontracted involves the management or handling of hazardous or toxic wastes. When

using Alternate I, add a subparagraph (a) designator to the basic clause, and add paragraph (b) of the alternate.

14.10 CONTRACT MODIFICATIONS AND CHANGES.

14.10.1 Definitions.

INFORMATION:

"Administrative change" means a unilateral contract change that does not substantially affect the rights of the parties (e.g., a change in the paying office or accounting data).

"Constructive change" means an act or failure to act by the CO (or representatives of the CO) which will be construed as if a change was actually issued.

"Contract modification" means any written change in the terms of a contract.

"Change Order" means a written order, signed by the CO directing the contractor to make a change that the Changes clauses authorize the CO to order without the contractor's concurrence.

14.10.2 Policy.

(a) Only COs, or persons delegated specific authority to execute contract modifications by a CO (see 2.3.3), may execute contract modifications.

(b) Contract modifications should be priced before their execution, if this can be done without adversely affecting the interests of BPA.

(c) COs shall convene a Strategy Panel in accordance with the procedures at BPI 6.15 prior to executing modifications that meet any of the criteria as developed by Sourcing Services.

14.10.3 Types of Contract Modifications.

INFORMATION: Contract modifications fall into the following categories:

(a) Bilateral. A bilateral modification is a contract modification that is agreed to jointly by the CO and the contractor. The contractor's oral or written agreement will be sufficient to indicate contractor agreement. Bilateral modifications are used to --

(1) Make negotiated equitable adjustments when necessary;
(2) Definitize quick-response contracts; or
(3) Reflect other agreements of the parties which modify the terms of contracts; or
(4) Make changes requested by the contractor.

(b) Unilateral. A unilateral modification is a contract modification that is made by the CO without advance concurrence by the contractor. Unilateral modifications are used to--

(1) Make administrative changes;
(2) Issue changes under the changes clause; or
(3) Make changes authorized by clauses other than a changes clause (e.g., Property clause, Options clause, Differing Site Conditions clause.)

14.10.4 Extension of Contracts.

(a) ***POLICY:*** Unilateral extensions. Contracts may be extended by issuing a unilateral modification whenever such right is provided in the contract and the appropriate factors concerning exercise of options (see 7.2.7 and 14.11) have been considered. The official file as identified in BPI 12.8.2, should explain why the CO ordered the extension.

(b) ***POLICY:*** Bilateral extensions - unexpired contracts. Where the contract has not expired and there is no option giving BPA the right to extend contract performance, such extension may be negotiated with the contractor. The official file, as identified in BPI 12.8.2, shall explain why the CO negotiated the extension.

(c) ***POLICY:*** Bilateral extensions - expired contracts. Where a contract has expired by its terms but BPA has permitted performance to continue to meet its needs, the contract may be extended by mutual agreement, incorporating all the terms of the original contract. The effective date of the modification shall be the expiration date of the original contract. A new contract expiration date shall be established.

(d) ***PROCEDURE:*** With regard to paragraph (c) above, the reason for the delay in extending the expired contract and the reason(s) that such action is in BPA's best interests, shall be documented as identified in BPI 12.8.2. The Contracting Officer and Contractor may mutually agree to extend a contract that has been expired for no more than six months. Any extension of a contract that expired more than three (3) months prior must be requested in writing to and approved by the HCA.

14.10.5 Changes.

14.10.5.1 Changes Made with a Changes Clause.

(a) ***INFORMATION:*** Noncommercial BPA contracts may contain a "Changes" clause that permits the CO to make unilateral changes within the general scope of the contract. These changes are accomplished by issuing written contract modifications (sometimes called change orders). The contractor must continue performance of the contract as changed, except that in cost-reimbursement or incrementally-funded contracts the contractor is not obligated to continue performance or incur costs beyond the dollar limit established in the contract. Pricing of equitable adjustments should be based on the variance in the cost of performance of the contract work following the change as compared to the contract cost before the change. See BPI 28.4.5 for policy and contract clauses for commercial acquisitions.

(b) ***POLICY:*** Although unilateral changes are permitted under the clause, it is generally preferable to execute a bilateral change in order to obtain the agreement of both parties, and to avoid subsequent disagreements. Bilateral changes should be used except when BPA and the contractor cannot quickly agree on the terms of the change, including price, and work must proceed. Only the CO or a person designated by the CO may reach agreement on pricing adjustments. Whenever possible, BPA prefers changes to be priced before work is initiated on the change.

(c) ***POLICY:*** Normally payments are not made for work performed under undefinitized change orders. The CO may authorize provisional payment if such payments are in BPA's interest.

(d) ***PROCEDURE:*** The CO should, whenever possible, confirm that all elements of the change have been resolved by including a release in the definitizing bilateral agreement similar to:

"This modification constitutes the total equitable adjustment for the changes described herein."

(e) ***PROCEDURE:*** The reasons for entering into both unilateral and bilateral modifications, including price or cost as appropriate, shall be documented in the official file as identified in BPI 12.8.2 for changes within the scope of the contract. See Subpart 4.2.1 for a general discussion of documentation standards.

(f) ***PROCEDURE:*** Changes outside the scope of the contract shall be documented per BPI 12.8.2, as if the transaction was a new award.

(g) ***PROCEDURE:*** COs should use a Part 14 Changes clause in noncommercial acquisitions when it is necessary to reserve the right for BPA to unilaterally order the types of changes described in paragraph (a) of the Changes clauses.

14.10.5.1.1 Clause Usage Prescriptions.

PROCEDURE:

(a) The CO may include a clause similar to 14-8, Changes - Fixed-Price, in solicitations and fixed-price contracts when the CO may want to direct the contractor to make specific changes in the work during the

contract. The CO may modify paragraph (a) to reflect the specific portions of the contract to be subject to the clause. Clause 14-8 shall not be included in solicitations and contracts for commercial acquisitions.

(b) The CO may include a clause similar to 14-9, Changes - Cost-Reimbursement, in solicitations and cost-reimbursement contracts when the CO may want to direct the contractor to make specific changes in the work during the contract. The CO may wish to modify paragraph (a) to reflect the specific portions of the contract to be subject to the clause. Clause 14-9 shall not be included in solicitations and contracts for commercial acquisitions.

(c) The CO may include a clause similar to 14-10, Changes - Time and Materials, in solicitations and time and materials contracts when the CO may want to direct the contractor to make specific changes in the work during the contract. The CO may wish to modify paragraph (a) to reflect the specific portions of the contract to be subject to the clause. Clause 14-10 shall not be included in solicitations and contracts for commercial acquisitions.

(d) The CO may include a clause similar to 14-11, Changes and Changed Conditions - Construction Contracts, in solicitations and contracts for construction as appropriate. Clause 14-11 shall not be included in solicitations and contracts for commercial acquisitions.

(e) The CO shall include Clause 14-12, Pricing of Adjustments, in solicitations and contracts exceeding $50,000. Clause 14-12 shall not be included in solicitations and contracts for commercial acquisitions.

(f) The CO may include clause 14-13, Modification Cost Proposal - Price Breakdown, in solicitations and contracts when appropriate. Clause 14-13 shall not be included in solicitations and contracts for commercial acquisitions.

14.10.5.2 Changes Made without a Changes Clause.
PROCEDURE: Contract changes may be negotiated with the contractor when the contract does not contain a changes clause. Pricing of such changes shall be based on, but not necessarily limited to, costs of the changed work, including appropriate overhead charges and profits; the impact on changed and unchanged work, etc.

14.10.6 Forms.
PROCEDURE: The Business Enterprise System electronically generated contract amendment form, or BPA F 4220.06 Modification of Contract, shall be used for contract modifications.

14.11 EXERCISING OPTIONS.
(a) ***POLICY:*** An option provides a unilateral right in the contract by which, for a specified time, the CO may elect to exercise the terms of the option. The decision to exercise options shall be based on the best buy for BPA.

(b) ***PROCEDURE:***
(1) Options are discussed in Subpart 7.2.7.
(2) COs shall consider the following before deciding whether or not to exercise an option:
(A) Will exercising this option, considering an analysis of prices, an examination of the market, evaluation of the contractor performance, and administrative expensive of re-competing the requirement obtain the best buy for BPA?
(B) Are funds available?
(C) Does the requirement covered by the option fulfill an existing need?
(D) How critical is BPA's need for continuity of operations and what are the potential costs of disrupting operations?
(3) Upon exercise of an option, the CO will document in the official file, per BPI 12.8.2.

14.12 SUSPENSION AND STOP WORK ORDERS.
(a) ***INFORMATION:*** Definitions:

"Suspension of work" means a temporary cessation of activity by the contractor under a specific contract.

"Stop work order" means a written notice to the contractor to suspend work.

(b) ***INFORMATION:*** Situations may arise during the conduct of a contract that might cause the CO to order a suspension of work, such as:

(1) Delays caused by waiting for a decision from BPA;
(2) Weather-related reasons;
(3) Technological advancement;
(4) Production or engineering breakthroughs;
(5) Realignment of BPA programs or objectives;
(6) Public safety concerns, including identified unsafe work practices and safety hazards;
(7) Emergency situations or other urgent conditions;
(8) Differing site conditions; and
(9) Violation of substantive contract terms, including BPA's safety, smoking, harassment-free workplace, or other policies.

(c) ***PROCEDURE:*** Except for safety related issues, generally, only the CO is authorized to suspend work. Most often the decision to suspend work will be made jointly by the CO and the program office, citing Clause 14-14, Stop Work Order, as the basis for suspension of work. However, in cases of public safety concerns (including identified unsafe work practices and safety hazards), emergency situations, or other urgent conditions, either the CO or COTR or field inspector shall promptly notify the Contractor of noncompliance with safety requirements of the contract. The Contractor is required to take immediate corrective action as per the contract Safety and Health clause (see Clause 15-2, Safety and Health, or Clause 15-4, Safety, Health and Property Protection – Services). If the Contractor fails or refuses to promptly correct the public safety, emergency or urgent condition, the CO, COTR or field inspector may suspend all or any portion of work affected by the noncompliance, pending discussion with the program and Safety office. Suspensions of work may be ordered orally, but should be followed up with a written stop work order. The stop work order should include information related to the following, as appropriate:

(1) A description of the work to be suspended, including whenever applicable, identified unsafe work practices or work hazards;
(2) Instructions concerning the contractor's issuance of further orders for materials or services;
(3) Guidance to the contractor on action to be taken on any affected subcontracts; and
(4) Other suggestions for minimizing the contractor's costs.

(d) ***PROCEDURE:*** As soon as feasible after the stop work order is issued, the CO should work with the program office, and the Safety Office whenever public safety (including work and safety hazards) are involved, to resolve the outstanding issues, and make a decision to terminate the contract, cancel the stop-work order, or continue the stop work order while the issues are being resolved.

14.12.1 Clause Usage Prescriptions.
PROCEDURE: The CO may include a clause similar to 14-14, Stop Work Order, in solicitations and contracts when it is desirable to retain the right to suspend the work during contract performance. For commercial acquisitions, Clause 14-14 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-7.

14.13 NOVATION AND CHANGE-OF-NAME AGREEMENTS.
14.13.1 Definitions.
INFORMATION:

"Change-of-name agreement" means a legal instrument executed by the contractor and BPA recognizing a legal change of the contractor's name without disturbing the original contractual rights and obligations of the parties.

"Novation agreement" means a legal instrument executed by (a) the contractor (transferor), (b) the successor in interest (transferee), and (c) BPA, by which, among other things, the transferor guarantees

performance of the contract; the transferee assumes all obligations under the contract; and BPA recognizes the transfer of the contract and related assets.

14.13.2 Responsibility for Executing Agreements.
POLICY: The CO shall be responsible for processing and executing novation and change of name agreements.

14.13.3 Agreement to Recognize a Successor in Interest (Novation Agreement).
(a) ***INFORMATION:*** BPA may, if in its interest, recognize a third party as the successor in interest to a BPA contract. Such transfers usually result when another company purchases the original contracting firm. The CO may also consider such actions when the original contractor is unable to perform and another viable contractor stands willing to assume the rights and duties under the contract.

(b) ***INFORMATION:*** When it is in BPA's interest not to concur in the transfer of a contract from one company to another company, the original contractor remains under contractual obligation to BPA, and the contract may be terminated for default should the original contractor not perform.

(c) ***PROCEDURE:*** When a contractor asks BPA to recognize a successor in interest, the CO shall obtain from the contractor two signed copies of the proposed novation agreement signed by the original contractor and the successor in interest.

(d) ***PROCEDURE:*** When recognizing a successor in interest to a BPA contract is consistent with BPA's interest, the responsible CO shall execute a novation agreement with the transferor and the transferee. It shall ordinarily provide that --

(1) The transferee assumes all the transferor's obligations under the contract;
(2) The transferor waives all rights under the contract against BPA;
(3) The transferor guarantees performance of the contract by the transferee (a satisfactory performance bond may be accepted instead of the guarantee); and
(4) Nothing in the agreement shall relieve the transferor or transferee from compliance with any Federal law.

(e) ***PROCEDURE:*** The CO generally should use the following format for agreements when the transferor and transferee are corporations and all of the transferor's assets are transferred. This format may be adapted to fit specific cases, and may be used as a guide in preparing similar agreements for other situations.

(f) ***PROCEDURE*****:** The CO shall coordinate with the BES Vendor Maintenance Team to ensure that the contractor’s BES vendor record information is updated, including new TAX ID if changed. Use form BPA 4220.01e, Request New or Change Vendor Profile to collect the new information. The CO may complete this form, or send it to the Contractor for completion and submittal to the BES Vendor Maintenance Team.

NOVATION AGREEMENT

The purpose of the agreement is to recognize _____(transferee) as the successor in interest to _____(transferor) under BPA Contract No(s). _____.

(1) The Transferor hereby transfers all rights and obligations under the contract(s) to the Transferee as of _____(date). By making such transfer, the Transferor waives any claims or rights it may have under the contract(s). The transferor guarantees performance of the contract by the transferee.

(2) The Transferee agrees to assume all rights and obligations transferred in paragraph (1), and understands that, as of the date specified, it stands in the same legal position as if it had been the original contractor.

(3) BPA recognizes the Transferee as the Transferor's successor in interest under the subject contract(s). Pursuant to this agreement, the Transferee becomes entitled to all rights and interests under the contract(s) as if the Transferee were the original contractor.

(4) Except as provided in this agreement, nothing in it shall be construed as (a) a waiver of any rights BPA may have against the Transferor, or (b) relieving the transferor or transferee from compliance with any Federal law.

The parties hereby execute this agreement as of the date specified in paragraph (1)

BONNEVILLE POWER ADMINISTRATION
By.....
Title.....

(NAME OF TRANSFEROR)
By.....
Title.....

(NAME OF TRANSFEREE)
By.....
Title.....

(End of Agreement)

14.13.4 Processing Novation Agreements.
PROCEDURE:

(a) The contractor shall submit a written request to the CO to recognize a successor in interest to one or more contracts.

(b) The CO shall confer with program offices and Disbursement Operations to obtain a list of affected contracts, and request prompt submission of any comments, which shall include technical considerations, if appropriate.

(c) The CO shall determine whether or not it is in BPA's interest to recognize the proposed successor in interest on the basis of the comments received from the affected parties, and whether or not the proposed successor is a viable supplier.

(d) The CO shall (1) forward a signed copy of the executed novation to the transferor and to the transferee and (2) retain a signed copy in the case file.

(e) The CO shall prepare the Business Enterprise System electronically generated contract amendment form, or form BPA F 4220.06 Modification of Contract, for each affected contract, incorporating a copy of the agreement. The modification shall be distributed in the usual manner.

(f) The CO shall ensure that the BES Vendor Maintenance Team receives the information to update the Vendor Record.

14.13.5 Contractor's Change of Name.
PROCEDURE:

(a) If only a change of the contractor's name is involved and BPA's and contractor's rights and obligations remain unaffected, the parties shall execute an agreement to reflect the name change. The contractor shall submit a written request to the CO to change the name.

b) The CO shall prepare a contract modification in the new name of the firm, and reference in the body of the modification the former name and date of the supplier's request. The modification should be similar to: "This modification changes the name of the contractor from _____(CO enter the old firm name) to that shown above. This change is made at the request of the contractor dated _____(CO insert date of request.)"

14.14 Reserved.

14.15 USE OF PRIVATELY-OWNED US FLAG VESSELS.
(a) ***INFORMATION:*** BPA has experienced excessive damage from the cross-country rail shipment of sensitive materials acquired from foreign vendors. BPA has determined that it is in its interest to require shipment of sensitive foreign materials by ocean vessel to the port nearest the site where the material will be used

(b) ***PROCEDURE:***
1) COs shall not require the use of U.S. Vessels for shipment of sensitive materials unless a U.S.-Flag Vessel serves a port in the BPA service area allowing minimal handling in rail shipment. In order to achieve the requirement that BPA obtain U.S. Flag Vessel shipping for 50 percent of the gross tonnage of foreign-produced materials, a provision requiring l00 percent of the gross tonnage for a contract will be used in those instances where it is not anticipated that damage will be caused by rail shipment and where contracts involve foreign manufacturing of materials or equipment.
2) Subcontracts for purchase of commercial items or components are exempt from the use of U.S. Flag Vessels.

14.15.1 Clause usage prescriptions.
PROCEDURE: The CO shall include the clause at 14-16, Requirement for U.S. Flag Vessels, in solicitations and contracts that exceed $100,000 and which will involve ocean transportation of materials or equipment not easily damaged during cross country rail shipments, except subcontracts for purchase of commercial items or components. For commercial acquisitions, Clause 14-16 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-20.

14.15.2 Remedy for U.S. Flag Vessel Noncompliance.
PROCEDURE: If, after award of the contract, the contractor is unable to obtain a U.S. Flag Vessel, it may request BPA to waive the requirements of the clause at 14-16, Requirement for U.S. Flag Vessels. Such request will be supported by documentation in the official file showing that no U.S. Flag Vessel was available, and that a timely attempt was made to obtain one. If the CO waives the applicable clause, the difference in cost between the U.S. Flag and Foreign Flag Vessel shipping costs will be added to or deducted from the contract by modification as appropriate.

14.16 CONTRACTOR PERFORMANCE MEASURES.

(a) ***POLICY:*** All aspects of a contractor's performance, including safety record, may be key considerations when making source selection decisions for future awards (See BPI 11.8.) COs are encouraged to provide regular feedback to contractors to help contractors continually improve their performance. However, COs are under no obligation to do so. It is the responsibility of the contractor to develop and maintain a solid reputation of performance. See 21.3.2 for information on handling disagreements on contractor performance evaluations.

(b) ***INFORMATION:*** Formal and informal systems which track contractors long term performance are useful to continually improve the quality of supplies and services purchased by BPA. There are many such systems available. Informal systems may be no more complex than regular communications with the BPA regarding a particular contractor's performance for specific transactions. Formal systems may also include supplier rating systems and preference programs such as supplier certifications, preferred suppliers, etc. Factors considered in these various systems vary, but always include past experience with the contractor.

(c) ***PROCEDURE:*** Operational contracting offices may develop procedures to implement contractor performance measurement systems. Such systems shall be as administratively simple as possible. The complexity and cost of developing and managing such systems should be commensurate with the probable benefits. In general, such systems should be designed to emphasize the measurement of performance for those supplies or services which are repeatedly bought by BPA and are most critical to meet BPA's mission. When possible, such systems should be designed to encourage superior performance as well as identify substandard performance.

14.17 INDIRECT COST RATES.

14.17.1 General Discussion.

INFORMATION:

(a) "Indirect costs" are those costs which are not readily identified as direct costs and which benefit more than one cost objective. Costs may be allocated (1) on the basis of benefit - e.g., the cost benefits both the contract and other work and can be distributed to them in reasonable proportion to the benefits received; or (2) on the basis of necessity to the overall operation of the contractor's business (e.g., supervision, management, facilities cost, insurance, utilities, etc.).

(b) "Indirect cost rate" means the percentage or dollar factor that expresses the ratio of indirect expense incurred in a given period to direct labor cost, manufacturing cost, or other appropriate base for the same period.

(c) "Indirect cost rate caps" are ceilings which can be negotiated by the CO which act as a limit (or ceiling) on the allowable rates applied to each contract. If a Cognizant Federal Agency (CFA) has established indirect rates, caps may be set at lower than the rate determined by the CFA, but generally should not be set higher than the rate determined by the CFA. Indirect cost rate caps are typically not used when predetermined final indirect cost rates have been established by the CFA for educational institutions.

(d) The determination and application of indirect cost rates to contracts is a complicated subject, and cannot be covered thoroughly in the BPI. This subpart briefly introduces the subject. Further detailed information concerning application to a specific contract may be obtained from experienced purchasing personnel, or the BPA Internal Audit staff.

14.17.2 Cognizant Federal (Audit) Agency.

(a) ***INFORMATION:*** "Cognizant Federal Agency" (CFA) means the agency having the major financial interest in the organization. In some cases, the CFA may be BPA. The CFA is responsible for establishing indirect cost rates for the organization on behalf of all Federal agencies. The CO should contact the CFA to determine the existence of audits addressing proposed indirect costs. Requests for

audit support should request the minimum information necessary to determine the best buy. A listing of CFA offices is contained in the Directory of Federal Contract Audit Offices, available form DCAA. Questions regarding audit offices may be referred to the Defense Contract Audit Agency, Attn: CMO Publications Officer, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, Virginia 22060-6219.

(b) ***POLICY:*** In general, COs shall accept and use the indirect cost rates established by the CFA subject to any specific limitation or cap negotiated for the contract (see 14.17.4). The CO shall not request a preaward audit of indirect cost rates unless the information available from an existing audit completed within the preceding 12 months is considered inadequate for determining the reasonableness of proposed indirect costs.

(c) ***POLICY:*** When BPA is the CFA, BPA's Manager of Internal Audit Services is hereby delegated authority as the cognizant CO for establishing, negotiating and approving such indirect cost rates on behalf of BPA.

14.17.2.1 Cognizant Federal Agency – State, Local, and Federally-Recognized Indian Tribal Governments.
INFORMATION: 2 CFR Part 225, Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A-87), establishes the cognizant agency concept and procedures for determining a cognizant agency for approving state, local, and federally-recognized Indian tribal government indirect costs associated with federally-funded programs and activities. The indirect cost rates negotiated by the cognizant agency will be used by all Federal agencies that also award contracts to these same state, local. and federally-recognized Indian tribal governments.

14.17.2.2 Cognizant Federal Agency -- Nonprofit Organizations.
INFORMATION: 2 CFR Part 230, Cost Principles for Non-Profit Organization (OMB Circular A-122), concerning cost principles for nonprofit organizations establishes the cognizant agency concept and procedures for determining a cognizant agency for approving nonprofit organization indirect costs associated with federally-funded programs and activities. The indirect cost rates negotiated by the cognizant agency will be used by all Federal agencies that also award contracts to these same nonprofit organizations.

14.17.2.3 Cognizant Federal Agency - Educational Institutions.
(a) ***INFORMATION:*** 2 CFR Part 220, Cost Principles for Educational Institutions (OMB Circular A-21), assigns either Department of Health and Human Services (HHS) or the Department of Defense's Office of Naval Research (DOD) as the CFA for each educational institution, responsible for the negotiation of indirect cost billing rates and, where appropriate, predetermined final indirect cost rates for use by all Federal agencies.

(b) ***INFORMATION:*** Most CFA's establish predetermined final indirect cost rates for the payment of reimbursable indirect costs under cost reimbursement research and development contracts with universities, colleges, or other educational institutions. If they have been established, their use must be extended to all the institution's Government contracts.

(c) ***POLICY:*** Post-determined final indirect cost rates shall be used in the settlement of indirect costs for all cost-reimbursement contracts with educational institutions, unless predetermined final indirect cost rates are authorized and used. COs shall use provisional (billing) rates established by the CFA to reimburse the contractor for work performed during a period not covered by predetermined rates.

14.17.3 Indirect Cost Rates.
(a) ***POLICY****:* COs shall use the final indirect cost rates of a commercial organization for a given period, which shall be binding on all the cost-reimbursement contracts of the organization for the period, subject to any specific limitation in a contract or advance agreement; unless the quick closeout procedure in 14.17.5 is used.

(b) ***INFORMATION:*** Various types of indirect cost rates are discussed below. The choice of which type of rate to use in a specific transaction is subject to negotiation between the contractor and the CO. The types of rates typically used at BPA are:

(1) Provisional (or billing) Indirect Cost Rates (see 14.17.3.1);
(2) Final Indirect Cost Rates (see 14.17.3.2);
(3) Predetermined Final Indirect Cost Rates (see 14.17.3.3); and
(4) Fixed Indirect Cost Rates with Carry forward (See 14.17.3.4).

14.17.3.1 Provisional Rates.

(a) ***INFORMATION:*** "Provisional rates" (often referred to as "billing rates") are indirect cost rates established temporarily for interim reimbursement of incurred indirect costs and adjusted, as necessary, until establishment of final indirect cost rates. They are rates established in anticipation of performance, and are subject to annual review or final audit at the end of contract performance. Provisional rates are negotiated, and may be based on the rate established by the CFA, or negotiated between the CO and the contractor. Negotiating a lower provisional rate may reduce interim billings for indirect costs. In contracts without indirect cost rate caps, BPA will pay the final audited rate for the entire period of performance, regardless of the provisional rate established at the beginning of, or during, the contract, and paid throughout the contract performance period. This could result in a refund to BPA if the audited rate is lower than the provisional rate, or require BPA to make an additional payment to the contractor if the final audited rate is higher than the provisional rate. Any amounts due to higher final rates are still subject to the contract price ceiling and the contract ceiling clause.

(b) ***PROCEDURE:*** The CO shall establish a provisional rate on the basis of recent review, previous audits or experience, or similar reliable data or experience of other contracting activities. In establishing the provisional rate, the CO should ensure that it is as close as possible to the final indirect cost rate anticipated for the contractor's fiscal period, as adjusted for any unallowable costs. When the CO determines that the value of contracts requiring use of a provisional rate does not warrant submission of a detailed provisional rate proposal, the provisional rate may be established by making appropriate adjustments from the prior year's indirect cost experience to eliminate unallowable and non-recurring costs and to reflect new or changing conditions. In establishing the provisional rate, the CO may request advisory audit services from BPA Internal Audit or other audit organizations when deemed necessary.

(c) ***PROCEDURE:*** Once established, provisional rates may be prospectively or retroactively revised by mutual agreement of the CO and the contractor, at either party's request, to prevent substantial overpayment or underpayment.

14.17.3.2 Final Indirect Cost Rates.

(a) ***INFORMATION:*** "Final indirect cost rates" are established based on audits which determine the actual costs for the covered period and agreed upon by the CO and the contractor as final.

(b) ***PROCEDURE:*** When BPA is the CFA, the CO shall assure that the contractor submits a final annual indirect cost rate proposal together with supporting cost or pricing data in accordance with the clause at 22-5, Basis of Payment - Cost Reimbursement. The proposal shall be submitted within 90 days after expiration of the contractor's fiscal year and shall reflect actual cost experience for that period.

14.17.3.3 Predetermined Final Indirect Cost Rates.
INFORMATION:

(a) "Predetermined final indirect cost rates" are typically established by the CFA only for educational institutions with cost reimbursement research and development contracts based on an estimate of the costs to be incurred during the covered period. They are established at the beginning of the contract, and are not subject to audit at the end of the contract. (See clause 22-6.) They may be modified during the contract period if negotiated between the parties. COs may accept a lower predetermined rate than was established by the CFA if it is offered by the institution. However, the CO shall not attempt to negotiate such a lower rate (see 14.17.2.3).

(b) Predetermined final indirect cost rates may be negotiated by BPA COs for other than cost reimbursement research and development contracts with educational institutions when the contractor has not been assigned to a CFA for negotiation of indirect cost rates. Situations where a CO may want to consider negotiation of predetermined final indirect cost rates are:

(1) Where the contractor is a newly formed entity with no previous cost experience;

(2) Where BPA has had a long term relationship with the contractor and the contractor has had a history of relatively stable indirect cost rates; or

(3) Where the indirect cost rate could be frequently manipulated by small business owners.

14.17.3.4 Fixed Indirect Cost Rates with Carry-Forward.
INFORMATION:

(a) Fixed indirect cost rates with carry-forward are typically established by the CFA for state and local governments, including Indian tribes. They are a blend of both provisional (billing) rates and predetermined final indirect cost rates. Like the predetermined final rate, a rate is established based on the estimate of a future period's cost and is not subject to revision. However, differences between the estimated costs and actual costs, when they become known, are carried forward and are considered in the negotiation of rates for subsequent periods. As an example, if an agency's costs are more than estimated, the amount of the increase is added to the estimate for the next period to determine the fixed rate for the next period. Conversely, if an agency's costs are less than estimated, the difference between the fixed rate and the actual cost is subtracted from the estimate of the next period to determine the fixed rate for the next period. (See Clause 22-19.)

(b) The fixed rate with carry forward is not used where:

(1) There is only short term or widely fluctuating Federal funding;

(2) There is likelihood of organizational change; or

(3) There is a fluctuating level of operation which would make the projection of costs unrealistic.

14.17.4 Limitations on Indirect Cost Rates.
INFORMATION:

(a)

(1) Some situations may make it prudent to provide a final indirect cost rate ceiling or cap in a contract. Examples of such circumstances are when the proposed contractor;

(A) Is a new or recently reorganized company, and there may be no past or recent record of incurred indirect costs;

(B) May have a recent record of a rapidly increasing indirect cost rate due to a declining volume of sales without a commensurate decline in indirect expenses;

(C) May be seeking to enhance its competitive position in a particular circumstance by basing its proposal on indirect costs rates lower than those that may reasonably be expected to occur during contract performance, thereby causing a cost overrun; or

(D) Will participate (share) in the costs of the contract by accepting indirect cost rates lower than the anticipated actual rates. In such cases, a negotiated indirect cost rate ceiling may be incorporated into the cost-sharing contracts for prospective application.

(2) In such cases, indirect cost rate caps covering the final indirect cost rates may be negotiated and specified in the contract. This ceiling (cap) may be negotiated as an individual rate for each indirect cost category (i.e., labor overhead, materials overhead, general and administrative expense, etc.) or may be negotiated as a composite of all indirect expenses (e.g., "all indirect expenses added together shall not exceed 134.5% of allowable direct costs"). In either case care should be taken to ensure the cap conforms to the contractor's indirect rate accounting practices.

(b) When ceiling (cap) provisions are utilized, the contract shall also provide that

(1) BPA will not be obligated to pay any additional amount should the final indirect cost rates exceed the negotiated ceiling (cap) rates unless required by law or regulation, and

(2) In the event the final indirect costs rates are less than the negotiated ceiling (cap) rates, BPA shall make payment based on the actual final indirect cost rate.

14.17.5 Quick-Close-Out of Cost-Reimbursement Contracts.
PROCEDURE:

(a) COs may negotiate settlement of indirect costs for a specific cost-reimbursement contract in advance of the determination of final indirect cost rates if--

(1) The contract is physically complete;
(2) The amount of unsettled indirect costs to be allocated to the contract is relatively insignificant; and
(3) Agreement can be reached on a reasonable estimate of allocable dollars.

(b) Use of the quick-close-out procedure provided for by Clause 22-5, Basis of Payment - Cost Reimbursement, shall be subject to agreement that the determination of indirect costs is final for the contract it covers and that no adjustment shall be made to other contracts for over- or under-recoveries of costs allocable to the contract covered by the agreement.

(c) Indirect cost rates used in the quick close-out of a contract shall not be considered a binding precedent when establishing the final indirect cost rates for other contracts.

14.18 HOMELAND SECURITY.
14.18.1 Definitions
"Critical Information" means any information which must be safeguarded from loss, misuse, compromise, unauthorized, access, or modification, because such actions may adversely affect the business, security or other interests of the government, or the privacy of individuals; or which may otherwise be used by BPA's competitors or adversaries (including, but not limited to, other utilities, contractors, foreign interests, or disgruntled employees) to harm or embarrass BPA, or to gain and unfair advantage. Examples of Critical Information include confidential legal strategies, employee personnel files, contract negotiations, pricing and business strategies, active investigations, critical infrastructure addresses, e-mail addresses, physical and personal system entry codes, badges, equipment (model numbers, name, quantity, software (vendor, product name), passwords, or data. Critical Information can exist in the form of printed documents, electronically stored information, telecommunications traffic, or the spoken work.

"Cyber Security" means those measures used to safeguard electronic systems capable of electronically creating, storing, viewing, using or transmitting data; to prevent unauthorized access to electronic systems; to safeguard electronic systems against espionage, sabotage, damage, and theft; and to reduce the exposure to threats which could result in a disruption or denial of service.

"Data," means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. Data are discreet elements of information processed in a computer system, printed on paper or other medium such as CD-ROM, DVD, or diskette, and the analysis, combination or association of such elements can impart both content and context. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing or management information.

"Export" means the transfer of anything to a "FOREIGN PERSON" by any means, anywhere, anytime, or the knowledge that what is being transferred to a "U.S. PERSON" will be further transferred to a "FOREIGN PERSON.

"Foreign Contractor" means a person, who does not live in the United States and is not a U.S. citizen, or an entity, residing in a foreign country that provides technical support and maintenance services for an entity in the United States.

"Foreign National" means any person who is not a citizen or permanent resident alien of the United States. A foreign national is considered to be from a Sensitive Country if he/she is a citizen residing in a country or is employed by the government of an institution of a country on the Sensitive Country List. A foreign national is subject to the "deemed export" rule except a foreign national who (1) is granted

permanent residence, as demonstrated by the issuance of a permanent resident visa (i.e., "Green Card"); or (2) is granted U.S. citizenship; or (3) is granted status as a "protected person" under 8 U.S.C. 1324b(a)(3).

“Information” is the meaning derived by a human being from associated data elements appearing in a certain order.

“Intangible Exports” means technical information transmitted through electronic media, such as telephone, facsimiles and electronic mail.

“Physical Security” means those measures used to safeguard personnel; to prevent unauthorized access to equipment, facilities, material, and documents; to safeguard them against espionage, sabotage, damage, and theft; and to reduce the exposure to threats, which could result in a disruption or denial of service.

“Security Incident” means intended or actual harm or injury to an employee, contractor or visitor, Government or personal property, or unauthorized access, use, sabotage, theft or vandalism of Government or personal property.

“Sensitive County List” means a country in which particular attention is given during the review and approval process for Foreign Visits & Assignments. Countries may be designated as sensitive for reasons of national security, nuclear nonproliferation, regional instability, threat to national economic security, or terrorism support.

“Terrorist Country” means a sponsor of international terrorism as designated by the U.S. Secretary of State. These countries presently include Iran, Iraq, Syria, Libya, Cuba, North Korea, and Sudan.

14.18.2 BPA Designation and Policy.
POLICY: It is BPA’s policy to protect the agency facilities and Critical Information (CI). See BPI 11.4.3

POLICY: The U.S. Department of Homeland Security designates BPA as part of the critical national infrastructure. Information concerning the physical and technical infrastructure of BPA’s existing and future power or transmission operations or information systems, which may be represented in data, drawings, notes, or oral presentations is deemed information critical to maintaining national security. This information shall not be exported tangibly or intangibly to countries on the U.S. DOE Sensitive Country List or to any country designated as a Terrorist Country by the U.S. Department of State. Any intended export of this information must have the prior written approval of BPA and be in accordance with all laws of the United States. Breach of this section shall be reported immediately to BPA Cyber Security at 503-230-3082 or at 503-230-4679.

14.18.3 Clause Usage Prescriptions.
PROCEDURE: COs shall include Clause 14-17 Homeland Security in solicitations and contracts when:

1) BPA is contracting for hardware, software or services;
2) A non-disclosure agreement has been included; or
3) Any other instance where the requisitioner or CO determines it is necessary to protect BPA’s interests.

14.19 BANKRUPTCY.

(a) ***POLICY:*** The contracting officer shall take prompt action to determine the potential impact of a contractor bankruptcy on BPA in order to protect the interests of BPA.

(b) ***PROCEDURE*:**

(1) When notified of bankruptcy proceedings, contracting officers shall, at a minimum—

(A) Furnish the notice of bankruptcy to legal counsel and other appropriate agency offices (*e.g.,* contracting, financial, property) and affected buying activities;

(B) Determine the amount of BPA's potential claim against the contractor (in assessing his impact, identify and review any contracts that have not been closed out, including those physically completed or terminated);
(C) Take actions necessary to protect BPA's financial interests and safeguard BPA property; and
(D) Furnish pertinent contract information to the legal counsel representing BPA.

(2) The contracting officer shall consult with legal counsel prior to taking any action regarding the contractor's bankruptcy proceedings.

14.19.1 Clause Usage Prescriptions.
PROCEDURE: COs shall include clause at 14-18, Bankruptcy, in all solicitations and contracts exceeding $100,000, except IGC's.

14.50 TEXT OF CLAUSES.
The following clauses are referred to in BPI Part 14:

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Clause 14-2 CONTRACT ADMINISTRATION REPRESENTATIVES 20
Clause 14-3 ORDER OF PRECEDENCE 21
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Clause 14-1 CONTRACTING OFFICER'S REPRESENTATIVES - CONSTRUCTION CONTRACTS (Sep 98) (BPI 14.3.2)

(a) The Field Inspector is an authorized representative of the Contracting Officer’s Technical Representative (COTR) for technical oversight of contract performance. This includes the functions of inspection and review of work performed.

(b) The Contracting Officer’s Technical Representative (COTR) is responsible for all technical oversight of the contract. The functions of the COTR include interpretation of specifications and drawings, and processing of payments.

(c) The Contracting Officer's Representative (COR) is the authorized representative of the Contracting Officer for administrative matters, including payment, updated delivery schedules, and changes.

(d) These representatives are authorized to act for the Contracting Officer in all matters pertaining to the contract, except: (1) contract modifications that change the contract price, technical requirements or time for performance, unless delegated field modification authority (see clause 24-25); (2) suspension or termination of the Contractor's right to proceed, either for default or for convenience of BPA; and (3) final decisions on any matters subject to appeal, as provided in the disputes clause. In addition, the COTR may not make final acceptance under the contract.

(End of clause)

Clause 14-2 CONTRACT ADMINISTRATION REPRESENTATIVES (Sep 98)(BPI 14.3.2)

(a) In the administration of this contract, the Contracting Officer may be represented by one or more of the following: Contracting Officer's Representative for administrative matters, and Contracting Officer's Technical Representative, Receiving Inspector, and/or Field Inspector for technical matters.

(b) These representatives are authorized to act on behalf of the Contracting Officer in all matters pertaining to the contract, except: (1) contract modifications that change the contract price, technical requirements or time for performance, unless delegated field modification authority (see clause 24-25); (2) suspension or termination of the Contractor's right to proceed, either for default or for convenience of BPA; and (3) final decisions on any matters subject to appeal, as provided in a disputes clause. In addition, Field Inspectors may not make final acceptance under the contract.

(End of clause)

Clause 14-3 ORDER OF PRECEDENCE (Jul 13)(BPI 14.4.1.1)

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order: (a) the Schedule (excluding the specifications or statement of work); (b) contract clauses; (c) the specifications or statement of work; and (d) other documents, exhibits, and attachments.

(End of Clause)

Clause 14-4 OTHER RIGHTS AT LAW (Jul 13)(BPI 14.4.2.1)

BPA, as an independent agency in the Department of Energy, reserves any other rights it may have at law, unless superseded specifically by this contract.

(End of Clause)

Clause 14-5 VARIATION IN QUANTITY - SUPPLY CONTRACTS (Aug 02) (BPI 14.6.1.1)

(a) A variation in the quantity of any contract item will not be accepted unless the variation has been caused by conditions of packing or allowances in manufacturing processes, and then no more than _____% more or less than the specified quantity. This percentage variation applies to each item separately, without regard to designated delivery location.

(b) BPA may retain excess quantities up to $100 in value without compensating the contractor for the increased quantity, and the contractor waives all rights, title or interest therein.

(End of clause)

Clause 14-6 VARIATION IN ESTIMATED QUANTITY- SERVICE AND CONSTRUCTION CONTRACTS. (Sep 98)(BPI 14.6.2.1)

If the quantity of a unit-priced item in this contract is an estimated quantity and the actual quantity of the item varies more than _____ (usually 10% for service contracts and 25% for construction contracts) from the estimated quantity, an equitable adjustment in the unit price of units performed outside of the established range shall be made at the request of either party, if the variation in quantity alters the cost of the performance of the work.

(End of Clause)

Clause 14-7 SUBCONTRACTS. (Sep 98) (BPI 14.9.1)

The Contractor shall not subcontract any work without prior approval of the Contracting Officer, except work specifically agreed upon at the time of award. BPA reserves the right to approve specific subcontractors for work considered to be particularly sensitive. Consent to subcontract any portion of the contract shall not relieve the contractor of any responsibility under the contract.

(End of Clause)

Alternate I (Sep 98)
(b)(1) If the subcontract is for the management or handling of hazardous or toxic wastes, before work may begin, BPA must receive:

(A) a copy of EPA Notification of Hazardous Waste Activity (EPA form 8700-12) or equivalent) and

(B) acknowledgment of the notification filing (EPA form 8700-12A or equivalent).

(2) If the subcontract involves management of PCBs, before work may begin, BPA must receive:

(A) a copy of EPA Notification of PCB Activity (EPA form 7710-53 or equivalent), and

(B) acknowledgment of the filing (a letter from EPA). The acknowledgment from EPA will include the EPA identification number assigned.

(End of Alternate I)

Clause 14-8 CHANGES - FIXED-PRICE. (Jul 13)(BPI 14.10.5.1.1)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract to any one or more of the following:
(1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for BPA in accordance with the drawings, designs, or specifications.
(2) Method of shipment or packing.
(3) Place of delivery or performance.
(4) Description of services to be performed.
(5) Time of performance (i.e., hours of the day, days of the week, etc.).
(6) BPA-furnished property.
(7) Place of inspection or acceptance.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order, but not later than final payment.

(d) Failure to agree to any adjustment shall be a dispute under a disputes clause if one is included in this contract. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(e) Constructive Changes. If the Contractor considers that a BPA action or inaction constitutes a change to the contract (constructive change), and the change is not identified as such in writing and signed by the CO, the Contractor shall promptly notify the CO in writing. No equitable adjustment will be made for costs incurred more than 20 days before the Contractor gives written notice of the constructive change.

(f) Notwithstanding other provisions herein, only the Contracting Officer, or persons specifically delegated authority to do so by the Contracting Officer, are authorized to orally modify or affect the terms of this contract. Contractor response to oral direction from any other source is at its own risk of liability.

(End of clause)

Clause 14-9 CHANGES - COST-REIMBURSEMENT. (Jul 13)(BPI 14.10.5.1.1)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract to any one or more of the following:

(1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for BPA in accordance with the drawings, designs, or specifications.
(2) Method of shipment or packing.
(3) Place of delivery or performance.
(4) Description of services to be performed.
(5) Time of performance (i.e., hours of the day, days of the week, etc.).
(6) BPA-furnished property.
(7) Place of inspection or acceptance.

(b) If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, or if it otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in (1) the estimated cost, delivery or completion schedule, or both; (2) the amount of any fixed fee; and (3) other affected terms and shall modify the contract accordingly.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order, but not later than final payment.

(d) Failure to agree to any adjustment shall be a dispute under a disputes clause, if one is included in this contract. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(e) Notwithstanding the terms and conditions of paragraphs (a) and (b) above, the estimated cost of this contract and, if this contract is incrementally funded, the funds allotted for the performance of this contract shall not be increased or considered to be increased except by specific written modification of the contract indicating the revised contract estimated cost and, if this contract is incrementally funded, the additional amount allotted to the contract. Until this modification is made, the Contractor shall not be obligated to continue performance or incur costs beyond the point established in the Contract Ceiling Limitation clause of this contract.

(f) Notwithstanding other provisions herein, only the Contracting Officer, or persons specifically delegated authority to do so by the Contracting Officer, are authorized to orally modify or affect the terms of this contract. Contractor response to oral direction from any other source, is at its own risk of liability.

(End of clause)

Clause 14-10 CHANGES - TIME AND MATERIALS. (Jul 13)(BPI 14.10.5.1.1)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract to any one or more of the following:

(1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for BPA in accordance with the drawings, designs, or specifications.
(2) Method of shipment or packing.
(3) Place of delivery or performance.
(4) Description of services to be performed.
(5) Time of performance (i.e., hours of the day, days of the week, etc.).
(6) BPA-furnished property.
(7) Place of inspection or acceptance.

(b) If any change causes an increase or decrease in any hourly rate, the ceiling price, or the time required for performance of any part of the work under this contract, whether or not changed by the order, the Contracting Officer shall make an equitable adjustment in the

(1) ceiling price;
(2) hourly rates;
(3) delivery schedule; and
(4) other affected terms, and shall modify the contract accordingly.

(c) The Contractor must assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order, but not later than final payment.

(d) Failure to agree to any adjustment shall be a dispute under a disputes clause, if one is included in this contract. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(e) Notwithstanding the terms and conditions of paragraphs (a) and (b) above, the estimated cost of this contract and, if this contract is incrementally funded, the funds allotted for the performance of this contract, shall not be increased or considered to be increased except by specific written modification of the contract indicating the revised contract estimated cost and, if this contract is incrementally funded, the additional amount allotted to the contract. Until this modification is made, the Contractor shall not be obligated to continue performance or incur costs beyond the point established in the Contract Ceiling Limitation clause of this contract.

(f) Notwithstanding other provisions herein, only the Contracting Officer, or persons specifically delegated authority to do so by the Contracting Officer, are authorized to orally modify or affect the terms of this contract. Contractor response to oral direction from any other source is at its own risk of liability.

(End of clause)

Clause 14-11 CHANGES AND CHANGED CONDITIONS - CONSTRUCTION CONTRACTS. (Jul 13)(BPI 14.10.5.1.1)

(a) The Contracting Officer may, in writing, order changes in the drawings and specifications within the general scope of the contract.

(b) The Contractor shall promptly notify the Contracting Officer, in writing, of subsurface or latent physical conditions differing materially from those indicated in this contract or unknown unusual physical conditions at the site before proceeding with the work.

(c) If changes under paragraph (a) or conditions under paragraph (b) increase or decrease the cost of, or time required for performing the work, the Contracting Officer shall make an equitable adjustment (see paragraph (d)) upon assertion of a claim by the Contractor before final payment under the contract.

(d) The Contracting Officer shall not make an equitable adjustment under paragraph (b) unless--
(1) The Contractor has submitted and the Contracting Officer has received the required written notice; or
(2) The Contracting Officer waives the requirement for the written notice.

(e) Failure to agree to any adjustment shall be a dispute under a disputes clause, if one is included in this contract.

(End of clause)

Clause 14-12 PRICING OF ADJUSTMENTS (Jul 13)(BPI 14.10.5.1.1)

When costs are a factor in any determination of a contract price adjustment pursuant to the Changes clause or any other modification in connection with this contract, such costs shall be in accordance with the contract cost principles and procedures in Part 13 of the Bonneville Purchasing Instructions which are in effect on the date of this contract.

(End of Clause)

Clause 14-13 MODIFICATION COST PROPOSAL - PRICE BREAKDOWN (Jul 13)(BPI 14.10.5.1.1)

(a) The contractor, in connection with any proposal it makes for a contract modification, shall furnish a price breakdown, itemized as required by the Contracting Officer. The breakdown shall be in enough detail to permit an analysis of all material, labor, equipment, subcontract, and overhead costs, as well as profit, and shall cover all work involved in the modification, whether such work was deleted, added or changed. Any amount claimed for subcontracts shall be supported by similar price breakdowns from those subcontractors.

(b) In addition, if the proposal includes a time extension, a justification thereof shall also be furnished. Notwithstanding any other provisions of this contract, it is mutually understood that the time extension for changes in the work will depend upon the extent, if any, by which the changes cause delay in the completion of the various elements of work. The contract completion dates will be extended only for those specific elements so delayed and the remaining contract completion dates for all other portions of the work will not be altered.

(c) The proposal, together with the price breakdown and time extension justification, shall be furnished by the date specified by the Contracting Officer.

(End of clause)

Clause 14-14 STOP WORK ORDER (Jul 13)(BPI 14.12.1)

(a) The Contracting Officer may order the Contractor to suspend all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of BPA.

(b) The contractor shall immediately comply with the Contracting Officer's order and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order.

(c) If a stop work order is issued for the convenience of BPA, the Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, if the order results in a change in the time required for, or the costs properly allocable to, the performance of any part of this contract.

(d) A claim under this clause shall not be allowed (1) for any cost incurred more than 20 days before the Contractor notified the Contracting Officer of the basis of the claim in writing, and (2) unless the claim stating the amount of time or money requested, is asserted in writing as soon as practicable after the termination of the delay or interruption, but not later than the day of final payment under the contract.

(End of clause)

Clause 14-15 Reserved.

Clause 14-16 REQUIREMENT FOR U.S. FLAG VESSELS (Jul 13)(BPI 14.15.1)

(a) The Contractor shall use a privately owned U.S. flag commercial vessel, to ship no less than 50 percent of the gross tonnage involved in this contract (computed separately for dry bulk carriers, dry cargo liners, and tankers) whenever shipping any equipment, materials, or commodities to the extent such vessels are available at rates that are fair and reasonable for United States flag commercial vessels. Privately owned U.S. flag commercial vessel means one of the following: a vessel (1) registered and operated under the laws of the United States, (2) used in commercial trade of the United States, (3) owned and operated by U.S. citizens, including a vessel under voyage or time charter to the Government, or (4) a Government-owned vessel under bareboat charter to, and operated by U.S. citizens.

(b)

(1) The Contractor shall submit one legible copy of a rated on-board ocean bill of lading for each shipment to both (i) the Contracting Officer and (ii) the Division of National Cargo, Office of Market Development, Maritime Administration, U.S. Department of Transportation, Washington, D.C. 20590. Subcontractor bills of lading shall be submitted through the Prime Contractor.

(2) The Contractor shall furnish these bill of lading copies (i) within 20 working days of the date of loading for shipments originating in the United States, or (ii) within 30 working days for shipments originating outside the United States. Each bill of lading copy shall contain the following information:

(A) Sponsoring U.S. Government agency.
(B) Name of vessel.
(C) Vessel flag of registry.
(D) Date of loading.
(E) Port of loading.
(F) Port of final discharge.
(G) Description of commodity.
(H) Gross weight in kilograms and cubic meters if available.
(I) Total ocean freight revenue in U.S. dollars.

(c) Guidance regarding fair and reasonable rates for privately owned U.S.-flag commercial vessels may be obtained from the Division of National Cargo, Office of Market Development, Maritime Administration, U.S. Department of Transportation, Washington, D.C. 20590, Phone: (202) 366-4610.

(d) In the event that the contractor is unable to obtain a U.S. Flag Vessel, it may request BPA to waive the requirements of this clause. Such request will be supported by documentation showing that no U.S. flag vessel was available, and that a timely attempt was made to obtain one. If the CO waives the applicable clause, the difference in cost between the U.S. Flag and Foreign Flag Vessel shipping costs will be added to or deducted from the contract by modification, as appropriate.

(e) Where a contract may involve shipment on U.S. Flag vessels, BPA may furnish information on the award to the Maritime Administration so that it can assist the Contractor in locating such vessels. However, Maritime's relationship to the Contractor is noncontractual.

(f) The requirement to use U.S. Flag vessels for shipment shall not apply to subcontracts for commercial items or components.

(End of clause)

Clause 14-17 HOMELAND SECURITY (Dec 12) (BPI 14.18.3)(BPI 17.4.1.1)

(a) If any portion of the Contractor's maintenance or support service is located in a foreign country, then the Contractor will disclose those foreign countries to BPA to determine if the foreign country is on the Sensitive Country List or is a Terrorist Country as determined by the United States Department of State. BPA will notify the Contractor in writing whether or not it can allow an intangible export of BPA's Critical Information or if a Deemed Export License is required.

(b) The Contractor shall notify the CO in writing in advance of any consultation with a foreign national or other third party that would expose them to BPA Critical Information. BPA will approve or reject consultation with the third party.

(c) Notification of Security Incident. The Contractor shall immediately notify BPA's Office of the Chief Information Officer (OCIO) Chief Information Security Officer (CISO) of any security incident and cooperate with BPA in investigating and resolving the security incident. In the event of a security incident, the Contractor shall notify the CISO by telephone at 503-230-5088 and ask for a Cyber Security Officer. BPA may also provide in writing to the Contractor alternate phone numbers for contacting Cyber Security Officers. A call back voice message may be left but not the details of the Security Incident.

(End of clause)

Clause 14-18 BANKRUPTCY (Oct 05) (BPI 14.19.1)

In the event the Contractor enters into proceedings relating to bankruptcy, whether voluntary or involuntary, the Contractor agrees to furnish written notification of the bankruptcy to the Contracting Officer responsible for administering the contract. This notification shall be furnished within five days of the initiation of the proceedings relating to bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of Government contract numbers and contracting officers for all Government contracts against final payment has not been made. This obligation remains in effect until final payment under this contract.

(End of Clause)

Clause 14-19 POST AWARD ORIENTATION (Sep 07)(BPI 14.5.3)

The successful offeror will be required to participate in a post award orientation as designated by the Contracting Officer.

(End of Clause)

PART 15 ENVIRONMENT AND SAFETY

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15.1 POLLUTION CONTROL AND CLEAN AIR & WATER.

(a) ***POLICY:*** BPA shall not contract with violators of the Clean Air & Water Act.

(b) ***PROCEDURE:*** The CO shall not contract with suppliers listed on EPA's list of violators of the Clean Air and Water Act requirements.

15.1.1 Clause Usage Prescriptions.

PROCEDURE: The CO shall include Clause 15-1 Clean Air and Water, in solicitations and contracts for supplies and construction expected to exceed $100,000. Clause 15-1 shall not be included in solicitations and contracts for commercial items and services.

15.2 SAFETY, HEALTH & PROPERTY PROTECTION.

POLICY: The contractor is responsible for safety, health and property protection. With regard to safety, BPA has adopted a safety policy requiring additional measures for working safely on and around transmission lines, substations, rights-of-way and other projects that may place workers in close proximity to energized transmission facilities and other potentially hazardous conditions. BPA safety policy and procedures are found in the Subpart and in BPA's Accident Prevention Manual. The CO shall include a safety and health clause in solicitations and contracts for constructionor when otherwise deemed advisable, regardless of the contract dollar amount.

15.2.1 Clause Usage Prescriptions.
PROCEDURE:

(a) The CO shall include Clause 15-2 Safety and Health – Non-Electrical Contractor(s) in all solicitations and contracts for non-electrical services or construction, deleting any text after paragraph (b) that clearly does not apply to the project, or inserting additional considerations if needed. The clause section entitled "Site Specific Safety Plan" must be included if there are recognized or significant job hazards. The CO shall insert project specific safety provisions for Overhead Line Construction, Fiber Optic Construction, and Substation Construction, as provided by the BPA Safety Office.

(b) The CO shall include a clause similar to 15-3 Property Protection, in solicitations and contracts for construction valued in excess of $50,000 or when otherwise deemed advisable. The CO may delete those portions which clearly do not apply to the project, and insert additional requirements if conditions warrant. Unless an environmental plan is already included in the Statement of Work, Alternate 1 shall be added if the work is known to involve the use of hazardous materials or will create hazardous wastes. The CO shall identify known activities involving the use, handling or transportation of such materials in the text of the clause.

(c) The CO shall include a clause similar to 15-5 Protection of Existing Vegetation, Structures and Improvements, in solicitations and contracts for construction, or dismantling, demolition or removal of improvements contracts if the contract amount is expected to be greater than $50,000 or when otherwise deemed advisable.

15.3 HAZARDOUS MATERIALS AND SAFETY DATA.
(a) ***POLICY:*** The contractor is responsible for assuring that hazardous materials safety data requirements are met in accordance with current laws and regulations as established by Federal, state and local authorities.

(b) ***INFORMATION:*** BPA shall require contractors and their subcontractors to submit hazardous materials data. Federal Standard No. 313C (Materials Safety Data, Transportation Data and Disposal Data for Hazardous Materials Furnished to Government Agencies) includes criteria for identification of hazardous materials. The standard also prescribes DOL Form OSHA-174 for use with BPA contracts.

15.3.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include clause 15-6, Hazardous Material Identification and Material Safety Data, in solicitations and contracts if the contract will involve exposure to hazardous materials in any manner (performance of work; use; handling; manufacturing; packaging' transportation; storage; inspection; and disposal).

15.4 SUSTAINABLE PRODUCTS AND SERVICES.
15.4.1 General
(a) ***POLICY:*** It is BPA policy to advance procurement activities that are consistent with BPA's implementation of Executive Order 13514. This includes the procurement of products and services which promote energy efficiency, water efficiency, environmental preference, are bio-based, non-ozone depleting, and contain recycled content, non-toxic, or less-toxic alternatives, where cost-effective and reasonably available to meet the functional requirements the program office.

(b) ***PROCEDURE:*** It is the responsibility of the requesting organization/requisitioner to specify purchase requirements which comply with the BPA Sustainability Plan, and to identify services and products that meet such standards where appropriate.

15.4.2 Ozone-Depleting Substances
(a) ***POLICY:*** It is the policy of the BPA to advance cost-effective programs to minimize the procurement of materials and substances that contribute to the depletion of stratospheric ozone. Non-Ozone Depleting Alternative Products are at http://www.epa.gov/ozone/strathome.html.

(b) ***PROCEDURE:*** The requesting organization/requisitioner shall identify non-ozone depleting substances/materials or refrigeration equipment and air conditioner equipment in their requirements package whenever possible.

(c) ***INFORMATION:*** The Clean Air Act (CAA) is the comprehensive federal law that regulates air emissions from stationary and mobile sources. For the purposes of this subpart, ozone-depleting and refrigeration substances are discussed in sections 608 and 609 of the CAA. For more information on Section 608 as it relates to refrigeration, see: http://www.epa.gov/ozone/title6/downloads/Section_608_FactSheet2010.pdf. For more information on Section 609 as it relates to motor vehicle air conditioning, see: http://www.epa.gov/ozone/title6/downloads/Section 609 FactSheet2010.pdf.

15.4.2.1 Clause Usage Prescriptions
***PROCEDURE*:**

(a) COs shall include Clause 15-7, Ozone-Depleting Substances, in solicitations and contracts for products and services which may include the use of substances or supplies that contain, or be manufactured with, ozone-depleting substances. COs shall not include Clause 15-7 in contracts performed outside the United States or its outlying areas. For commercial acquisitions, Clause 15-7 shall not be included in solicitations and contracts; the requirement is addressed in Clause 28-20.

(b) COs shall include Clause 15-8, Refrigeration Equipment, in solicitations and contracts for services which may include the maintenance, repair, or disposal of any equipment or appliance which use ozone-depleting substances as a refrigerant, such as air conditioners, including motor vehicles, refrigerators, chillers, or freezers. COs shall not include Clause 15-8 in contracts performed outside the United States or its outlying areas. For commercial acquisitions, Clause 15-8 shall not be included in solicitations and contracts; the requirement is addressed in Clause 28-20.

15.4.3 Energy and Water Efficiency
(a) ***INFORMATION:*** Energy Star is a product designation issued by the U.S. Environmental Protection Agency indicating that the product uses less energy, saves money and protects the environment. FEMP is the Department of Energy's Federal Energy Management Program, which facilitates the Federal Government's implementation of sound, cost-effective energy management and investment practices to enhance the nation's energy security and environmental stewardship. Products that are FEMP designated for energy efficiency and low standby power are in the upper 25 percent of energy efficiency in their class.

Information on Energy Star and FEMP is available at:

(1) ENERGY STAR® at http://www.energystar.gov/products; and
(2) FEMP at http://www1.eere.energy.gov/femp/procurement/eep_requirements.html

(b) ***POLICY*:** It is BPA policy to advance sustainable acquisition of supplies and services that promote energy and water efficiency, advance the use of renewable energy products, and help foster markets for emerging technologies when appropriate.

(c) ***PROCEDURE*:** When procuring energy-consuming products, services or construction that are listed in a product category covered under the Energy Star or the Federal Energy Management Program (FEMP), COs shall procure such products and services when cost-effective and reasonably available to meet the functional requirements of the program office.

15.4.3.1 Clause Usage Prescriptions

PROCEDURE: COs shall include Clause 15-9, Energy Efficiency in Energy Consuming Products, in solicitations and contracts when products listed under the Energy Star or the Federal Energy Management Program may be delivered, acquired for BPA use or for performing services at a BPA facility, specified in the design of a building or work, or incorporated during its construction, renovation, or maintenance. For commercial acquisitions, Clause 15-9 shall not be included in solicitations and contracts; the requirement is addressed in Clause 28-20.

15.4.4 Recovered Materials and Bio-Based Products

(a) ***INFORMATION:*** BPA's Environment, Fish and Wildlife office promulgates BPA policy related to recovered or recycled materials. Recovered materials are waste materials and byproducts that have been recovered or diverted from solid waste, but do not include materials and byproducts generated from, and commonly reused within, an original manufacturing process. Buying recycled-content products ensures that the materials collected in recycling programs will be used again in the manufacture of new products. Utilizing their Comprehensive Procurement Guideline (CPG) program, the EPA has designated certain products that are or can be made with recovered materials. Further information is available at: http://www.epa.gov/osw/conserve/tools/cpg/index.htm. A list of CPG designated suppliers is available at: http://www.epa.gov/osw/conserve/tools/cpg/database.htm.

(b) ***INFORMATION:*** Bio-based or bio-preferred products are commercial or industrial products (other than food or feed) that are composed in whole, or in significant part, of biological products, renewable agricultural materials (including plant, animal, and marine materials), or forestry materials as set forth in the 2002 Farm Bill, as amended. Further information is available at: http://www.usda.gov/biopreferred.

(c) ***POLICY*****:** It is BPA policy to advance the acquisition of products containing recovered materials and bio-based products in service and construction contracts.

15.4.4.1 Clause Usage Prescriptions.

PROCEDURE:

(a) COs shall include Clause 15-10 Recovered Materials in solicitations and contracts for service or construction when the procurement could include products manufactured with recovered materials. For commercial acquisitions, Clause 15-10 shall not be included in solicitations and contracts; the requirement is addressed in Clause 28-20.

(b) COs shall include Clause 15-11 Bio-Based Products in solicitations and contracts for service or construction when the procurement could include products identified as bio-based pursuant to the USDA. For commercial acquisitions, Clause 15-11 shall not be included in solicitations and contracts; the requirement is addressed in Clause 28-20.

15.50 TEXT OF CLAUSES.

The following clauses are referred to in BPI Part 15:

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Clause 15-1 CLEAN AIR AND WATER 5
Clause 15-2 SAFETY AND HEALTH – Non-electrical Contractor(s) 5
Clause 15-3 PROPERTY PROTECTION 10
Clause 15-4 RESERVED. 11
Clause 15-5 PROTECTION OF EXISTING VEGETATION, STRUCTURES, AND IMPROVEMENTS 12
Clause 15-6 HAZARDOUS MATERIAL IDENTIFICATION AND MATERIAL SAFETY DATA 12
Clause 15-7 OZONE-DEPLETING SUBSTANCES 12
Clause 15-8 REFRIGERATION EQUIPMENT 13
Clause 15-9 ENERGY EFFICIENCY IN ENERGY CONSUMING PRODUCTS 13
Clause 15-10 RECOVERED MATERIALS 14
Clause 15-11 BIO-BASED PRODUCTS 14

Clause 15-1 CLEAN AIR AND WATER (Jul 13)(BPI 15.1.1)

Facilities listed on the Environmental Protection Agency List of Violating Facilities shall not be used in the performance of this contract. The contractor agrees to meet Clean Air and Water standards as identified in 42 U.S.C. 7401 et seq., Executive Order 11738, and any implementation plan described in 42 U.S.C. 1342 as well as local government with pretreatment regulations (33 U.S.C. 1317). The contractor shall comply with all requirements of the Clean Air Act (42 U.S.C. 7414) and the Clean Water Act (33 U.S.C. 1318) relating to inspection, monitoring, entry, reports and information, and all regulations and guidelines.

(End of clause)

Clause 15-2 SAFETY AND HEALTH – Non-electrical Contractor(s) (Sep 09)(BPI 15.2.1)

(a) General.

(1) The Contractor shall assure that no person employed on this contract works in surroundings or under conditions that are unsanitary, hazardous, or dangerous to their health or safety. In fulfilling these requirements, the Contractor shall comply with:

(A) Department of Labor Safety and Health Standards for Construction under Section 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 3701 et seq.).

(B) Occupational Safety and Health Act of 1970, (Public Law 91-598) and applicable rules and regulations as may have been delegated to the States.

(C) All Federal and state safety and health rules and regulations applicable to the contract work, as supplemented by BPA safety and health requirements stated below or elsewhere in the contract.

(2) If there are conflicts between any of the requirements referenced in this contract, the more stringent requirement will prevail.

(3) If the Contractor fails or refuses to promptly comply with any safety or health requirement, the Contracting Officer's Technical Representative (COTR) may notify the Contractor of any noncompliance and the Contractor shall take immediate corrective action. Such notice, whether oral or written, when served on the Contractor or any of its employees at the site of the work shall be deemed sufficient. If the Contractor fails or refuses to promptly correct the condition, the COTR may stop all or any portion of the work. When satisfactory corrective action has been taken, the contractor shall request permission to resume work from the COTR. When all work on a contract has been suspended for a Safety and Health violation, accident, or incident by the Contracting Officer (CO), the contractor shall meet with representatives of BPA's Contracting Office, and the BPA Safety Office to present a written statement outlining specific changes in work procedures that the contractor will make in order for work to safely resume. BPA must be satisfied that the contractor is capable of completing the contract in a safe manner before allowing work to resume. No time extension or

additional costs, resulting from the directive to stop work shall be allowed. Failure of the COTR to provide notice of noncompliance or to stop work shall not relieve the Contractor of its responsibility for the safe performance of the work.

(4) The Contractor shall maintain an accurate record of, and shall immediately report to the COTR in the manner prescribed by the latter, all cases of death, occupational diseases, and injury arising from, or incident to, performance of work under this contract. The record and report shall include a description of the preventative measures to be taken to avoid recurrence, any restitution or settlement made, or the status thereof. The contractor shall complete and file with the COTR, BPA form 6410.15e (Contractor's Report of Personal Injury, Illness, or Property Damage Accident) within five (5) working days of such an occurrence.

(5) In case of an injury, the Contractor shall have 30 days to make full restitution or settlement. If the Contractor fails to make full restitution or settlement within 30 days, BPA may:

(A) Make, or cause to be made, the required remedial action or cash settlement to the person or persons who have been injured, and

(B) Charge to the Contractor's account an equitable amount, not to exceed $2,500, for any injury claim. More than one such payment, and charge, can be assessed if more than one injury has occurred.

(6) The Contractor bears sole responsibility for ensuring that all personnel engaged in work related to the contract possess the necessary knowledge and skills to perform their work safely and to otherwise function in compliance with the foregoing criteria. (See also the Material and Workmanship clause)

(7) The Contractor shall hold BPA harmless from any and all suits, actions, and claims for injuries to or death of persons arising from any act or omission of the Contractor, its subcontractors, or any employee of the Contractor or subcontractors, in any way related to the work or operations under this contract.

(8) The Contractor shall indemnify and hold harmless the property owners or parties lawfully in possession against all claims or liabilities asserted by third parties, including all governmental agencies, resulting directly or indirectly from the Contractor's wrongful or negligent acts or omissions.

(9) Nothing stated herein shall be construed to be a limitation on the Contractor's liability. The rights and remedies of BPA provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

(b) Personal Protective Equipment. The Contractor shall furnish non-conductive hard hats and all other required safety and personal protective equipment, except that which has been specified to be furnished by BPA. All persons on all construction projects shall wear non- conductive hard hats meeting the requirements of OSHA/ANSI. Contract employees shall not wear yellow non- conductive hard hats. (A yellow hat signifies a qualified BPA electrical worker.) Only a BPA approved safety watcher may wear orange non-conductive hard hats.

(c) Energized Facilities.

(1) Whenever a worker enters energized substation yards or communication equipment sites, or whenever work is otherwise in proximity to BPA's normally-energized transmission facilities, the Contractor shall provide for the safety of the workers and shall at all times take necessary precautions to protect BPA's facilities from accidental contact that could cause an outage, or damage the facility. At no time will any contractor employee or equipment come closer to energized lines or equipment than the Minimum Approach Distances (MAD) in Table 2.

(2) The Contractor shall, as directed by the COTR or BPA's Qualified Electrical Employee, erect, maintain, and remove such safety fences as are required to prevent accidental contact between BPA's normally energized facilities and the Contractor's equipment or workers. BPA will normally furnish the safety fences required in its energized substation yards or communication equipment sites. The safety fences shall not be removed without consent of the COTR or BPA's Qualified Electrical Employee. Safety fences furnished by BPA remain the property of BPA. If 'Safety Fence' is not specified separately in the Schedule of Prices as a specially priced item, its cost shall be considered included in the contract price(s) for the other item(s) listed in the Schedule. If separately priced, the estimated units (linear meters) of safety fence and the price for same are set forth in the

Schedule of Prices. The "Variation in Quantity" clause, whether or not included herein, is inapplicable to this safety fence requirement. The Contractor will be compensated at the same unit price for the actual lineal meters of safety fence installed.

(3) Contractor employees shall not cross red and white or yellow and black ropes. These are used by BPA to designate electrical hazards.

(4) Contractors using station service to power portable electric tools in energized yards must use grounding boxes (BPA "eartha-kits") to minimize step and touch hazards. Station service may not be used for temporary power off the ground mat. As an alternative, contractors may use generators for portable power.

(5) Conductive Devices

(A) Portable metal ladders are not permitted in energized substations.

(B) Conductive objects such as metal tapes, surveyor chains, fish tapes, and center line may be used in energized yards only when specifically approved by the BPA Safety Watcher and restrained by adequate methods, to prevent electrical contact in the event of slippage or breakage at any point.

(6) All contractor employees entering BPA substations must obtain Contractor Electrical Worker or Contractor Non-Electrical Worker permits (as applicable), or be escorted by a qualified BPA employee at all times.

(d) Flammable Liquids.

(1) Flammable liquids within 21.5 meters (70 feet) of conductors energized at voltages of 345kv and higher shall not be transferred from one metal container to another unless the two have been electrically bonded together to eliminate arcing. Plastic or any other non-conducting portable containers shall not be used, except those with a capacity of one gallon or less that are UL or FM approved.

(2) Fuel storage shall not take place under or adjacent to energized lines or equipment.

(e) HAZCOM.

(1) The Contractor shall supply employees with effective information and training regarding any hazardous chemicals used at the work site.

(2) The contractor shall maintain any required Material Safety Data Sheets (MSDS) at the work location and available to employees

TABLE 1

Minimum Approach Distances (MAD) For Non-Electrical Workers and Equipment	
Nominal Voltage Phase to Phase	MAD (in feet) (Phase to ground)
Up to 345 kV	15 ft.
500 kV*	20 ft.
400 kV DC + 500 kV DC +*	20 ft.
Fiber Optics (OPGW)	10 ft.
Insulated Overhead Ground Wires	10 ft.

* Note-Lines nominally designated as 500 kV lines may be operated up to 550 kV operating voltage, which is therefore used to calculate the MAD for 500 kV nominal voltage.

(f) Site Specific Safety Plan.

(1) The Contractor shall prepare, implement, and enforce a site specific safety plan for each contract or release.

(2) Prior to the start of any on-site work for each contract or release, the Contractor shall:

(A) Provide a site specific safety plan to identify and mitigate any recognized hazards or conditions. Site and adjacent conditions shall be considered. All significant hazards shall be identified. Unusual or unique hazards or conditions specific to the contract or release, known by BPA, will be identified in the technical specification.

(B) Submit to BPA a copy of the site specific safety plan at least 10 days prior to start of on-site work. If the BPA Safety Office determines the site specific safety plan to be insufficient, they may stop the Contractor's right to start with any or all on site work.

(3) The contractor shall ensure that their subcontractors, suppliers, and support personnel follow all safety and health provisions and that all employees working on the project are knowledgeable of the provisions of the plan.

(4) The contractor shall conduct and document job briefings each morning with safety as an integral part of the briefing. Provide copies of any other safety meeting notes to the COTR. The notes will at a minimum show the date, time, topics discussed, and attendees of each meeting.

(g) Helicopter.

(1) Helicopter(s) can only be used for the following: pulling sockline, moving personnel from and to a safe ground location near the work site, moving equipment and material to the work site.

(2) When aircraft are to be used for performance of work under this contract, they must be certified under the applicable Federal Aviation Regulation (FAR) for the type of work being performed, and comply with all applicable regulations. No aircraft will be operated as a public aircraft at anytime while working on a BPA contract. All aircraft operators and pilots must be approved by BPA's Aircraft Services prior to performance of any work on BPA's power system or property.

(3) All helicopter pilots must meet the following minimum qualifications: 1) Possess a current FAA Rotocraft-Helicopter Pilot's Certificate with Commercial Privileges; 2) Possess a current FAA Class II Medical Certificate; 3) Have a minimum of 3,000 hours pilot time in helicopters with 500 hours in the make, model and series being flown on this project; 4) Have 500 hours mountain flying experience and a minimum of 100 hours pilot time in support of electrical utility activities or demonstrate proficiency to a BPA check airman for the type of mission being contracted; and 5) Must have attended a formal pilot training program, i.e., factory school, Flight Safety, etc., for the model of helicopter being contracted. If external load work is required, recent experience and FAR Part 133 qualification is required.

(4) Prior to operation of any aircraft, the Contractor must submit, to the Contracting Officer, the operator and pilot's minimum qualifications on "Aircraft Operator Questionnaire" and "Contractor Pilot History" forms. (Forms will be provided by BPA.)

(5) During the performance of helicopter work, the contractor shall submit a "Federal Aviation Interactive Reporting Systems (FAIRS) Aircraft Usage Report quarterly. (Form to be provided by BPA.)

(6) A flight plan must be filed with BPA's Dittmer Control Center each day prior to operating a helicopter at or adjacent to any BPA overhead line or substation.

(h) Ground Mat.

(1) Employees shall not "come between" cut sections of substation ground grids. Separated sections of the mat shall only be connected after first being jumpered using hot methods by qualified electrical workers under the supervision of the COTR.

(2) Do not perform work on ground mat conductors with lightning in the area.

(3) For employee protection, the local substation operator shall be notified whenever any work is being performed on the ground grid.

(i) Grounding Equipment. Manlifts, cranes, booms, and any other overhead lift equipment working in proximity to energized lines or equipment shall be grounded with 2/0 AWG copper ground cables. Multiple (parallel) ground leads may be required at some locations on the BPA power system when the anticipated fault current exceeds the capacity of a single 2/0 copper ground. These locations (if applicable) will be provided by BPA in the contract technical specifications.

(j) Trenching and Excavation.

(1) Before any trenching or excavation work commences, the contractor must submit to BPA for review, an excavation site safety plan for the specific excavation work proposed.
(2) This plan must conform to all applicable state and federal trenching, shoring and excavation safety standards.
(3) The contractor shall be responsible for obtaining all necessary locates before any work commences.

(k) Welding in Substations.

(1) Welding ground leads must be placed on the equipment being welded to assure a solid return path to the welding machine. Do not use ground mat risers for welding ground return paths to avoid causing stray currents entering the ground mat.
(2) Welders and helpers shall not “come between” welding current paths to avoid becoming part of the welding circuit.

(l) Safety Watchers.
(1) The Contractor shall take adequate safety measures to protect its employees and others from induced voltages as well as direct contact. The Contractor shall provide qualified safety watchers for the protection of workers and BPA facilities for the phases of the work where required by these specifications, law or regulation, or where it considers them to be necessary. A safety watcher’s main responsibility is to limit the movement of personnel or equipment to prevent contact with energized overhead or underground electrical facilities. Safety watchers shall take a suitable location and give undivided attention to ensure that no action on the part of the workers being watched can result in violation of the minimum approach distances set forth below in Table 2. There must be a definite understanding between the safety watcher and the persons being watched as to when the watching begins and ends. Safety watchers, who must leave their assigned jobs, shall first make sure that all workers are in the clear and remain in the clear until the safety watcher returns or is replaced. Safety watchers have the authority to halt the work operation whenever any unsafe act or condition is imminent. The safety watcher shall wear a red or orange vest or hard hat (as designated by the COTR) at all times.
(A) Safety watchers are required under any of the following conditions:
(i) Whenever inadvertent movement by a worker could result in violating the Minimum Approach Distance as specified in Table 2.
(ii) When operating or moving motor-driven equipment in the vicinity of high-voltage circuits and the possibility of violating the MAD in Table 2 exists.
(iii) Whenever the contractor otherwise determines a safety watcher is necessary.
(2) All safety watchers shall be qualified electrical workers, having satisfactory experience with energized high-voltage facilities of the type located in proximity to the employees they are assigned to watch. Additionally, safety watchers must pass a test administered by BPA and participate in an interview prior to performing any safety watcher duties.
(3) A list of currently qualified Contractor Substation Safety Watchers may be obtained from the B.P.A. Contracting Officer (C.O.).
(4) If "Safety Watcher" is not specified separately in the Schedule of Prices, the costs therefore shall be considered included in the contract price specified for the contract item(s) listed. If separately priced as a separate unit-priced item, the estimated hours of safety watcher and the price for same are set forth in the schedule of prices. The "Variation in Estimated Quantity " clause, whether or not included herein, is inapplicable to this safety watcher requirement. The Contractor will be compensated at the specified rate for the actual hours of safety watcher hours performed.

(m) Fall Protection.
(1) Contractors performing work on structures over four feet above a lower level shall use approved fall protection.
(2) Contractors working in aerial manlifts shall use approved fall protection.
(3) Contractors performing work at a height of ten feet (10’) or greater shall have an approved, written, site specific fall protection work plan in place prior to the commencement of work.

(4) The contractor shall insure that portable ladders are inspected and contain no defects, be adequately secured, extend at least three feet above any upper landing surface, and shall not be loaded past their manufacturer's rated load capacity.

(n) Confined Spaces.
(1) The contractor shall identify any needed or required employee entry into a confined space as defined by federal OSHA standard 1910.146 (b) and/or any applicable state standard or regulation.
(2) The contractor shall identify any permit required confined space and implement a confined space entry program as required by OSHA 1910.146 and/or any applicable state standard or regulation.
(3) The contractor shall monitor for hazardous atmosphere before and during any employee entry into an identified or suspected confined space.

(o) Lockout/Tagout (LOTO).
(1) The contractor shall insure that no employees are exposed to injury from the unexpected startup or release of stored energy systems.
(2) Contractors performing work on machinery or equipment where such hazards may exist shall have a documented LOTO training and work program in place before performing such work. This program shall conform to all the requirements of federal OSHA 1910.147 and any other applicable federal or state standards and regulations.
(3) The contractor shall supply all required locks, tags, and devices required for locking out and tagging the machinery or equipment to be worked on.

(End of clause)

Clause 15-3 PROPERTY PROTECTION (Sep 98)(BPI 15.2.1)

(a) The Contractor shall construct and maintain such temporary fences, gates and other facilities as shall be necessary for preservation of crops, control of livestock, and protection of property. Before cutting a fence, the Contractor shall take necessary precautions to prevent the straying of livestock and shall prevent the loss of tension in or damage to adjacent portions of the fence. The Contractor shall immediately replace all fencing and gates that it cuts, removes, damages, or destroys with new materials to the original standard, with the exception that undamaged gates may be reused.

(b) The Contractor shall comply with the request of the property owner relative to leaving gates open or closed.

(c) The Contractor shall use all necessary precautions to avoid the destruction of surveying markers such as section corners, witness trees, property corners, mining claim markers, bench markers, triangulation stations, and the like. If any such marker must be destroyed, the Contractor shall first notify the agency responsible for the marker, as well as the CSR, and assume all responsibility for replacing markers.

(d) The Contractor shall use care to prevent unnecessary damage caused by performance of its work to property in or near the work area. Unnecessary damage is that which can be avoided through efficient and careful performance of the work in a careful manner, taking into account the land rights which have been secured. If the Contractor damages any property, the contractor shall at once notify the owner or custodian and shall make or arrange to make prompt and full restitution.

(e) Maps and specifications provided by BPA may not give the location of all water supply, drainage, irrigation, and other underground facilities. Prior to entering a tract of land for contract purposes, the Contractor shall ascertain from the property owner or other reasonably available source the location of any irrigation system, domestic water system, source of water, and drainage system existing on the property, whether serving that property or other property. The Contractor shall avoid damaging or obstructing these facilities or polluting water supplies.

(f) The Contractor shall hold BPA harmless from any and all suits, actions, and claims for damages, including environmental impairment, to property arising from any act or omission of the contractor, its subcontractors, or any employee of the Contractor or subcontractors, in any way related to the work or operations under this contract.

(g) The Contractor shall indemnify and hold harmless the property owners or parties lawfully in possession against all claims or liabilities asserted by third parties, including all governmental agencies, resulting directly or indirectly from the Contractor's wrongful or negligent acts or omissions.

(End of Clause)

Alternate I (Sep 98)

(h) The management and disposal of hazardous wastes and materials exposes the contractor and BPA to short- and long-term liabilities. In order to reduce these potential liabilities it is critical that the contractor be fully aware of the hazards and regulatory requirements associated with the hazardous materials involved in this project. Only qualified personnel shall be used in their handling and transportation.

(i) Before commencing work, the Contractor shall:

(1) Perform an environmental assessment of the work required under the contract identifying tasks which involve the use, handling or transportation of hazardous materials or wastes. The following items of work are known to involve such substances:

(A) _____,
(B) _____, etc.(CO to list)

(2) Submit an environmental plan to the CO identifying and dealing with each specific task involving the wastes. The plan must be specific enough to demonstrate a thorough understanding of the environmental risks and the appropriate methodology for dealing with them. The plan shall also list the required permits and reference the relevant regulations which govern the activities involved in dealing with the materials or wastes.

(3) Meet with representatives of the Contracting Officer during the preconstruction conference to discuss and to develop a mutual understanding on implementation of the plan.

(4) The CO, or her or his representatives may require other tasks to be added to the plan. If planned methodologies for dealing with the risks are deemed insufficient, the CO, or a designated representative, may require revision. Work involving hazardous materials or wastes shall not commence until adequate plans have been submitted and reviewed. BPA's review of the Contractor's plan shall in no way relieve the Contractor of its liability for environmental law and regulatory compliance.

(End of Alternate I)

Clause 15-4 RESERVED.

Clause 15-5 PROTECTION OF EXISTING VEGETATION, STRUCTURES, AND IMPROVEMENTS (Sep 98)(BPI 15.2.1)

(a) The Contractor shall preserve and protect all structures, equipment, utilities, other improvements, and vegetation (such as trees, shrubs, and grass) on or adjacent to the work site, which are not to be removed and which do not unreasonably interfere with the work required under this contract. The Contractor shall only remove trees when specifically authorized to do so, and shall avoid damaging vegetation that will remain in place. If any limbs or branches of trees are broken during contract performance, or by the careless operation of equipment, or by workers, the Contractor shall trim those limbs or branches with a clean cut and paint the cut with a tree-pruning compound as directed by the CO's representative.

(b) If the Contractor fails or refuses to repair the damage promptly, the Contracting Officer may have the necessary work performed and charge the cost to the Contractor.

(End of clause)

Clause 15-6 HAZARDOUS MATERIAL IDENTIFICATION AND MATERIAL SAFETY DATA (Sep 98)(BPI 15.3.1)

(a) The Contractor agrees to submit a Material Safety Data Sheet (Department of Labor Form OSHA-20), as prescribed in Federal Standard No. 313C, for all hazardous material 5 days before delivery of the material whether or not it is listed in Appendix A of the Standard. This obligation applies to all materials delivered under this contract which will involve exposure to hazardous materials or items containing these materials.

(b) "Hazardous material," as used in this clause, is as defined in Federal Standard, No. 313C, in effect on the date of this contract.

(c) Neither the requirements of this clause nor any act or failure to act by BPA shall relieve the Contractor of any responsibility or liability for the safety of BPA, Contractor, or subcontractor personnel or property.

(d) The Contractor shall comply with applicable Federal, state, and local laws, codes, ordinances, and with regulations (including the obtaining of licenses and permits) in connection with hazardous material.

(e) The Contractor shall insert this clause, including this paragraph (e), with appropriate changes in the designation of the parties, in subcontracts at any tier (including purchase orders) under this contract involving hazardous material.

(End of Clause)

Clause 15-7 OZONE-DEPLETING SUBSTANCES (Jul 13)(BPI 15.4.2.1)

(a) In the performance of this contract, the Contractor shall advance the use of non-ozone depleting products that are Environmental Protection Agency (EPA)-designated items unless—

(1) The product cannot be acquired—

(A) Competitively within a time frame providing for compliance with the contract performance schedule;

(B) Meeting contract performance requirements; or

(C) At a reasonable price.

(b) "Ozone-depleting substance," as used in this clause, means any substance the Environmental Protection Agency designates in 40 CFR Part 82 as—

(1) Class I, including, but not limited to, chlorofluorocarbons, halons, carbon tetrachloride, and methyl chloroform; or

(2) Class II, including, but not limited to, hydrochlorofluorocarbons.

(c) The Contractor shall label products which contain, or are manufactured with, ozone-depleting substances in the manner and to the extent required by 42 U.S.C. § 7671j (b), (c), and (d) and 40 CFR Part 82, Subpart E, as follows:

Warning

Contains (or manufactured with, if applicable) *_____, a substance(s) which harm(s) public health and environment by destroying ozone in the upper atmosphere.

The Contractor shall insert the name of the substance(s).

(End of clause)

Clause 15-8 REFRIGERATION EQUIPMENT (Jul 13)(BPI 15.4.2.1)

The Contractor should make every effort to comply with the applicable requirements of Sections 608 and 609 of the Clean Air Act (42 U.S.C. 7671g and 7671h) as each or both apply to this contract. For more information on Section 608 (general refrigeration), see: http://www.epa.gov/ozone/title6/downloads/Section_608_FactSheet2010.pdf. For more information on Section 609 (motor vehicle air conditioning), see: http://www.epa.gov/ozone/title6/downloads/Section_609_FactSheet2010.pdf.

(End of clause)

Clause 15-9 ENERGY EFFICIENCY IN ENERGY CONSUMING PRODUCTS (Jul 13)(BPI 15.4.3.1)

(a) "Energy-Efficient Product" means a product that meets Department of Energy and Environmental Protection Agency criteria for use of the Energy Star trademark label; or is in the upper 25 percent of efficiency for all similar products as designated by the Department of Energy's Federal Energy Management Program.

(b) Unless otherwise approved in writing by the CO, the Contractor and its subcontractors shall make every effort to ensure that energy-consuming products are Energy-Efficient Products at the time of contract award, for products that are—

(1) Delivered; or acquired by the Contractor for BPA use or for performing services at a BPA facility; or

(2) Specified in the design of a building or work, or incorporated during its construction, renovation, or maintenance.

(c) Information about these products is available for—

(1) ENERGY STAR® at http://www.energystar.gov/products; and

(2) FEMP at http://www1.eere.energy.gov/femp/procurement/eep_requirements.html.

(End of clause)

Clause 15-10 RECOVERED MATERIALS (Jul 13)(BPI 15.4.4.1)

(a) In the performance of this contract, the Contractor shall advance the use of products containing recovered materials as designated by the EPA's Comprehensive Procurement Guideline (CPG) program unless the product cannot be acquired—

(1) Competitively within a timeframe providing for compliance with the contract performance schedule;
(2) Meeting contract performance requirements; or
(3) At a reasonable price.

(b) Information about this requirement is available at EPA's Comprehensive Procurement Guidelines web site, http://www.epa.gov/osw/conserve/tools/cpg/database.htm. The list of EPA designated items is available at http://www.epa.gov/osw/conserve/tools/cpg/index.htm.

(End of clause)

Clause 15-11 BIO-BASED PRODUCTS (Jul 13)(BPI 15.4.4.1)

(a) In the performance of this contract, the Contractor shall advance the use of bio-based products that are United States Department of Agriculture (USDA)-designated items unless—

(1) The product cannot be acquired—
(A) Competitively within a time frame providing for compliance with the contract performance schedule;
(B) Meeting contract performance requirements; or
(C) At a reasonable price.

(b) Information about this requirement and these products is available at www.usda.gov/biopreferred.

(End of clause)

PART 16 BONDS AND INSURANCE

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16.1 BONDS.

16.1.1 Performance and Payment Bonds for Construction Contracts.

16.1.1.1 General.

POLICY: BPA requires performance and payment bonds for construction contracts exceeding $150,000. The requirement to furnish performance and payment bonds may be waived by the CO, if a risk assessment, conducted by the CO, justifies such waiver. Waiver of performance and payments bonds requires considerable thought on the part of the CO as the protective elements of the bonds are important to effective government contracting. If the CO determines that performance and payment bonds are required, the contractor shall furnish all bonds, including any necessary certificate of insurance agreements, before receiving a notice to proceed with the work or being allowed to start work. The CO's risk assessment outlining the basis for waiver of payment and/or performance bonds shall be inserted in the official contract file.

16.1.1.2 Amount Required.

POLICY:

(a) Performance bonds.
(1) The penal amount of performance bonds should generally be 100 percent of the original contract price.
(2) BPA may require additional performance bond protection when the contract price is increased by a substantial amount. The increase in protection shall generally equal 100 percent of the increase in contract price. BPA may secure additional protection by directing the contractor to increase the penal amount of the existing bond or to obtain an additional bond.

(b) Payment bonds.

(1) The penal amount of payment bonds should generally be related to the total estimated amounts of subcontractors' or suppliers' contracts, and the amounts of the bonds established as shown in Clause 16-1, Performance and Payment Bonds. If the amount of the subcontracts and/or suppliers' contracts are not known, the percentages shown in Clause 16-1 should be applied to the prime contract price.

(2) If the total subcontractor and supplier contracts (or the prime contract price) is $5,000,000 or less, BPA may require additional protection if the price is increased. The penal amount of the total protection as revised shall meet the requirement of subparagraph (1) above.

(c) When determining the penal sum of bonds for indefinite quantity contracts, the CO shall consider the contract price to be the price payable for the specified minimum quantity. When the minimum quantity is exceeded, see subparagraphs (a)(2) and (b)(2) above.

16.1.1.3 Clause Usage Prescriptions.

PROCEDURE: The CO may include a clause similar to Clause 16-1, Performance and Payment Bonds, in solicitations and contracts for construction which exceed $150,000, and in contracts below that amount when the CO determines that bonds are required. The CO may vary the percentage in the clause as needed.

16.1.2 Performance and Payment Bonds Other Than Construction Contracts.

16.1.2.1 General.

POLICY: The CO may use, but not routinely require performance and/or payment bonds for other than construction contracts. A Performance bond may be required when it is necessary to provide assurance that the work will be completed. A payment bond in a penal amount sufficient to protect the interest of subcontractors or suppliers may be required by the CO (See 16.1.1.2). If so, the contractor must furnish any required bonds before receiving a notice to proceed with the work. When a contract price is increased, BPA may require additional bond protection in an amount adequate to protect subcontractors or suppliers.

16.1.2.2 Clause Usage Prescriptions.

PROCEDURE: The CO may include a clause similar to Clause 16-1, Performance and Payment Bonds, in non-construction solicitations and contracts when necessary to provide assurance that the work will be completed. The 100% in the clause may be reduced at the CO's discretion.

16.1.3 Administration.

16.1.3.1 Processing Performance and Payment Bonds.

PROCEDURE:

(a) The SF 25, Performance Bond, shall be used, when a performance bond is required. The SF 25A, Payment Bond, shall be used when a payment bond is required. Bond forms shall be used as indicated in the instruction portion of each form.

(b) The CO shall notify the contractor at the time of award of the obligation to furnish bonds within 10 days of the receipt of the bond forms. The CO shall prepare the bond forms (SF 25 and SF 25A) in quadruplicate, typing in the Contractor's name, type of organization, state of incorporation, the penal sum of the bond, contract date and contract number. The CO shall retain one copy in the contract file and send the original and two copies to the contractor. The contractor should be requested to sign and return the original and one copy. The documents require the signature of the surety and a power of attorney.

(c) On occasion, contractors may make a written request for the return of their performance bonds after contract completion. Bonds are normally not returned to the contractor, because they expire when the contract is completed. Contract completion, for purposes of the performance bond, includes the life of any guarantee required by the contract. However, where the bond is supported by a negotiable instrument rather than by surety, the supporting instrument shall be returned (or the amount reduced) upon completion of the contract. The CO may reduce or eliminate the amount of bond coverage required

during warranty periods, or when contract performance is substantially complete, if it would not adversely impact the subcontractors, suppliers, or BPA.

16.1.3.2 Additional Bond Coverage.
PROCEDURE: When additional bond coverage is required and is furnished in whole or in part by the original surety or sureties, BPA shall use an amendment to the SF-25, Performance Bond, or SF-25A, Payment Bond. When additional coverage is furnished in whole or in part by a new surety, BPA shall use a new SF 25, Performance Bond or SF 25A, Payment Bond.

16.1.3.3 Notification to Surety of Contract Modifications.
PROCEDURE: The surety shall be provided a copy of all contract modifications outside the scope of the contract to advise them of the total scope and size of the contract as work progresses.

16.1.3.4 Withholding Contract Payments.
PROCEDURE:

(a) During contract performance, BPA shall not withhold payments due contractors or assignees because subcontractors or suppliers have not been paid, except for claims by sureties.

(b) If, after completion of the contract work, BPA receives written notice from the surety regarding the contractor's failure to meet its obligation to its subcontractors or suppliers, the CO shall withhold final payment. However, the surety must agree to hold BPA harmless from any liability resulting from withholding the final payment. The CO shall authorize final payment upon agreement between the contractor and surety, or upon a judicial determination of the rights of the parties.

(c) For any withholding incident to the labor standards provisions of the contract, see Part 10.

16.2 SURETIES.
16.2.1 Requirements for Sureties.
POLICY: BPA shall obtain adequate security for bonds (including coinsurance and reinsurance agreements).

16.2.2 Acceptability of Corporate Sureties.
INFORMATION:

(a)(1) Corporate sureties offered for bonds furnished with contracts performed in the United States, its possessions, or Puerto Rico must appear on the list contained in the Department of the Treasury Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies."

(2) The penal amount of the bond should not exceed the surety's underwriting limit stated in the Department of the Treasury circular. If the penal amount exceeds the underwriting limit, the bond will be acceptable only if:

(A) The amount exceeding the specified limit is coinsured or reinsured, and

(B) The amount of coinsurance or reinsurance does not exceed the underwriting limit of each coinsurer or reinsurer.

(3) Coinsurance or reinsurance agreements shall conform to the Department of the Treasury regulation in 31 CFR 223.10 and 223.11. When reinsurance is contemplated, the CO generally shall require reinsurance agreements to be executed and submitted with the bonds before making a final determination on the bonds.

(4) The CO may accept a bond from the direct writing company in satisfaction of the total bond requirement of the contract. This is permissible until necessary reinsurance agreements are executed, even though the total bond requirement may exceed the insurer's underwriting limitation. The contractor shall execute and submit necessary reinsurance agreements to the CO within the time specified by the CO, which may not exceed 45 calendar days after the execution of the bond.

(b) The Department of the Treasury issues supplements to Treasury Circular 570, notifying all Federal agencies of:

(1) New approved corporate surety companies, and;

(2) The termination of the authority of any specific corporate surety to qualify as a surety on Federal bonds. Upon receipt of notification of termination of a company's authority to qualify as a surety on Federal bonds, the CO shall review outstanding contracts and take action necessary to protect BPA, e.g., obtaining new bonds.

(c) The Department of the Treasury Circular 570 may be obtained from the U.S. Treasury Department, Financial Management Service, Surety Bond Branch, 401 14th Street, SW, 2nd Floor, West Wing, Washington, DC 20227. Treasury Circular 570 is also available at the U.S. Treasury Department website Internet address: http://www.fms.treas.gov/c570.html

16.2.3 Acceptability of Individual Sureties.
POLICY: Individual sureties are normally not desirable. In the event that the contractor wishes to utilize an individual surety, contact the HCA for advice and information concerning requirements.

16.2.4 Options in Lieu of Sureties.
INFORMATION: The contractor may deposit any of the types of security listed in this section in lieu of furnishing corporate or individual sureties on performance and payment bonds. When any of those types of security are deposited, a statement shall be incorporated in the bond form pledging the security. The contractor shall execute the bond forms as the principal. The CO shall safeguard against loss of the security and shall return the security or its equivalent to the contractor when the bond obligation has ceased.

(a) United States bonds or notes. Any person required to furnish a bond to BPA has the option, instead of furnishing a surety or sureties on the bond, of depositing certain United States bonds or notes in an amount equal at their par value to the penal sum of the bond (the Act of February 24, 1919 (31 U.S.C. 9303) and Treasury Department Circular No. 154 dated July 1, 1978 (31 CFR Part 225)). In addition, a duly executed power of attorney and agreement authorizing the collection or sale of such United States bonds or notes shall accompany the deposited bonds or notes. The CO may:

(1) Turn securities over to the finance or other authorized BPA official, or;

(2) Deposit them with the Treasurer of the United States, a Federal Reserve Bank (or branch with requisite facilities), or other depository designated for that purpose by the Secretary of the Treasury, under procedures prescribed by the agency concerned and Treasury Department Circular No. 154.

(b) Certified or cashier's checks, bank drafts, money orders, or currency. Any person required to furnish a bond has an option to furnish a certified or cashier's check, bank draft, Post Office money order, or currency, in an amount equal to the penal sum of the bond, instead of furnishing surety or sureties on the bonds. Those furnishing checks, drafts, or money orders shall be drawn to the order of the Bonneville Power Administration.

16.2.5 Furnishing Information to Sureties.
INFORMATION:

(a) When a contractor is performing a contract in a manner that may lead to default, or when claims are being made against payment bonds, the CO shall promptly notify the surety by sending the surety a copy of the CO's letter to the contractor advising of the possibility of default termination. That copy may be transmitted with a brief letter referencing the attached copy and requesting any assistance in securing performance which the surety may be in a position to render.

(b) The surety on the bond may be furnished information on the progress of the work, payments, and the estimated percentage of completion, concerning the contract for which the bond was furnished. Requests from sureties are responded to by the CO.

(c) When a payment bond has been provided for a contract, the CO shall, upon request, furnish a copy of the bond and the contract for which it was given to any person who makes a request therefore.

16.2.6 Claims by Sureties.
PROCEDURE: Where a surety submits a claim for money due its principal under the terms of the contract, the claim shall be immediately forwarded to the CO, who will consult with the General Counsel to determine who has the right to payment.

16.3 INSURANCE.
(a) ***POLICY:*** Contractors are required to provide insurance for certain types of perils. At a minimum, the insurance specific in 16.3.1 (a) through (h) is required for all service contracts and construction contracts over $100,000, and for all service contracts and construction contracts under $100,000 which involve the activities listed in 16.3.1(c) through (h).

(b) ***POLICY:*** A contractor may be required to provide insurance for furnish/install supply contracts where the estimated cost of installation is less than $100,000 if the CO determines that it is necessary to protect BPA's interests.

(c) ***POLICY:*** A contractor may be required to provide insurance for IGCs when the governmental entity is not adequately self-insured to protect BPA's interests. (BPI 25).

(d) ***POLICY:*** The minimum amounts of insurance required by BPA may be increased when activities to be performed create a potential for loss exceeding the minimum amounts stated.

(e) ***PROCEDURE:*** Unless otherwise granted an extension of time for submission by the CO, the Contractor must provide the CO with certificates of insurance before the start of work. The CO shall ensure that the certificates:

(1) Are issued by the insurance company or an authorized insurance agent;
(2) State that the required insurance is currently in force;
(3) Contain a statement that the insurers will endeavor to provide 30 days advance notice of cancellation to the CO.
(4) Do not contain exclusions which, in effect, exempt the insurance company from meeting the required insurance.
(5) Include Bonneville Power Administration as a Named Insured.

16.3.1 Required Insurance.
POLICY: The following types of liability insurance may be required, as appropriate. Except for the increase of policy amounts as described in (d) above, waivers of, or deviations from, these requirements must be submitted to the HCA. If the HCA concurs with the request, the request will be forwarded to the Risk Management staff.

(a) **Workers' compensation and employer's liability**. Contractors are required to comply with applicable Federal and State workers' compensation and occupational disease statutes. Employer's liability coverage shall be required. Contractors who are individuals (whether incorporated or not) may not be required by statute to carry worker's compensation or employer's liability insurance, but COs may require these Contractor individuals to carry worker's compensation insurance to protect agency interests.

(b) **General liability**. The CO shall require general liability insurance.

(c) **Automobile liability.** The CO shall require automobile liability insurance for operation of all automobiles or other vehicles used in performing the contract. This includes professional and other service contracts that permit contractor access to government licensed vehicles.

(d) **Aircraft liability.** When contract performance involves use of aircraft, the CO shall require aircraft liability insurance.

(e) **Watercraft liability.** When contract performance involves the use of watercraft, the CO shall require watercraft liability insurance.

(f) **Contractor's Pollution Liability Insurance**. When contract performance involves transportation and/or handling and/or disposal of hazardous wastes as defined in 40 CFR 261.3, the CO shall require contractor's pollution liability insurance.

(g) **Professional liability.** The CO shall require professional liability insurance when the contract exceeds $50,000, and involves rendering a professional opinion upon which BPA and/or third parties will rely. Examples of contracts when professional liability insurance is required are: opinions by external auditors, special legal counsel, bond counsel, services performed by architects or engineers when their licensure stamp on work products is not counter-signed by licensed BPA engineers or architects, medical professionals (doctors and nurses).

(h) **Medical malpractice liability insurance.** The CO shall require medical malpractice liability insurance on health care services contracts.

16.3.2 Insurance Coverage Which Should Be Considered.
When contract performance involves the use or transportation of hazardous substances as defined in 40 CFR 116.4 in the quantities defined in 40 CFR 117.3, the CO should consider requiring environmental impairment liability insurance of at least $5,000,000 for bodily injury and property damage per occurrence.

16.3.3 Clause Usage Prescriptions.
PROCEDURE:

(a) Fixed-price and time-and-materials contracts.
(1) The CO shall include Clause 16-2, Insurance, in all fixed-price or time-and-materials service and construction solicitations and contracts over $100,000, and fixed-price or time-and-materials service and construction solicitations and contracts under $100,000 which involve the activities listed in 16.3.1(a) through (h), unless the requirement for insurance has been waived by the HCA (BPI 16.3.1).
(2) The CO may include this clause in furnish/install supply contracts where the estimated cost of installation is less than $100,000 if the CO determines that it is necessary to protect BPA's interests.

(3) The CO may insert the clause in IGCs if the CO determines that the governmental entity is not adequately self-insured, or as the COs deems necessary to protect BPA's interests (BPI 25).
(4) The CO shall modify the contents of this clause to reflect only those types of insurance which are required for a specific transaction, and shall redesignate the paragraphs accordingly. The CO may increase the dollar amounts of coverage if necessary to protect BPA's interests. If additional types of insurance are required, additional paragraphs shall be added to describe that insurance.

(b) Cost reimbursement contracts. The CO shall include Clause 16-2, Insurance, with its Alternate I, in all cost-reimbursement service and construction solicitations and contracts over $100,000, and cost-reimbursement service and construction solicitations and contracts under $100,000 which involve the activities listed in 16.3.1 (c) through (h), unless the requirement for insurance has been waived (BPI 16.2 and 25). This requirement may not apply to IGCs if the governmental entity is adequately self insured (BPI 16.3.1. and 25). This CO may include this Clause in supply/install contracts where the estimated cost of installation is less than $100,000 if the CO determines that it is necessary to protect BPA's interests. When Alternate I is used, add paragraphs (e) through (g) to the basic clause. The CO shall modify the contents of this clause to reflect only those types of insurance which are required for a specific transaction, and shall redesignate the paragraphs accordingly. If additional types of insurance are required, additional paragraphs shall be added to describe that insurance.

16.50 TEXT OF CLAUSES.
The following clauses are referred to in BPI Part 16:

Clause 16-1 PERFORMANCE AND PAYMENT BONDS 7
Clause 16-2 INSURANCE 7

Clause 16-1 PERFORMANCE AND PAYMENT BONDS (Sep 98)(BPI 16.1.1.3; 16.1.2.2)

(a) The contractor shall furnish all bonds, including any necessary reinsurance agreements, before receiving a notice to proceed with the work or being allowed to start work.
(1) Performance Bond shall be furnished on Standard Form 25 in the amount of 100 percent of the original contract price.
(2) Payment Bond shall be furnished on Standard Form 25-A in the amount of 100 percent of the original contract price.

(b) If the performance and payment bonds are in the form of a corporate surety bond signed by an agent or attorney in-fact, a copy of the power of attorney authorizing action on behalf of the surety shall be attached to the bond.

(c) If the contract price is substantially increased during the course of the contract, and the Contracting Officer determines that an increase in bond amount is required, the increased bond amount shall be evidenced by submitting SF-25 or SF-25A as described in paragraph (a) of this clause.

(d) The cost of the performance and/or payment bond premiums is to be included in the contract price. No additional payment will be made for bond premiums.

(e) The Contractor shall promptly furnish additional security required to protect BPA and persons supplying labor or materials under this contract if:
(1) Any surety upon any bond furnished with this contract becomes unacceptable to BPA; or
(2) Any surety fails to furnish reports on its financial condition as required by BPA.

(End of clause)

Clause 16-2 INSURANCE (Dec 12)(BPI 16.3.3)

(a) Before commencing work under this contract, the Contractor shall provide to the Contracting Officer certificates of insurance from the insurance company, or an authorized insurance agent, stating the

required insurance has been obtained and is in force. The certificate(s) shall identify the Contractor and name BPA as the named insured as follows:

Bonneville Power Administration
Attention: Contracting Officer - _____ (fill in name of CO)

The certificate shall also identify the contract number(s) for which coverage is provided, and shall contain a statement that the insurer will endeavor to give notice of cancellation or any material change to the certificate holder at least 30 days before the effective date.

(b) Throughout the period of the contract the Contractor shall deliver a new certificate of insurance to the Contracting Officer within 10 business days of existing policy expiration, changes, and/or changes in insurance providers. If the Contractor's insurance does not cover the subcontractors involved in the work, the Contractor shall provide the Contracting Officer with certificates of insurance stating that the required insurance has been obtained by the subcontractors.

(c) The Contractor may, with the approval of the Contracting Officer, maintain a self-insurance program; provided that, with respect to workers' compensation, the Contractor is qualified pursuant to statutory authority.

(d) The following minimum kinds and amounts of insurance are applicable in the performance of the work under this contract. All insurance required by this paragraph shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with insurers approved by the Contracting Officer.

(1) **Workers' compensation and employer's liability**. Contractors are required to comply with applicable Federal and State workers' compensation and occupational disease statutes. Employer's liability coverage of at least $1,000,000 shall be required. BPA may require Contractors who are individuals (whether incorporated or not) to carry workers' compensation to protect agency interests. The Contracting Officer shall advise the Contractor regarding specific requirements.
(2) **Commercial General liability**. The contractor shall provide commercial general liability (CGL) insurance of at least $1,000,000 per occurrence. Any policy aggregate limits which apply shall be modified to apply to each location and project. The policy shall name BPA, its officials, officers, employees and agents, as additional insureds with respect to the contractor's performance of services under the contract. The contractor's policy shall be primary and shall not seek any contribution from any insurance or self-insurance programs of BPA. The Contractor's CGL policy shall be issued on an occurrence basis.
(3) **Automobile liability.** The contractor shall provide automobile liability insurance covering the operation of all automobiles used in performing the contract. Policies shall provide limits of at least $1,000,000 per accident and include coverage for all owned, non-owned and hired automobiles.
(4) **Aircraft liability.** The contractor shall provide aircraft liability insurance. Limits shall be at least $10,000,000 per occurrence, other than for voluntary settlement. Limits for passenger liability shall be at least $200,000 multiplied by the number of seats. The insurance policy shall include coverage for owned, non-owned and hired aircraft and name BPA, its officials, officers, employees and agents as additional insureds. The contractor's policy shall be primary and shall not seek any contribution from any insurance or self-insurance programs of BPA.
(5) **Watercraft liability.** The contractor shall provide watercraft liability insurance. Limits shall be at least $1,000,000 per occurrence. The insurance policy shall include coverage for owned, non-owned and hired watercraft and name BPA, its officials, officers, employees and agents as additional insureds. The contractor's policy shall be primary and shall not seek any contribution from any insurance or self-insurance programs of BPA.
(6) **Contractor's Pollution Liability Insurance**. The contractor shall provide environmental impairment liability insurance of at least $5,000,000 per occurrence. Such insurance will include coverage for the clean up, removal, storage, disposal, transportation and/or use of pollutants. The insurance policy shall name BPA, its officials, officers, employees and agents as additional insureds.

The contractor's policy shall be primary and shall not seek any contribution from any insurance or self-insurance programs of BPA.

(7) **Professional liability.** The contractor shall provide professional liability insurance. Coverage shall be at least $1,000,000 per occurrence for claims arising out of negligent acts, errors or omissions.

(8) **Medical malpractice liability insurance.** The contractor shall maintain medical malpractice liability insurance of at least $500,000 per occurrence.

(End of clause)

Alternate I (Feb 94)

(e) The Contractor shall be reimbursed:

(1) For that portion (i) of the reasonable cost of insurance allocable to this contract and (ii) as required or approved under this clause; and

(2) For certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise without regard to and as an exception to the Contract Ceiling clause of this contract. These liabilities must arise out of the performance of this contract, whether or not caused by the negligence of the Contractor or of the Contractor's agents, servants, or employees, and must be represented by final judgments or settlements approved in writing by BPA. These liabilities are for:

(A) Loss of or damage to property (other than property owned, occupied, or used by the Contractor, rented to the Contractor, or in the care, custody, or control of the Contractor); or

(B) Death or bodily injury.

(f) The Contractor shall not be reimbursed for liabilities (and expenses incidental to such liabilities):

(1) For which the Contractor is otherwise responsible under the express terms of any clause specified in the contract;

(2) For which the Contractor has failed to insure or to maintain insurance as required by the Contracting Officer; or

(3) That result from willful misconduct or lack of good faith on the part of any of the Contractor's director, officers, managers, superintendents, or other representatives who have supervision or direction of:

(A) All or substantially all of the Contractor's business;

(B) All or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed; or

(C) A separate and complete major industrial operation in connection with the performance of this contract.

(g) If any suit or action is filed or any claim is made against the Contractor, the cost and expense of which may be reimbursable to the Contractor under this contract, and the risk of which is then uninsured or is insured for less than the amount claimed, the Contractor shall:

(1) Immediately notify the Contracting Officer and promptly furnish copies of all pertinent papers received;

(2) Authorize BPA representatives to collaborate with counsel for the insurance carrier in settling or defending the claim when the amount of the liability claimed exceeds the amount of coverage; and

(3) Authorize BPA representatives to settle or defend the claim and to represent the Contractor in or to take charge of any litigation, if required by BPA, when the liability is not insured or covered by bond. The Contractor may, at its own expense, be associated with BPA representatives in any such claim or litigation.

(End of Alternate I)

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17.1 INTELLECTUAL **PROPERTY.**

17.1.1 Overview.

INFORMATION:

(a) The Bonneville Project Act grants the Administrator the power to “acquire . . . such real and personal property, or any interest therein . . . as the administrator finds necessary or appropriate” to carry out BPA’s mission. 16 U.S.C. § 832a(c). The term “personal property” includes both tangible and intangible property. Ideas, processes, data, information, symbols, software, and creative expressions such as books and music are all examples of intangible property. The term “intellectual property” refers to legal protections available for intangible property. Intellectual property includes patents, copyrights, trademarks, rights in data, trade secrets, and other confidential data. Intellectual property includes both ownership rights as well as rights to use intellectual property, typically granted via a license, nondisclosure/confidentiality agreement, or other agreement.

(b) Part 17 of the BPI attempts to address the most common transactions that COs encounter which give rise to intellectual property issues. Procurements of Information Technology (“IT”) includes software licenses, computer hardware and equipment, office equipment, such as printers, copiers and faxes, telecommunication systems and any necessary supporting services.
Additionally, intellectual property ownership and use issues may arise in financial assistance agreements, grants, and intergovernmental contracts. The transactions described below represent the majority of BPA IT procurements, identified as either commercial or non-commercial. Policy and guidance on these transactions appear after the chart below.

(c) Definitions. BPA procures IT items and services that are either noncommercial, commercial or commercial-off-the-shelf (COTS), as defined in BPI 1.8. “Noncommercial” items mean those items which

do not meet the definition of "commercial items," in that they are so BPA specific that use is limited to BPA, or the product will not be, or is not currently, offered for sale to the general public, even if the intent is that the product or work will, or might, eventually become a commercial product.

17.1.2 Commercial Items and Services.

(a) ***INFORMATION:***

(1) It is in BPA's best interest to procure IT items and services that provide the best value to BPA's ratepayers. Procuring in the commercial marketplace results in lower cost, shorter lead times and increased product availability, enabling BPA to return best value to its ratepayers. Some of the benefits to BPA of procuring commercial or commercial-off-the-shelf IT items and services include potentially lower lifecycle costs, ease of contract administration, and increased competition. When possible, BPA should procure IT items and services that meet the definition of "commercial."

(2) The definition of "commercial" is broad. It encompasses items that have been offered for sale to the general public but not yet sold; items that have been sold but not in "substantial" quantities; items that are sold in substantial quantities so as to be considered COTS; items requiring modifications customary in the marketplace or minor modifications unique to BPA; many services; and certain nondevelopmental items. This broad definition enables BPA to take greater advantage of the commercial marketplace.

(b) ***POLICY:*** Contractors of commercial IT products typically require the use of their contract document, or "paper," for the sale of their products and/or services. In direct contrast, per BPI 1.7 and 4.9, BPA procurement contracts must include the required BPI clauses. These commercial products represent minimal risk to BPA.

17.1.3 Noncommercial Items.

(a) ***INFORMATION:*** Some BPA requirements may be referred to as "custom" or unique to BPA, such as a software system which cannot be utilized by other utilities. Noncommercial items are those which are specific to BPA such that they are not found in the commercial marketplace.

(b) ***POLICY:*** When necessary, and only when BPA is unable to obtain its requirement(s) from the commercial marketplace, BPA may solicit and procure noncommercial items.

17.1.4 Clause Matrixes.

PROCEDURE: The clause matrixes below are provided as guidance to the CO in determining whether a clause is applicable to a commercial or noncommercial procurement. COs must refer to BPI policy and consider the specifics and uniqueness of each procurement to assess whether the clause should be utilized in the subject procurement.

17.1.4.1 Clause Usage Matrix for Commercial IT Items and Services.

Clause Number	Clause	Commercial Software	COTS Software	Commercial Hardware and Equipment	COTS Hardware and Equipment	Commercial Services
17-2.1	Patent Rights-Ownership by Contractor	n/a	n/a	n/a	n/a	yes
17-2.2	Patent Rights-Ownership by BPA	n/a	n/a	n/a	n/a	yes
17-6	Commercial Software -No Contractor License	yes	n/a	n/a	n/a	n/a
17-8	Source Code Escrow-3rd Party Agent	yes	n/a	n/a	n/a	n/a
17-9	Source Code Escrow-BPA as Agent	yes	n/a	n/a	n/a	n/a
17-10	Commercial Software-Contractor License	yes	yes	yes; if embedded software	yes; if embedded software	yes
17-12	Modifications to Commercial Software	yes	Yes	n/a	n/a	yes

Clause Number	Clause	Commercial Software	COTS Software	Commercial Hardware and Equipment	COTS Hardware and Equipment	Commercial Services
17-13	Patent and Copyright Infringement Notice	n/a	n/a	n/a	n/a	yes, if using 17-2.1 or 17-2.2
17-19	Survival of Perpetual License	yes	As appropriate	yes	As appropriate	n/a
17-20	Information Assurance	yes	n/a	n/a	n/a	yes
17-21	Nondisclosure for RFO/RFQ	As appropriate	As appropriate	As appropriate	As appropriate	As appropriate
17-22	Nondisclosure for Contract Performance	As appropriate	As appropriate	As appropriate	As appropriate	As appropriate
28-21	Order of Precedence	yes	yes	yes	yes	yes
23-3	Unauthorized Reproduction or Use of Software	yes	n/a	n/a	n/a	yes
14-17	Homeland Security	yes	yes	n/a	n/a	yes

17.1.4.2 Clause Usage Matrix for Noncommercial Items and Services.

Clause #	Clause Title	Noncommercial Software: Software 1) developed specifically for BPA that cannot be sold in the open market or utilized by the general public; or 2) does not yet exist which may, or may not, eventually become commercial software	Noncommercial Hardware or Equipment: Hardware or equipment developed specifically for BPA's use that cannot be sold in the open market or utilized by the general public	Research & development or demonstration of new technologies	Development of patentable products whether through contract, grant or financial assistance	Creation of new works: Original works of authorship, such as written or visual publications in hard or electronic format, or in other forms of media such as works of art, etc.	Modification of existing work: Third party original works of authorship modified for BPA's use, such as hard or electronic publications, works of art, etc.
17-1.1	Authorization & Consent: Research, Development & Demonstration Projects	n/a	n/a	yes	n/a	n/a	n/a
17-1.2	Authorization & Consent: Noncommercial Items or Services	yes	yes	n/a	n/a	n/a	n/a
17-2.1	Patent Rights-Ownership by Contractor	Consult with OGC on patentable software	yes	yes	yes	n/a	n/a
17-2.2	Patent Rights-Ownership by BPA	Consult w/OGC on patentable software	yes	yes	yes	n/a	n/a

17.1.4.2 Clause Usage Matrix for Noncommercial Items and Services (Continued…).

Clause #	Clause Title	Noncommercial Software	Noncommercial Hardware or Equipment	Research & development or demo of new technologies	Development of patentable products	Creation of new works	Modification of existing work
17-3	Rights in Data-Noncommercial Software	yes	n/a	n/a	n/a	n/a	n/a
17-4	Rights in Data-Use of Existing Works-No Modifications	n/a	n/a	n/a	n/a	n/a	n/a
17-5.1	Rights in Data- New Work	n/a	n/a	n/a	n/a	yes	yes
17-5.2	Rights in Data- New Work, Restricted	n/a	n/a	n/a	n/a	yes	yes
17-7.1	Infringement Indemnification-Noncommercial Software (Contractor indemnifies BPA)	yes	n/a	yes	n/a	yes	yes
17-7.2	Infringement Indemnification-Patents (Contractor indemnifies BPA)	n/a	yes	yes	yes	n/a	n/a
17-8	Source Code Escrow-3rd Party Agent	yes, if contractor owns copyright	n/a	n/a	n/a	n/a	n/a
17-9	Source Code Escrow-BPA as Agent	yes, if contractor owns copyright	n/a	n/a	n/a	n/a	n/a

17.1.4.2 Clause Usage Matrix for Noncommercial Items and Services (Continued…).

Clause #	Clause Title	Noncommercial Software	Noncommercial Hardware or Equipment	Research & development or demonstration of new technologies	Development of patentable products	Creation of new works	Modification of existing work

17-13	Patent & Copyright Infringement Notice	yes, if using 17-2.1 or 17-2.2	yes, if using 17-2.1 or 17-2.2	yes	yes	n/a	n/a
17-14	Noncommercial Software Warranty	yes	yes; if embedded	yes	Consult /OGC on patentable software	n/a	n/a
17-15	Noncommercial Hardware and Equipment Warranty	n/a	yes	yes	yes	n/a	n/a
17-19	Survival of Perpetual License	yes	yes; if embedded software	yes	yes	yes	n/a
17-20	Information Assurance	yes	yes	yes	yes	yes	yes
17-21 (RFO/ RFQ)	Nondisclosure for RFO/RFQ	As appropriate	As appropriate	As appropriate	As appropriate	As appropriate	As appropriate
23-3	Unauthorized Reproduction or Use of Software	yes	yes	yes	yes	yes	yes
17-22	Nondisclosure during Contract Performance	As appropriate	As appropriate	As appropriate	As appropriate	As appropriate	As appropriate

17.2 COMMERCIAL SOFTWARE (COPYRIGHT).

17.2.1 General.

(a) ***POLICY:*** BPA shall procure licenses to commercial software whenever doing so represents the best value to BPA. Procuring licenses to commercial software represents potentially significant savings and efficiencies to BPA and its ratepayers.

(b) ***POLICY:*** BPA's policy is to acquire commercial software under the same license that contractors offer to the general public. Contractors of commercial software identify the use rights granted to BPA in their license documents. BPA honors the intellectual property rights of others and will comply with the provisions of the commercial software licenses it purchases. Commercial software licenses may be included as an attachment in the BPA contract. For commercial software which is provided to BPA without a contractor's software license agreement, BPA will accept the software with restricted rights, provided the software contains proprietary markings substantially similar as set forth in Clause 17-6 Commercial Software-No Contractor License.

(c) ***POLICY:*** Certain clauses are required to ensure BPA's ability to comply with the contract terms and conditions and with federal law. Therefore, BPA's required clauses for the procurement of commercial items and services must be included in the solicitation and contract. Any modifications to the required clauses must approved by the HCA.

(d) ***POLICY:*** BPA will negotiate for fixed term or perpetual software licenses. Where BPA's contract expires prior to the term of the contractor's software license, the contractor's software license shall survive the expiration of the BPA contract and shall be implemented in the same manner it would have been if the BPA contract had not expired.

(e) ***PROCEDURE:*** Only COs with warranted authority may commit BPA funds for the procurement of licenses, including break-the-seal or click-through licenses. Any unauthorized commitments by unwarranted individuals are subject to BPI 2.4 and 6.16, Ratification of Unauthorized Contract Commitments. Break-the-Seal or Click-Through licenses are COTS software. See discussion in BPI 17.2.3 on COTS software policy.

(f) ***PROCEDURE:*** COs may use a contractor's contract documents for the purchase of commercial software in conjunction with BPA's required commercial terms and conditions. The contractor's contract documents should be attached to the BPA terms and conditions, utilizing Clause 28-21 Order of Precedence. If the contractor's agreement is not acceptable as written or BPA is unable to comply with the terms of the contractor's license as written, the CO should negotiate specific terms to be included in the contract. General Counsel or HCA may be consulted, as needed.

17.2.1.1 Clause Usage Prescriptions.

PROCEDURES:

(a) The CO shall include Clause 28-21, Order of Precedence in all solicitations and contracts for commercial software, including COTS software.

(b) The CO include use a clause similar to Clause 17-10, Commercial Software—Contractor License, in solicitations and contracts for the purchase of proprietary commercial computer software when the contractor's software license or lease agreement is included as an attachment to BPA's commercial terms and conditions.

(c) The CO incluide use a clause similar to Clause 17-6, Commercial Software—No Contractor License, in solicitations and contracts for the purchase of proprietary commercial computer software when the contractor's software license or lease agreement is not included as an attachment to BPA's commercial terms and conditions. Clause 17-6 shall not be used if Contractor's license or lease agreement is included in the BPA contract. If Contractor's license or lease agreement is used, then the CO may include

Clause 17-10 Commercial Software-Contractor License. Clause 17-6 shall not be included in solicitations and contracts for the acquisition of COTS software.

(d) The CO shall include Clause 17-19 Survival of Perpetual Licenses in all solicitations and contracts where BPA receives a perpetual use license.

17.2.2 Development of New Software Products.
(a) ***INFORMATION*:** Commercial software licenses are typically for object code versions of the software making the creation of new software products, or derivative products, difficult. At issue whenever new products are developed is the ownership rights of the derivative product. The development of new software products, including resulting ownership rights, is discussed In noncommercial products. This should be distinguished from modifications to commercial software, in that the modification is considered to be commercial.

(b) ***PROCEDURE:*** COs shall consult with OGC where there may be difficulty determining whether a new product may result from a BPA contract.

17.2.3 Commercial Off-the-Shelf (COTS) Software.
(a) ***INFORMATION*:** COTS software is a subset of commercial software in that COTS software is sold in such quantities that the licenses are standardized to industry practices, eliminating the need for negotiation.

(b) ***POLICY*:** It is in BPA's best interest to procure COTS software where the products can be utilized by BPA in the same form as available to the general public. Licenses for COTS are drafted to reflect industry practices eliminating any need for negotiation. Additionally, source code is typically not placed into escrow for COTS software.

(c) ***PROCEDURE:*** COs may accept a contractor's license agreements for COTS software without negotiating the terms and conditions, provided BPA can comply with the requirements therein. COTS procurements must meet all other BPI procurement requirements for commercial procurements, including competition, price reasonableness, etc. Source Code Escrow is not required for COTS products.

17.2.4 GSA Schedule Contracts – Commercial Software.
PROCEDURE: The CO may utilize available government contracts, such as GSA Schedule contracts, to fulfill BPA's IT software and equipment requirements only when the GSA Schedule represents the best buy for the agency as stated in BPI 11.1.2 and 11.1.3. If necessary to address specific BPA agency risks and requirements, the CO will negotiate appropriate terms and conditions to mitigate such risks or address BPA's requirements.

17.2.5 Modifications to Commercial Software.
(a) ***INFORMATION*:** At times, commercial software must be modified to meet BPA's needs. If commercial software is customarily modified for licensee use, per the commercial item definition in BPI 1.8, the resulting modification is also commercial. If the software is not customarily modified for use by licensees, but the modification is minor, the resultant modification will also be considered commercial. Where BPA pays for a modification to a contractor's commercial software, it is in BPA's best interest to be granted use rights to that modification without further license fees.

(b) ***POLICY:*** BPA treats a modification to commercial software as a commercial item. Where BPA pays for a modification of commercial software, BPA should receive a fully paid-up, non-exclusive, irrevocable world-wide license for the use of the modification.

17.2.5.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include a clause similar to Clause 17-12, Modifications to Commercial Software in solicitations and contracts where commercial software is modified, or is expected to be modified, to meet BPA's needs, regardless of whether the modification is initiated in the initial acquisition

or in a later modification/request by BPA. If there is no expectation of modifications at the time of award, but later a need for a modification arises, the CO shall include a clause similar to Clause 17-12 at the time of modification.

17.2.6 Modifications that Result in New Software Products.
PROCEDURE: If there is a likelihood that a new software product may be developed by the contractor as a result of a BPA commercial procurement, the CO shall determine in advance the ownership and license rights of the new product, per BPI 17.5.4, Rights in Data.

17.2.7 Limited Rights Licensing – Commercial Software.
POLICY: Many software contractors are concerned that by licensing to BPA they are licensing the entire Federal government, or conversely that their software has just entered the public domain. BPA's policy is that software licensed to BPA will not be shared with other federal government entities and that contractors' ownership and rights in the software are preserved.

17.2.8 Commercial Software Documentation.
***INFORMATION*:** Commercial software, at times, is provided with documentation either electronically or in hard copy. For procurement purposes, if the documentation is procured separate from the software, it is considered a commercial item and procured in the same manner as the software.

17.2.9 Support and Maintenance.
(a) ***INFORMATION*:** Support and maintenance of commercial software is addressed either in the software license agreement, or a separate document. Support and maintenance (when procured under a contract document other than the software license agreement) is considered a commercial service. "Software as a Service" and other services under that delivery model are also commercial services and discussed below.

(b) ***PROCEDURES:***

(1) The CO shall contract for support and/or maintenance for licensed commercial software, where appropriate, from either the software licensor or a qualified third party. Support agreements cover upgrades, updates and bug-fixes. These may be stand-alone agreements or incorporated into the software license agreement. Support and support renewals for COTS software, while services, are treated as COTS items for the purpose of negotiating contract terms and conditions.

(2) Maintenance is ongoing support of embedded software in either hardware or equipment. Where continued maintenance is necessary, the CO will contract for maintenance through the original procurement document, a separate contract or purchase order, reflecting the contractor's and BPA's commercial terms and conditions, with the contractor's support agreement as an attachment where possible. Maintenance and maintenance renewals for COTS hardware are also treated as COTS.

(3) The CO will utilize Software as a Service and similar IT service delivery models such as Infrastructure as a Service, and Cloud computing, when the service meets the sourcing requirements in BPI 17.6.1, in addition to representing a best buy to the agency. Special consideration should be given to data sensitivity and return of data issues. These services are considered commercial services; see BPI 17.4 Commercial IT Services as well as 17.4.5 Software as a Service.

17.2.10 Warranty – Commercial Software.
POLICY:

(a) Contractors shall warrant to BPA that their product shall perform substantially in accordance with the express warranties as presented to BPA.

(b) BPA's IT systems support the region's critical transmission and power systems. All software procured by BPA must be virus and mal-ware free at the time of initial procurement.

(c) BPA honors the intellectual property rights of others and expects that commercial software delivered to BPA does not infringe upon others' copyright or patent rights. In addition to indemnification for infringement, By offering their products to BPA, contractors are representing that they have the rights to license and/or sublicense the software being delivered to BPA.

17.2.10.1 Clause Usage Prescriptions.
(a) PROCEDURE: The CO shall include Clause 28-11 Warranty in solicitations and contracts for the acquisition of commercial items.

17.2.11 Rights in Data – Commercial Software.
POLICY: BPA will not pursue rights in technical data for commercial software except as provided to the general public in the contractor's standard commercial license.

17.2.12 Perpetual Software Use Licenses.
(a) ***INFORMATION*:** When a contractor's software license agreement is included in the BPA contract as an attachment, the BPA contract, having a definite term, may expire while the contractor's software license exceeds the term of the BPA contract. In these cases, the contractor's perpetual license shall survive any expiration of the BPA contract, and BPA may continue to use the software within the terms of the rights granted in the contractor's software license agreement.

(b) ***POLICY:*** BPA will comply with the terms of a perpetual software license agreement, notwithstanding any expiration of a fixed term BPA contract as if the contract was still in effect.

(c) ***PROCEDURE:*** The CO should distinguish between a perpetual license right and an evergreen contract. The CO should be aware that an evergreen contract, also referred to as an automatically renewing contract, may subject BPA to indefinite financial liability. Automatic renewing contracts are common for support or maintenance services. COs should work with the program office to determine the acceptable length of financial liability that the contract should commit to.

17.2.12.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include Clause 17-19 Survival of Perpetual Licenses in all solicitations and contracts where BPA receives a perpetual use license.

17.3 COMMERCIAL IT HARDWARE AND EQUIPMENT (PATENTS).

(a) ***INFORMATION:***

(1) BPA purchases commercial IT hardware and equipment whenever such a purchase represents the best value to BPA. Procuring commercial IT hardware and equipment represents potentially significant savings and efficiencies to BPA and its ratepayers.

(2) BPA purchases hardware and equipment that is developed, manufactured and marketed on the commercial market pursuant to a contractor's patent rights. The CO may procure these products from the manufacturer directly or through a distributor. BPA considers these procurements commercial. BPA may issue a contract or a purchase order for procurements of commercial IT hardware or IT equipment.

(3) Commercial IT hardware and equipment are products offered for sale to the general public as described in the definition of "commercial" at BPI 1.8. COTS hardware and equipment is a subset of commercial hardware and equipment in that COTS products are sold in such quantities that the transactions are standardized to industry practices, eliminating the need for negotiation.

(b) ***PROCEDURE:*** The CO shall review any terms and conditions included in the contractor's sales agreement or quoteto determine if they give BPA the ability to use the IT hardware and equipment in a manner that fulfills the need for which the products are being purchased, and if the agreement is in BPA's best interests. The CO may incorporate the contractor's sales agreement into BPA's contract or purchase order as an attachment. If the contractor's terms and conditions are not acceptable as written, the CO should negotiate specific terms to be included in the contract. General Counsel or HCA may be consulted, as needed.

17.3.1 Acquisition of Commercial Hardware and Equipment.

(a) ***POLICY:*** BPA shall procure commercial IT hardware and equipment whenever such a purchase represents the best value to BPA. BPA's policy is to acquire commercial IT hardware and equipment under the same sales or lease agreements that contractors offer to the general public. BPA honors the intellectual property rights of others and will comply with the intellectual property rights granted in hardware or equipment commercial sales or lease agreements, including any license terms applicable to software embedded within contractor's hardware or IT equipment.

(b) ***PROCEDURE:*** The CO shall procure commercial IT hardware and equipment under BPA's commercial terms and conditions with the contractor's terms and conditions as an attachment, if necessary. COs may utilize contractor's contract documents in conjunction with BPA's required commercial terms and conditions in commercial IT contracts.

17.3.1.1 Clause Usage Prescriptions.

PROCEDURE: The COs shall include a clause similar to Clause 28-21 Order of Precedence in solicitations and contracts for commercial acquisitions. COs shall modify the clause as necessary to meet the needs of the particular purchase. If the contractor's documents such as quotes, proposals, or contracts are incorporated into the contract, the clause shall be modified to identifiy their place in the order of precedence. equipment.

17.3.2 Commercial Off-the-Shelf (COTS) Hardware and Equipment.

PROCEDURE: The CO may accept a contractor's sales agreements or quotes for COTS hardware and equipment without negotiating the terms and conditions, per BPI 17.3.1, Acquisition of Commercial Hardware and Equipment, provided BPA can comply with the requirements therein. Maintenance and maintenance renewals for COTS products are also considered COTS products.

17.3.3 GSA Schedule Contracts – Commercial Hardware and Equipment.

PROCEDURE: The CO may utilize available government contracts, such as GSA schedule contracts, to fulfill its IT hardware and equipment requirements only when they represent the best buy to the agency as stated in BPI 11.1.2 and 11.1.3. The CO, where necessary to address specific BPA agency risks and requirements, will negotiate appropriate terms and conditions to mitigate such risks and address such requirements.

17.3.4 Modifications to Commercial Hardware or Equipment.
INFORMATION:

(a) Modifications to commercial hardware and equipment are considered commercial with no intellectual property rights for BPA in the modification.

(b) Minor modifications to commercial equipment done at BPA's request or expense, or which result in a modification which is BPA exclusive and/or specific, are considered commercial with no ownership rights for BPA.

17.3.5 Modifications that Result in New Hardware Products.
(a) ***INFORMATION:*** BPA may request a modification of such scope that an entirely new hardware product results. Per the definition of commercial items, BPI 1.8, modifications that significantly alter the function or essential characteristics of an item are not commercial in nature, and should be addressed under noncommercial items with ownership rights determined and reduced to writing prior to commencement of work.

(b) ***PROCEDURE:*** COs must evaluate the extent of the modification against the definition of commercial items in BPI 1.8 to determine whether the modified product can be considered a modification, and retain its commercial characterization, or whether the modified product resulted in an entirely new product. If an entirely new product results, COs shall consult BPI 17.5 Noncommercial Intellectual Property for guidance and appropriate contract clauses.

17.3.6 Support and Maintenance of Embedded Software.
(a) ***INFORMATION:*** Some equipment includes embedded software which must be updated on a regular basis through a support/maintenance agreement. Maintenance is ongoing support of embedded software in either hardware or equipment. The original support/maintenance agreement may be included as a part of the original purchase agreement, or may be executed as a stand-alone agreement.

(b) ***PROCEDURE:*** Where continued support is necessary, the CO will contract for maintenance through either the original procurement document, a separate contract, or a purchase order, incorporating, if possible, both the contractor's and BPA's commercial terms and conditions, with the contractor's support agreement as an attachment.

(c) ***PROCEDURE:*** Procurements of support and maintenance of embedded software in either IT hardware or equipment must meet the sourcing requirements as set forth in BPI 17.6.1.

17.3.7 Warranty – Commercial Hardware and Equipment
POLICY:

(a) Contractors shall warrant to BPA that their product shall be free of defects and fit for the particular purpose for which BPA is procuring it, if identified in the contract, as well as comply with any express warranties identified for the product.

(b) BPA honors the intellectual property rights of others and expects that commercial hardware or equipment and its embedded software delivered to BPA does not infringe upon others' copyright or patent rights.

17.3.7.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include a clause similar to Clause28-11 Warranty in solicitations and contracts for commercial acquisitions. COs may modify Clause 28-11 only to reflect commercial market practices. Modifications must be reviewed by OGC per BPI 4.3.

17.4 COMMERCIAL IT SERVICES.
17.4.1 General.

(a) ***INFORMATION:***

(1) Commercial IT services at BPA include IT supplemental labor, IT subscription services, software support and maintenance services and other services such as modifying commercial software products for BPA use. Contracts for commercial services also include such IT services such as cabling and utility installation services and IT training (see matrix above).

(2) "Commercial IT services" is a broad category that includes installation services, maintenance services, repair services, training services, and other services if such services are procured in support of a commercial item. Commercial IT services are those services (i) which are procured for support of a commercial item regardless of whether such services are provided by the same source or at the same time as the item; and (ii) where the source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the BPA.

(3) Where BPA is contracting for commercial IT services for the development of a noncommercial product, the ownership of the resulting product becomes an issue. Under this scenario, the clauses addressed in the noncommercial goods subpart should be used as appropriate in the commercial IT services contract.

(4) The definition of COTS typically does not include services. However, for procurement of COTS software, hardware and equipment purposes, support and maintenance are treated as COTS products and are discussed briefly below.

(b) ***POLICY:*** BPA shall procure commercial IT services, as defined in BPI 1.8, whenever such a purchase represents the best value to BPA. BPA's policy is to acquire commercial services under the same terms and conditions that contractors offer to the general public.

17.4.1.1 Clause Usage Prescriptions.
PROCEDURES:

(a) The CO shall include Clause 17-2.1 Patent Rights-Ownership by Contractor in all solicitations and contracts when procuring commercial IT services where there is a high likelihood that the performance of the contract may result in a patentable or copyrightable product that the parties have determined will be owned by the contractor.

(b) Alternatively, the CO shall include Clause 17-2.2 Patent Rights-Ownership by BPA in all solicitations and contracts when procuring commercial IT services where there is a high likelihood that the performance of the contract may result in a patentable or copyrightable product that the parties have determined will be owned by BPA.

(c) The CO shall include Clause 23-3 Unauthorized Reproduction or Use of Software where in all supplemental labor contracts where contractor employees or subcontracts are expected to have access to copyrighted or proprietary software.

(d) The CO shall include a clause similar to Clause 17-12 Modifications to Commercial Software in all solicitations and contracts when procuring services to modify commercial software to meet BPA's specific needs.

(e) The CO shall include Clause 14-17 Homeland Security in solicitations and contracts when:

4) BPA is contracting for hardware, software or services;
5) A non-disclosure agreement has been included; or
6) Any other instance where the requisitioner or CO determines it is necessary to protect BPA's interests.

17.4.2 Warranty – IT Services.
POLICY: BPA requires that IT services shall be performed in a competent and workmanlike manner in conformity with generally acceptable industry standards for the services provided. BPA is entitled to recover the costs of the nonconforming services as identified in the BPA contract.

17.4.2.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include a clause similar to Clause 28-11 Warranty in solicitations and contracts for commercial acquisitions. COs may modify Clause 28-11 only to reflect commercial market practices. Modifications to warranty clauses must be reviewed by OGC per BPI 4.3.

17.4.3 Supplemental IT Services (Supplemental Labor).
(a) ***INFORMATION:*** BPA uses a supplemental labor force to meet a portion of its IT needs. BPA's supplemental labor work force must meet security requirements as set forth by the Department of Energy as well as those set forth by BPA. In addition to the requirements set forth for contractors elsewhere in the BPI, contractors who have access to BPA information or information systems, or who develop, design, support or maintain BPA's information, software or systems must comply with the requirements of this subpart as well.

(b) ***POLICY:*** Supplemental labor contracts for IT services are subject to the sourcing requirements as set forth in BPI 17.6.1.

17.4.3.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include Clause 14-17 Homeland Security in solicitations and contracts when:

1) BPA is contracting for hardware, software or services;
2) A non-disclosure agreement has been included; and
3) Any other instance where the requisitioner or CO determines it is necessary to protect BPA's interests.

17.4.4 IT Support and Maintenance.
INFORMATION: Most licensed software, whether stand-alone or embedded, requires support/maintenance services to keep the software up to date and free from defects. BPA contracts with contractors to provide support services for its COTS, commercial and noncommercial software as well as for maintenance for hardware and equipment. Support and maintenance contracts are subscription-like arrangements where annual payment is due in advance for an established amount of technical assistance including, but not limited to, bug-fixes, updates, upgrades, and problem-solving. In addition to the requirements of this subpart, IT support sourcing is subject to the requirements set forth in BPI 17.6.1 Sourcing Requirements.

17.4.4.1 Advance Payment.
(a) ***INFORMATION:*** Licensed software typically requires a support or maintenance subscription to receive on-going technical assistance as well as bug fixes, updates, and upgrades. Support or maintenance is usually billed on an annual basis in advance of the period of performance.

(b) ***POLICY:*** Advance payment for software support and maintenance service is authorized without review and approval by the HCA under BPI 22.1.4.1(e) and shall not be subject to the limitations against advance payment for commercial acquisitions under BPI 22.22.1.4(d).

17.4.4.2 Competition Requirement.
(a) ***INFORMATION:*** Support obtained from the licensor is a cost effective method of keeping licensed software up-to-date rather than attempting to provide support in-house. The software licensor has the technical expertise with their software and is able to develop necessary solutions in a timely and economic manner.

(b) ***POLICY:*** Pursuant to 11.7.1.2(a), competition is not required where the software support or maintenance is being procured from the software licensor if the licensor does not allow third party support for its products. The CO must, however, note in the DAD the rational for the source selection.

Additionally, the CO must verify upon each contract renewals that the licensor has not out-sourced support of the software.

17.4.4.3 Price Reasonableness.
(a) ***INFORMATION:*** Price reasonableness is a determination that the pricing is appropriate for the level of effort and complexity of the activity. Additionally, market conditions and product availability as well as functionality may change from year to year. BPA has a responsibility to its ratepayers to verify price reasonableness for new awards as well as renewals of support and maintenance and extensions.

(b) ***POLICY:*** Price reasonableness must be addressed in the best buy determination. While support and maintenance may not be available from multiple sources, COs must address price reasonableness for support procurements. This requires documenting in the DAD an assessment of the proposed price against the contractor level of effort, past performance, complexity of the software and support, and program utilization expectations.

17.4.5 Software as a Service.

(a) ***INFORMATION:*** Software as a Service (SaaS), and other "…as a Service" delivery methods (sometimes referred to as "cloud computing"), are commercial services in which software is hosted off-site and accessed using a web browser over the Internet. SaaS is referred to as "on-demand software," and is typically accessed via a subscription paid in advance. Unlike traditional software, which is conventionally sold as a perpetual license with an associated up-front licensing fees and ongoing support fees, SaaS providers generally price applications using a subscription fee, most commonly a monthly fee or an annual fee.

(b) ***POLICY:*** BPA may use cloud computing and SaaS methods and approaches, provided BPA Security and Cyber Security requirements are met. BPA's requirements specific to each service must be included in the contract requirements document or statement of work. Special attention must be given to safeguarding BPA's IT information and data, including the return of the information upon termination of the service. The Statement of Work must identify BPA's requirements for the particular cloud computing or SaaS method being used. The CO must work closely with program office to determine the appropriate approach and special requirements and to ensure accuracy and compliance.

17.5 NONCOMMERCIAL INTELLECTUAL PROPERTY.
17.5.1 General.
(a) ***INFORMATION:*** When BPA issues contracts, grants and financial assistance with the intent of developing or creating noncommercial items (e.g. hardware, software, and equipment, including transmission and power generation equipment, or works of authorship such as videos, presentations, and books), the issue of title, or who has ownership rights to the end product or work, must be addressed in advance. Failure to identify title prior to commencement of development or creation puts BPA at risk of not having the requisite rights to use the product or work as originally anticipated.

(b) ***INFORMATION:*** A new product may inadvertently result from a commercial IT services contract where, in the course of performing the services, the contractor either identifies or creates a new patentable or copyrightable product but the primary purpose of the contract was not the creation of that new product. While impossible to anticipate all scenarios where the development of a product may result, in those cases where there is a high probability that a new product may result, the ownership rights should be identified in the contract prior to the commencement of work. In the event that a CO becomes aware of a new patentable or copyrightable product being developed, the CO should work with the contractor to identify ownership rights to the product through modification of the contract.

(c) ***INFORMATION:*** Noncommercial products are either patentable or copyrightable, depending on the nature of the product and the body of federal law applicable to that product. BPA's patent and rights in data clauses address whether BPA or the contractor owns the rights to the product and what use rights

are permitted. BPA's rights to a product copyrightable by a Contractor are conveyed through the Rights in Data clauses.

(d) ***POLICY:*** BPA treats a product of work paid for using BPA funds resulting from either of the above scenarios as noncommercial as defined in BPI 1.8. The resulting work product will either be so BPA-specific or custom that use is limited to BPA. Alternatively, the resulting product will not be, or is not currently, offered for sale to the general public, even if the intent is that the product may eventually become a commercial product.

(e) ***PROCEDURE:*** When contracting for the creation or development of a noncommercial item, the CO shall include the appropriate patent and rights in data clauses as set forth in this subpart.

If BPA contracts for a service under a commercial IT services contract where there is a high likelihood of creating or developing a noncommercial product, the ownership rights for that product must be addressed using the patent and rights in data clauses set forth in this noncommercial subpart, 17.5.

17.5.2 PATENTS.
(a) ***INFORMATION:*** Patent rights become an issue in procurement when work performed under federal funding results in a patentable item or a new invention because BPA has the right to retain title to inventions developed with its funds and to prosecute patents for its inventions. BPA procurement is concerned with "utility" patents, which may be granted for a "new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof." 35 U.S.C. §101.

(b) ***POLICY:*** BPA encourages the maximum practical commercial use of inventions made under BPA contracts. BPA will exercise the rights available to the Federal government to ensure that contractors meet their responsibilities to commercialize inventions.

17.5.2.1 Policy Objectives.
POLICY:

(a) BPA supports the commercialization of inventions arising from BPA-funded research and development. BPA encourages the maximum practical commercial utilization of inventions made during the performance of BPA contracts.

(b) BPA invests in research and development to return benefits to its ratepayers through improvements in the generation, transmission, and conservation of electricity.

(c) BPA adheres to the requirements of the Bayh-Dole Act, P.L. 96-517, codified at 35 U.S.C. §200 et seq., and extends Bayh-Dole's policy of third-party vesting of title to federally-funded inventions to all contractors, regardless of size or for-profit status.

(d) BPA ensures that it obtains sufficient rights in BPA-funded inventions to meet the needs of BPA and protect the public against nonuse or unreasonable use of inventions.

17.5.2.1.1 Clause Usage Prescription.
The CO shall include a clause similar to Clause 17-15 Noncommercial Hardware and Equipment Warranty in all solicitations and contracts for noncommercial hardware and equipment where the contractor is developing hardware or equipment for BPA which meets the definition of noncommercial as set forth in BPI 1.8.

17.5.2.2 Confidentiality of Patentable Information.
(a) ***INFORMATION:*** Publishing information concerning an invention before a patent application is filed on a subject invention may create a bar to a valid patent. To avoid this bar, BPA may withhold information from the public that would disclose any invention in which the Government owns or may own a right, title, or interest (including a nonexclusive license).

(b) ***POLICY:*** As necessary to avoid any bar to a valid patent, BPA will only withhold information concerning inventions for a reasonable time in order for a patent application to be filed. Once filed in any patent office, BPA is not required to release copies of any document that is a part of a patent application for those subject inventions.

17.5.2.3 Title to Inventions.
INFORMATION: Generally, each contractor may, after required disclosure to BPA, elect to retain title to any subject invention. A contract may require the contractor to assign to BPA the title to any subject invention when the contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government.

17.5.2.4 License Rights to Inventions.

(a) ***INFORMATION:*** When BPA acquires title to subject invention, the contractor is normally granted a revocable, nonexclusive, paid-up license to that subject invention throughout the world. The contractor's license extends to any of its domestic subsidiaries and affiliates within the corporate structure of which the contractor is a part and includes the right to grant sublicenses to the extent the contractor was legally obligated to do so at the time of contract award. The contracting officer shall approve or disapprove, in writing, any contractor request to transfer its licenses. No approval is necessary when the transfer is to the successor of that part of the contractor's business to which the subject invention pertains.

(b) ***POLICY:*** If a Contractor retains title to the invention, the Contractor must grant BPA at least a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on behalf of the United States, any subject invention throughout the world. BPA may require additional rights in order to comply with treaties or international agreements, and in such case, these additional rights shall be made part of the contract.

(c) ***POLICY:*** BPA has the right to receive title to an invention:
(1) If the contractor has not disclosed the invention within the time specified in the clause;
(2) In any country where the contractor—
(A) Does not elect to retain rights or fails to elect to retain rights to the invention within the time specified in the clause;
(B) Has not filed a patent application within the time specified in the clause;
(C) Decided not to continue prosecution of patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on the patent; or
(D) No longer desires to retain title;

(3) If the contractor is a foreign entity; or
(4) If the subject invention results in disclosure of BPA critical infrastructure, Cyber Security or Physical Security information.

17.5.2.5 Third Party Application.
POLICY: In response to a third party's proper application for an exclusive license, the contractor's domestic license may be revoked or modified to the extent necessary to achieve expeditious practical application of the subject invention. The application shall be submitted in accordance with the application provisions in 37 CFR 404 and agency licensing regulations. The contractor's license will not be revoked in that field of use or the geographical areas in which the contractor has achieved practical application and continues to make the benefits of the subject invention reasonably access to the public. The license in any foreign country may be revoked or modified to the extent the contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that country.

17.5.2.6 Invention Utilization Reports.
POLICY: BPA has the right to require periodic reporting on how any subject invention is being used by the contractor or its licensees or assignees. In accordance with 35 U.S.C. § 202(c)(5) and 37 CFR 401,

agencies shall not disclose such reports to persons outside the Government without permission of the contractor. Contractors should mark as confidential/proprietary any report to help prevent inadvertent release outside the Government.

17.5.2.7 March-In Rights.
(a) ***POLICY:*** Pursuant to 35 U.S.C. § 203, agencies have march-in rights that require the contractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to responsible applicants, upon terms that are reasonable under the circumstances. If the contractor, assignee or exclusive licensee of a subject invention refuses to grant such a license, the agency can grant the license itself. March-in rights may be exercised only if the agency determines that this action is necessary because the contractor or assignee has not taken or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in the field(s) of use.

(b) ***PROCEDURE:*** BPA shall not exercise its march-in rights unless the contractor has been provided a reasonable time to present facts and show cause why the proposed agency action should not be taken. BPA shall provide the contractor an opportunity to dispute or appeal the proposed action in accordance with 37 CFR 401.11. The CO shall refer the matter to the Office of General Counsel and assist counsel will require proceedings and notices.

17.5.2.8 Administration.
(a) ***POLICY:*** BPA and the contractor should know and exercise their rights in subject inventions. Contracts having subject inventions should be administered so that—

(1) Inventions are identified, disclosed, and reported as required the contract and elections are made;
(2) The rights of the Government in such inventions are established;
(3) Patent applications are filed in a timely manner and prosecuted by contractors or by BPA;
(4) The rights of the Government in filed patent applications are documented by formal instruments such as licenses or assignments; and
(5) Expeditious commercial utilization of such inventions is achieved.

(b) ***PROCEDURE:*** COs shall maintain appropriate follow-up procedures to protect the Government's interest, to verify that subject inventions are identified and disclosed, and, when appropriate, patent applications are filed, and that the Government's rights therein are established and protected.

(c) ***PROCEDURE:*** The CO administering the contract is responsible for obtaining all documentation from the contractor relating to subject inventions. Such documentation shall be submitted to General Counsel, which shall be responsible for directing appropriate actions.

17.5.2.8.1 Clause Usage Prescriptions.
PROCEDURE:

(a) The CO shall determine whether the title to the patent shall be owned by the contractor or by BPA prior to executing the contract. COs may supplement either clause, below, to require the contractor to provide periodic reporting of subject inventions, information filed for any patent application on any subject invention, copies of each subcontract containing a patent rights clause, and submit periodic reports on the utilization of a subject invention.

(b) The CO shall include Clause 17-2.1 Patent Rights-Ownership by Contractor, in solicitations and contract, including intergovernmental contracts with other than Federal agencies, for research and development or for any contract that may produce a subject invention, where the parties determine that the contractor shall own the title to the resultant patent. The CO shall consult with BPA IT staff prior to including this clause in contracts for software developed solely for BPA's use.

(c) The CO shall include Clause 17-2.2 Patent Rights-Ownership by BPA, in solicitations and contracts, including intergovernmental contracts with other than Federal agencies, for research and development or for any contract that may produce a subject invention, where the parties determine that BPA shall hold title to the resultant patent. The CO shall consult with BPA IT staff prior to including this clause in contracts for software developed solely for BPA's use.

(d) The CO shall include Clause 17-2.2 Patent Rights-Ownership by BPA, in solicitations and contracts, including intergovernmental contracts with other Federal agencies, for research and development or for any contract that may produce a subject invention if the contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government.

17.5.2.9 Contractor Follow-up.
(a) ***INFORMATION:*** Contractors are required by Clause 17-2.1 Patent Rights-Ownership by the Contractor to establish and maintain effective procedures to ensure that its patent rights obligations are met, and that subject inventions are identified and disclosed in a timely manner and that when appropriate, patent applications are filed. Contractors shall submit all reports required by the CO.

(b) ***PROCEDURE:*** The CO shall maintain appropriate follow-up procedures to protect the Government's interest, to verify that subject inventions are identified and disclosed, and, when appropriate, patent applications are filed, and that the Government's rights therein are established and protected. The CO administering the contract is responsible for obtaining all documentation from the contractor relating to subject inventions. Such documentation shall be submitted to OGC, which shall be responsible for directing appropriate actions.

17.5.2.10 Royalties.
(a) ***INFORMATION:*** It may be appropriate for BPA to collect royalties from the successful application of project or invention completed or developed with BPA funds. A provision to collect royalties should not be added to a contract unless the probable revenues are expected to exceed the associated administrative costs.

(b) ***PROCEDURE:*** When a CO determines that royalties are appropriate, the CO shall contact the HCA for advice and assistance.

17.5.3 COPYRIGHTS.
17.5.3.1 General.
(a) ***INFORMATION:*** A copyright protects the expression of authors in certain types of original works. Copyright owners have exclusive privilege to reproduce, perform, or display their original works, or to prepare new works based on them, and may license any of these rights to others. BPA will allow

contractors to assert and register copyright for their original works, with the retention of a license to the work for its own use.

(b) ***INFORMATION:*** Prior to delivery, contractors are required to obtain permission to any copyrighted materials to be delivered to BPA. Contractors are expected to defend and indemnify BPA from any third party claim arising from contractor-supplied software that infringes on any patent, copyright, or trade secret.

(c) ***POLICY:*** BPA may own a license to use, reproduce, perform, display, or make derivative works of copyrighted material.

17.5.3.2 Permissions.
POLICY: BPA requires that contractors obtain permission from copyright owners before including copyrighted works, owned by others, in data to be delivered to BPA.

17.5.3.2.1 Clause Usage Prescription.
PROCEDURE: **The** CO shall include 17-7.1 Infringement Indemnification-Noncommercial Software in all solicitations and contracts where noncommercial software will be delivered to BPA.

17.5.3.3 Noncommercial Copyright.
POLICY:

(a) For noncommercial copyrights, BPA's policy is to determine those rights in advance by including rights in data clauses in the procurement contract. BPA addresses noncommercial copyright through its Rights in Data clauses.

(b) It is BPA policy to allow contract contractors to assert copyright for their original works of authorship including software. This includes allowing contractors to register the copyright, without BPA approval, except that BPA must retain a license to copy, display, perform, or create derivative works for its own use.

(c) BPA may exercise its rights in data for noncommercial intellectual property goods and services including noncommercial software. When a contractor licenses noncommercial software to BPA, BPA receives the software with either limited, restricted, or unrestricted rights. Contractors have an obligation to either mark or license their software with the rights in data that BPA acquires in their software.

(d) BPA will negotiate for fixed term or perpetual software licenses. Where BPA's contract expires prior to the term of the contractor's software license, BPA shall comply with the terms of the contractor's software license notwithstanding any expiration of the BPA contract.

17.5.3.3.1 Clause Usage Prescriptions.
PROCEDURE:

(a) The CO shall include Clause 17-19 Survival of Perpetual Licenses in all solicitations and contracts where BPA receives a perpetual use license.

(b) The CO shall include Clause 17-14 Noncommercial Software Warranty in all noncommercial solicitations and contracts where a contractor is developing, designing, configuring software specifically for BPA.

17.5.4 RIGHTS IN DATA.
17.5.4.1 General.
(a) ***INFORMATION:*** "Rights in Data" is an intellectual property right available to federal government entities and is used in contracts for development of products and services specifically for government use. Rights in Data refers to a set of rights only the federal government can exercise to acquire the data

associated with noncommercial goods and services. Rights in Data does not apply to commercial software.

It overlaps with other rights, such as copyright and patents. Congress, in 41 U.S.C. § 2302, provided the federal government special rights to data delivered under a contract. Unlike Patent Rights, there is no standard approach to data rights.

Congress recognizes that, while the government must respect the rights of private parties in their intellectual property, the government has special needs in contracting, especially when contracting for development of products and services specifically for government use. For example, BPA may pay a particular company to develop a highly efficient energy saving widget for use on BPA transmission lines. With rights to technical data, BPA may use a competitive solicitation to develop competitive markets for on-going maintenance and spare parts for the widget, as well as secondary markets.

(b) ***INFORMATION:*** Whenever a BPA contract results in a developed product, there is a certain amount of information or data about that product which is not part of the product specifications or software code. As a federal entity, BPA may have a need to access that information or data in order to carry out its mission or to insure that its competition requirements are met. For example, if a contractor develops noncommercial software specifically for BPA, BPA will have rights in data, enabling it to obtain that data so that competition for the support and maintenance function could take place.

(c) ***POLICY:*** BPA's policy is to determine data rights to products developed under BPA contract in advance by including patent or copyright (rights in data) clauses in the solicitation and procurement contract. In the typical situation, the contractor will own the work product and BPA will retain a license to make or use the invention. The contractor will have an obligation to commercialize and support the invention. If the contractor fails to do so, BPA could regain ownership of the work product by exercising "march-in" rights, see BPI 17.5.2.7.

(d) ***PROCEDURE:*** The CO shall consult with OGC in procurements where BPA shall take title to developed software and work products.

(e) ***PROCEDURE:*** The CO shall consult BPI 17.1.4.2 for the Clause Usage Matrix for the Rights in Data clauses.

17.5.4.1.1 Clause Usage Prescriptions.
PROCEDURE:

(a) The CO shall include Clause 17-3 Rights in Data-Noncommercial Software in solicitations and contracts where the BPA is contracting for the creation of noncommercial software per definition of BPI 1.8, and the contractor owns the resultant software and will provide support with BPA receiving use rights. COs shall include either Clause 17-8 Source Code Escrow-Third Party Agent or Clause 17-9 Source Code Escrow-BPA as Agent in the contract. The CO may supplement the Rights in Data clauses to require specific periodic reporting and periodic verification of BPA rights.(b) The CO shall include Clause 17-4 Rights in Data-Use of Existing Work in solicitations and contracts where the BPA is contracting for use rights (no modifications) for existing work already created by the contractor.

(b) **The** CO shall include Clause 17-5.1 Rights in Data-Creation of New Work in solicitations and contracts where the BPA is contracting for the creation of new work where the contractor will own the resultant work with a use license for BPA. The CO may supplement the Rights in Data clauses to require specific periodic reporting and periodic verification of BPA rights.

(c) **The** CO shall include Clause 17-5.2 Rights in Data-Creation of New Work, Restricted, in solicitations and contracts where the BPA is contracting for the creation of new work where the contractor will own the resultant work with a use license for BPA. Under this clause, the contractor agrees to restrict

its use rights as identified by BPA. The CO may supplement the Rights in Data clauses to require specific periodic reporting and periodic verification of BPA rights.

17.5.4.2 Assertion of Rights.
POLICY:

(a) BPA recognizes rights in data, including trade secrets and other proprietary information, developed at private expense, and limits its demands for delivery of that data. When such data is delivered, BPA will acquire only those rights essential to its needs.

(b) BPA will only assert its rights in data when contracting for non-commercial items or for research, development, or demonstration of new technologies. When BPA asserts its rights to data, BPA will do so in a way that respects the trade secrets and other proprietary information of others. For example, for data (other than computer software) that embodies a trade secret or is otherwise confidential or privileged, and not developed with government funds, BPA will respect the rights of the contractor through a "limited rights notice." For computer software that is developed at private expense and is a trade secret, BPA will negotiate only for "restricted rights."

17.5.4.3 Administration.
(a) ***POLICY:*** BPA and the contractor should know and exercise their rights in subject data. Contracts having data rights should be administered so that—

(1) Data is identified, disclosed, and reported as required in the contract and elections are made;
(2) The rights of the Government in such data are established;
(3) Patent or copyright applications are filed in a timely manner and prosecuted by contractors or by BPA;
(4) The rights of BPA in filed patent applications are documented by formal instruments such as licenses or assignments; and
(5) Expeditious commercial utilization of such data is achieved.

(b) ***PROCEDURE:*** COs are responsible for including appropriate reporting and delivery requirements in the SOW or requirements document, including frequency, quantity, quality and content of such reporting and delivery.

(c) ***PROCEDURE:*** COs shall maintain appropriate follow-up procedures to protect the Government's interest, to verify that data are identified and disclosed, and, when appropriate, patent applications are filed, and that the Government's rights therein are established and protected.

(d) ***PROCEDURE:*** The CO administering the contract is responsible for obtaining all documentation from the contractor relating to subject data. Such documentation shall be submitted to OGC, which shall be responsible for directing appropriate actions.

17.6 OTHER REQUIREMENTS FOR IT AND INTELLECTUAL PROPERTY TRANSACTIONS.

17.6.1 Sourcing Requirements.
(a) ***POLICY:*** Because of the critical nature of BPA's information and information systems, additional safeguards and requirements are imposed on those procurements which have the potential of impacting the region's critical transmission and power systems and BPA's ability to successfully achieve its mission. Many of these additional obligations are reflected in additional contract clauses which have their origins in Executive Orders, or Department of Energy Directives, as well as BPA specific policy requirements. Deviations requiring waivers are identified below.

17.6.1.1 Buy American Act.
(a) ***INFORMATION:*** BPA is subject to the Buy American Act (41 U.S.C. § 8301-8305.), various international agreements regarding government procurement, and Executive Order 10582, as amended.

The requirements under the Buy American Act apply to supply contracts and to the supply portion of contracts for services that involve the furnishing of supplies.

(b) ***POLICY:*** The Buy American Act shall not be applied to the purchase of information technology equipment and supplies that are commercial products, as set forth in 41 USC §8301-8305.

(c) ***PROCEDURE:*** The CO shall comply with the requirements of the Buy American Act for noncommercial procurements as set forth in BPI 9.1. IT procurements for commercial software and commercial IT hardware and equipment, including COTS software, hardware and equipment are exempt from the requirements of the Act.

17.6.1.2 Restrictions on Citizenship.
(a) ***INFORMATION:*** U.S. export control regulations apply to the transfer of software and technology to foreign nationals whether within or outside the U.S. The intent of the export control regulations is to safeguard national and economic security. "Technology," when defined for export control purposes, means both technical data and technical assistance. Provision of technology to a foreign national that takes place within the U.S. is considered to be an export to the foreign national's country, and is referred to as a "deemed export." Permanent Resident Aliens are considered to be U.S. persons under export control regulations.

(b) ***POLICY:*** The transfer of any BPA information, data or technology to non-citizens must be approved by the BPA Office of Personnel and Information Security pursuant to BPA Manual Chapter 1074.

(c) ***PROCEDURE:*** BPA's Office of Personnel and Information Security shall approve, in advance, all foreign nationals, whether located within or outside the U.S, who may :

1) receive BPA Critical Information as defined in BPI 14.18.1; or
2) receive BPA software, data or technology in the performance of a contract.

The BPA Office of Personnel and Information Security shall determine if there is a risk of a deemed export or the need for an export license.

17.6.1.3 Restrictions on Entity and Service Location.
(a) ***INFORMATION:*** Performance, including research, development, design maintenance and support, under BPA's IT or intellectual property contracts may not be located in countries identified on the Sensitive Country List, as described in BPI 14.8.1 or identified on the Terrorist Country List as designated by the US Secretary of State.

(b) ***POLICY:*** BPA will not contract with entities located within those countries identified on the U.S. DOE Sensitive Country List or with any country designated as a Terrorist Country by the U.S. Secretary of State. Additionally, the location of contract performance may not be within any country identified on the Sensitive Country or Terrorist Country Lists.

(c) ***PROCEDURE:*** The BPA Office of Personnel and Information Security and BPA's Office of Cyber Security shall determine if there is a risk associated with contracting for IT design, development, support and/or maintenance services from contractors physically located outside the United States. Additionally, any outsourcing of such services shall be approved by the BPA Offices of Personnel and Information Security, Cyber Security and HCA. COs shall consult BPA Manual Chapter 1074 Unclassified Foreign Visits and Assignments for guidance. COs shall include in the official file any waivers given by the HCA allowing such services to be performed in countries identified on the Sensitive Country or Terrorist Country lists.

17.6.1.3.1 Clause Usage Prescription.
PROCEDURE: The CO shall include Clause 14-17 Homeland Security in solicitations and contracts when:

4) BPA is contracting for hardware, software or services;
5) A non-disclosure agreement has been included; or
6) Any other instance where the requisitioner or CO determine it is necessary to protect BPA's interests.

17.6.1.4 Restrictions on Access to Information and Information Systems.
(a) ***INFORMATION***: The information and information systems used by BPA are subject to the requirements of the E-Government Act (Public Law 107-347) of 2002, Title III Federal Information Security Management Act (FISMA). FISMA establishes security controls protecting information and information systems from unauthorized access, use, disclosure, disruption, modification or destruction in order to assure integrity, confidentiality, and availability of the information and information systems.

(b) ***POLICY:*** BPA requires that contractors of information systems comply with the minimum requirements of protection as set forth by the National Institute of Standards and Technology (NIST) for national federal information systems. BPA, as a federal agency, will contract in compliance with the requirements of FISMA as adopted by BPA. Any variations or deviations from the policies and standards therein must be approved by the CIO and the HCA.

(c) ***PROCEDURE:*** The CO shall notify BPA's Office of Cyber Security of proposed solicitations and contracts for new information systems or modifications to existing information systems. COs shall also include BPA's Information Assurance requirements in the contract statement of work or requirements document and shall work with the program office to identify necessary requirements for compliance.

17.6.1.4.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include Clause 17-20 Information Assurance in all solicitations and contracts where a contractor's software will operate on, or come in contact with, BPA's systems or networks. The CO shall include Clause 17-20 Information Assurance in all solicitations and contracts where a contractor has access to BPA information or data that has been determined to be subject to FISMA. Modifications to this clause require both CIO and HCA approval. BPA's implementation of FISMA as well as any specific programmatic requirements must be set forth in the contract's requirements and included in the RFO/RFQ and contract statement of work/specifications document.

17.6.1.5 Standardization.
(a) ***INFORMATION:*** It is in BPA's best interest to standardize commercial IT hardware or equipment. Standardization allows BPA to achieve efficiencies across the agency where multiple organizations may utilize the same items. Additionally, standardization avoids unnecessary duplication in technological knowledge and training required to maintain multiple brands or specifications of functionally similar IT items.

(b) ***POLICY:*** Pursuant to BPI 11.7.1.2, BPA may procure only commercial IT hardware or equipment that conforms to BPA standardization determination when the CIO, as the equivalent level manager to the Business Line Vice President, has determined in writing that BPA must standardize the use of the item for business and technological reasons. Such written standardization determination must be available for review by the HCA and addressed in the DAD. Standardization is not applicable to commercial or COTS software; a unique source justification must be provided for such procurements.

17.6.2 Nondisclosure-Safeguarding of Information.
(a) ***INFORMATION:*** Performance under a BPA contract may require disclosure of either contractor proprietary information, or BPA information, including Critical Information as defined in BPI 14.18.1. Proprietary information is a broad category that includes trade secrets and technical data as well as financial information. A trade secret is information, not generally known, that has economic value and is protected from disclosure by its owner. A trade secret may be a formula, pattern, method, process, or technique. Trade secret protection is frequently used to protect computer software. Contractors often utilize trade secret law to protect their software under a trial use or evaluation agreement by signing a nondisclosure agreement with the potential licensee.

(b) ***POLICY:*** The timing of information disclosure and who is making the disclosure determines the documentation necessary to protect the information. BPA can protect contractor information, in both the solicitation stage of the procurement and during the performance of a contract, subject to the requirements of the Freedom of Information Act and other statutory authority, through the inclusion of a nondisclosure clause in the contract. The disclosure of BPA information, including CI, requires a stand-alone Nondisclosure Agreement drafted and approved by OGC. See BPI 11.4.3.

17.6.2.1 Contractor Information.
(a) ***INFORMATION:*** BPA will prevent unauthorized disclosure of contactor information by informing BPA personnel of the handling requirements, entering into nondisclosure agreements, and utilizing contractor information in accordance with the nondisclosure clauses included in the solicitation and contract.

(b) ***POLICY:*** Any confidential or proprietary contractor information disclosed by the contractor in the course of performance of a contract must be marked appropriately and disclosed pursuant to the terms of BPA's nondisclosure clause to avoid any confusion about proper handling.

(c) ***POLICY:*** Contractors may ask BPA to sign nondisclosure agreements or to include confidentiality agreements in contracts in order to protect their proprietary information or trade secrets, including trial use, evaluation or demonstration software. BPA will limit disclosure of contractor's proprietary, sensitive, or financial information pursuant to BPA's nondisclosure clauses, subject to the applicable federal disclosure laws. BPA will protect trade secrets of others pursuant and to the extent of the provisions of Clause 17-21 Nondisclosure for RFO/RFQ and Clause 17-22 Nondisclosure During Contract Performance.

(d) ***POLICY:*** BPA employees may be asked to sign nondisclosure agreements before potential contractors will disclose information about new products. BPA employees should understand whether the contractor is asking the employee to sign on their own behalf, or on behalf of BPA. If the contractor requires the employee to sign on behalf of BPA, the employee must either be a warranted CO or obtain approval from BPA's Office of General Counsel.

(e) ***PROCEDURE:*** The CO shall include any nondisclosure agreements protecting contractor/offeror information in the official file as identified in BPI 12.8.2.

17.6.2.1.1 Clause Usage Prescriptions.
PROCEDURE:

(a) The CO shall include Clause 17-21 Nondisclosure for RFO/RFQ in Attachment 1 Instructions to Offerors in solicitations where the offeror may reasonably be expected to include proprietary or confidential information in the offer.

(b) The CO shall include Clause 17-22 Nondisclosure During Contract Performance in the RFO/RFQ Attachment 3, draft contract, and the fully executed contract in all procurements where the contractor's proprietary or confidential information may be received by BPA during the performance of the contract.

17.6.2.2 BPA Information.
(a) ***INFORMATION:*** BPA, as a government entity, does not have trade secrets of its own. Information which is considered critical or sensitive will be marked accordingly. To maintain appropriate system integrity and security, information regarding BPA's current IT system architecture, platforms, operating systems, and specific software applications will only be disclosed on a need to know basis, both within and outside on BPA, per the BPA Program Cyber Security Plan issued by the Office of the Chief Information Officer.

(b) ***PROCEDURE:*** Contracting Officers and their designees shall not disclose to any outside source, including IT businesses, corporate survey firms, consultants, publications, potential offerors, or current

contractors, any information pertaining to BPA IT system architecture, platforms, operating systems, specific software applications, hardware, or any portion of the general BPA IT environment, except as authorized by the requisitioner acting under the CIO's policy guidance, and then only as necessary to acquire goods and services required to satisfy the IT need.

(c) ***PROCEDURE:*** Should the CO and requisitioner determine there is an appropriate rationale to disclose such information to offerors and/or contractors, COs shall consult with OGC prior to any disclosure for guidance on appropriate markings, nondisclosure agreements and procedures.

(d) ***PROCEDURE:*** The CO should refer to BPAM 1080 for guidance and policy on safeguarding critical information.

(e) ***PROCEDURE:*** IT procurements which require disclosure of information pertaining to BPA system architecture, platforms, operating systems, specific software applications, hardware, or any portion of the general BPA environment must adhere to the disclosure requirements as set forth in BPI 6.8.2(f). Procurements which require disclosure of critical BPA information or data should be referred to OGC for preparation of a nondisclosure agreement. Additionally, any publication of IT requirements must comply with BPI 11.3.

17.6.3 Reserved.

17.6.4 Infringement Indemnification.

17.6.4.1 Commercial Procurements**.**

(a) ***INFORMATION:*** Contractor Indemnification of BPA: Contractors, in offering to sell commercial items, including services, represent that they have the appropriate ownership and distribution rights in the items being delivered to BPA. In contracts for commercial items, BPA requires that the contractor indemnify BPA for any patent and copyright infringement resulting from the delivery of contractors' products or services to BPA. Indemnification rights for commercial products procured through third party distributors is passed through the distributor from the manufacturer to BPA.

(b) ***INFORMATION:*** BPA Indemnification of Contractors: BPA will not agree to indemnify a contractor for patent or copyright infringement on commercial software, goods or services.

(c) ***POLICY:*** BPA requires infringement indemnification for commercial hardware, IT items and services, and commercial software, including COTS.

(d) ***PROCEDURE:*** The CO shall include Clause 28-14 Indemnification in solicitations and contracts for commercial hardware, IT items and services, and commercial software, including COTS.

17.6.4.2 Noncommercial Procurements.

17.6.4.2.1 Injunction/Work Stoppage and Authorization and Consent

(a) ***INFORMATION:*** In accordance with Federal patent and copyright law, the contractor is protected from suit for patent or copyright infringement when the use of a patented invention or of a copyrighted work is for BPA and with the authorization and consent of BPA. The exclusive remedy for owners of patents or copyrights alleging infringement by a BPA contractor during the conduct of a BPA contract is a suit against BPA in the U.S. Court of Federal Claims without an injunction. The purpose of this provision of law (28 U.S.C. 1498) is to allow BPA discretion to allow progress on BPA contracts in spite of litigation.

(b) ***POLICY:*** Authorization and consent on the part of BPA may be either express or implied.

(c) ***POLICY:*** BPA enjoys additional protection under 17 U.S.C. § 1498, in that a copyright owner is not entitled to injunctive relief should BPA make authorized use of copyrighted material. BPA, at its discretion, may award a contract even if there is a possibility of unauthorized use of a copyright, although it is BPA policy to require contractors to license copyrighted materials to be included in deliveries to BPA.

By allowing contracts to be awarded even with the possibility of copyright infringement, BPA can avoid unsuccessful offerors alleging infringement as grounds for protest.

17.6.4.2.1.1 Clause Usage Prescription.
PROCEDURES:

(a) The CO shall include Clause 17-1.1 Authorization and Consent-Research, Development & Demonstration in solicitations and contracts for research, development, and demonstration of new technologies. The CO shall also include Clause 17-13 Patent and Copyright Infringement Notice when using Clause 17.1.1. Clause 17-1.1 shall not be included in solicitations and contracts for commercial acquisitions.

(b) The CO shall include Clause 17-1.2 Authorization and Consent-Noncommercial Items or Services in solicitations and contracts for procurement of noncommercial items or services. The CO shall also include Clause 17-13 Patent and Copyright Infringement Notice when using Clause 17-1.2. Clause 17-1.2 shall not be included in solicitations and contracts for commercial acquisitions.

17.6.4.2.2 Indemnification.
(a) ***INFORMATION:***
(1) Preparation of certain types of work requires permission from the patent and/or copyright owners. Contractors are expected to develop products without infringing the intellectual property rights of others, that is, without appropriating others' protected ideas or expression.

(2) BPA can protect itself in its acceptance of liability for patent or copyright infringement by requiring indemnification by the contractor who develops the product. If BPA is found liable for the infringement, BPA can then recover its loss from the contractor.

(b) ***POLICY:*** BPA requires that contractors indemnify BPA for any patent or copyright infringement resulting from the contractors' product development or licensing under a BPA contract.

(c) ***PROCEDURE:*** It may be in BPA's interest to exempt specific U.S. patents from the patent indemnity clause. Exclusion from indemnity of identified patents shall be approved by the HCA.

(d) ***POLICY:*** Where it is in BPA's best interest to exempt, exclude or include specific U.S. patents from the patent indemnity clause, the HCA must approve such actions. COs shall consult with Office of General Counsel to determine if appropriate and what clause to utilize.

17.6.4.2.2.1 Clause Usage Prescription.
PROCEDURE:

(a) The CO shall include clause 17-7.1 Indemnification for Infringement-Noncommercial Software in solicitations and contracts where a noncommercial software or database license is developed or provided by the contractor.

(b) The CO shall include Clause 17-7.2 Infringement Indemnification-Patents in noncommercial solicitations and contracts for research, development, or demonstration of new technologies where the CO determines after consultation with OGC that inclusion of the clause is in the best interest of BPA.

17.6.4.3 Notice of Infringement.
17.6.4.3.1 Research and Development.
(a) ***POLICY:*** In contracts for research, development, or demonstration or for procurement of non-commercial items, BPA may expressly authorize and consent to a contractor's use or manufacture of inventions covered by U.S. patents and copyrights. In contracts for research, development, or demonstration or for procurement of non-commercial items, BPA may choose to indemnify the contractor

for patent or copyright infringement when it is in the best interest of BPA to do so. This has the effect of extending BPA's protections against patent infringement suits to its contractors.

(b) ***POLICY:*** In contracts for the purchase of non-commercial items or for research, development, or demonstration projects, BPA has discretion in awarding a contract when prospective contractor may infringe a patent or a copyright. BPA, as a Federal government entity, has certain protections against suits for unauthorized use of items protected by patent and copyright.

(c) ***PROCEDURE:*** BPA requires notice and assistance from its contractors regarding any claims against a contractor for patent or copyright infringement where BPA has given its authorization and consent.

17.6.4.3.1.1 Clause Usage Prescriptions.
PROCEDURES:

(a) The CO shall include Clause 17-13, Patent and Copyright Infringement Notice, in all solicitations and contracts that include Clause 17-1.1, Authorization and Consent-Research, Development and Demonstration Projects.

(b) The CO shall include Clause 17-13, Patent and Copyright Infringement Notice, in all solicitations and contracts that include Clause 17-1.2, Authorization and Consent-Procurement of Noncommercial Items or Services.

17.6.4.3.2 Third-Party Rights.
(a) ***POLICY:*** It is BPA policy that if the software infringes a third party's rights, the contractor who infringed during performance of the BPA contract will be liable for all expenses that BPA might incur in the event of a claim, including a request to stop use of the software or database because of an alleged infringement, particularly when the software product is developed especially for BPA, and BPA is at greater risk for an infringement claim.

(b) ***PROCEDURE:*** BPA will not refuse or suspend a contract award pending notification to the patent owner.

(c) ***PROCEDURE:*** When questions arise regarding the notice requirements or other matters relating indemnification, the CO should consult with OGC.

17.6.5 Source Code Escrow.
(a) ***INFORMATION:*** By securing rights to the source code of a software product, BPA is better able to protect itself and provide continuity of operations in the event the software is no longer maintained or supported by the contractor for a number of reasons. If a contractor stops developing or maintaining the software product as specified in the contract, or goes out of business, an escrow arrangement permits BPA to access the source code, source materials and documentation necessary to maintain the software and/or build or modify the source code.

(b) ***POLICY:*** It is BPA policy that source code escrow agreements shall be used for noncommercial, and commercial where appropriate and available, software developed by a contractor to protect BPA's interests if a contractor goes out of business, or ceases support of the software in accordance with the contract.

(c) ***POLICY:*** In procurements for noncommercial software resulting in BPA ownership, BPA shall not require source code escrow, but shall require delivery of source code, materials and documentation as a contract deliverable.

(d) ***PROCEDURE:*** COs shall consider placing source code into escrow where the software is used in support of a critical business function, or where the contractor is new, small, unproven or of financially

questionable stability, or where the CO determines there is a risk that the contractor will cease support of the software in accordance with the contract terms.

Source code escrow for commercial software should be considered where the software is utilized on a critical business system and/or where the contractor is small, unproven, or of questionable financial stability. Source code escrow should also be considered for commercial hardware and equipment where there is embedded software critical to the functionality of the items and the items are an integral part of BPA's critical business systems. BPA does not require source code escrow on COTS software or for software that has been embedded in COTS hardware or COTS equipment.

COs shall include the appropriate contract provisions in the solicitation and contract upon the execution of the contract. However, should the market conditions, or the contractor's stability, change during the period of performance, the CO shall consider modifying the contract to include the necessary protections for BPA. COs must obtain CIO and HCA approval of critical business system solicitations and contracts that do not include source code escrow provisions.

(e) ***PROCEDURE:*** COs should consider including Clause 14-18 Bankruptcy when either Clause 17-8 Source Code Escrow-Third Party Agent or Clause 17-9 Source Code Escrow-BPA as Agent are prescribed.

17.6.5.1 Third Party Agent.
(a) ***POLICY:*** Where necessary to secure source code through third party escrow, the escrow arrangement must be documented through a separate source code escrow agreement. BPA requires a separate fully executed source code escrow agreement, naming BPA as a named beneficiary. The third party agent for a source code escrow agreement shall be a U.S. company located in the U.S. and the escrow account also must be located within the United States. The escrow agent may not be a parent, subsidiary or affiliate of the contractor.

(b) ***PROCEDURE:*** COs must obtain CIO and HCA approval for the use of a third party source code escrow agent.

(c) ***PROCEDURE:*** Where a third party is acting as the source code escrow agent, a source code escrow agreement must be included in the official file and must require the escrow agent to:

(1) Establish and maintain adequate procedures for protecting the source code and documentation delivered to or stored at the escrow agent's repository from unauthorized release or disclosure;
(2) Establish and maintain adequate procedures for controlling the release or disclosure of the source code and documentation from the repository to third parties consistent with BPA's rights in such data;
(3) When required by the contracting officer, deliver the source code in electronic form and documentation in electronic or paper form to BPA, or in other specified media;
(4) Be responsible for maintaining the currency of the source code and documentation delivered directly by BPA contractors or subcontractors to the repository;
(5) Authorize BPA to audit (but not copy) on a quarterly basis the source code material and reports by sampling at the location of the escrow agent to verify that the source code material is current;
(6) Obtain use and nondisclosure agreements from all persons to whom the source code and documentation is released or disclosed; and
(7) Indemnify BPA from any liability to source code owners or licensors resulting from, or as a consequence of, a release or disclosure of source code data made by the escrow agent or its officers, employees, agents, or representatives.

17.6.5.1.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include Clause 17-8 Source Code Escrow-Third Party Agent in all solicitations and contracts for commercial and noncommercial software where a third party will hold the source code in escrow for BPA's benefit in support of BPA's critical business systems. The CO shall also include Clause 17-8 where the CO determines it is in BPA's best interest to assure continuity of operations from a contractor's failure to support the software. In addition to including Clause 17-8, the

CO shall also include in the official file a fully executed third party source code escrow agreement which includes BPA as a named beneficiary of the escrow account. The term of the third party source code escrow agreement must match the term of the BPA contract or license agreement and have notice provisions requiring BPA be notified of any termination or expiration of the escrow agreement. Clause 17-8 shall not be included in acquisitions of COTS software.

17.6.5.2 BPA as Escrow Agent.
(a) ***POLICY:*** BPA policy requires that source code escrow for commercial and noncommercial software be maintained by BPA, with BPA as the escrow agent. Under these circumstances, BPA will negotiate an on-site source code escrow directly with the contractor, wherein the source code is held in a secure BPA location in lieu of an independent third party escrow account.

(b) ***PROCEDURE:*** When contracting with new or small technology companies, the CO shall obtain source code escrow rights with BPA as the escrow agent. BPA shall have rights in escrow to the source code and source materials for the current version and all subsequent releases, documentation and source code build information. Additionally, BPA shall have the right to periodically verify that the source code materials are accurate and current.

17.6.5.2.1 Clause Usage Prescription.
PROCEDURE: The CO shall include Clause 17-9 Source Code Escrow-BPA as Agent in all solicitations and contracts for commercial and noncommercial software solicitations and contracts for software utilized in support of BPA's critical business systems. The CO shall also include Clause 17-9 where the CO determines it is in BPA's best interest to assure continuity of operations from a contractor's failure to support the software. Clause 17-9 shall not be included in acquisitions of COTS software.

17.6.6 Trademarks.
(a) ***INFORMATION:*** A trademark or service mark is a work, symbol or device used to identify the source of goods or services. Trademarks are protected under both federal and state law. The federal law, known as the Lanham Act, 15 U.S.C. § 1051-1127, affects BPA in two ways. First, BPA may hold title to a trademark for its own goods or services. Secondly, the Lanham Act waives sovereign immunity, implying that BPA can be sued for infringing on a trademark.

(b) ***POLICY:*** BPA is subject to, and will comply with, the Lanham Act requirements.

(c) ***PROCEDURE:*** The CO shall consult with OGC on any issues of trademark law.

17.6.7 Audit Rights.
(a) ***INFORMATION:*** Many software licensing structures require the licensee to allow the licensor to access the installed software or system to verify compliance and usage. Alternate methods of license usage verification include licensee certification, periodic true-ups, and self-reporting. The contractor's audit of BPA's usage should be distinguished from BPA's right to audit under Clause 28-20 Requirements Unique to Government Contracts.

(b) ***POLICY:*** Due to the critical nature of BPA's information technology systems as well as the restricted access inherent in critical systems operations, BPA will not allow access to its IT systems for license compliance verification or usage purposes. BPA may agree to self-report its compliance and usage to contractors, upon contractor's written request or as negotiated within the contract documents.

(c) ***PROCEDURE:*** The CO shall not agree in any contract to any audit by contractor or third party of BPA information technology systems or data for license compliance verification or usage purposes. The CO may agree to self-reporting, certification or periodic true-ups for compliance and usage verification purposes.

17.50 TEXT OF CLAUSES

The following clauses are referred to in BPI Part 17:

Clause 17-1.1 AUTHORIZATION AND CONSENT -- RESEARCH, DEVELOPMENT, AND DEMONSTRATION CONTRACTS 35
Clause 17-1.2 AUTHORIZATION AND CONSENT -- NONCOMMERCIAL ITEMS OR SERVICES 35
Clause 17-2.1 PATENT RIGHTS -- OWNERSHIP BY THE CONTRACTOR 35
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Clause 17-1.1 AUTHORIZATION AND CONSENT -- RESEARCH, DEVELOPMENT, AND DEMONSTRATION CONTRACTS
(Jul 13)(BPI 17.6.4.1.1)

(a) BPA authorizes and consents to all use and manufacture of any invention described in and covered by a United States patent in the performance of this contract or any subcontract at any tier.

(b) The terms of this clause shall apply to subcontracts at any tier whether or not incorporated into such subcontracts.

(End of Clause)

Clause 17-1.2 AUTHORIZATION AND CONSENT -- NONCOMMERCIAL ITEMS OR SERVICES
(Jul 13)(BPI 17.6.4.1.1)

(a) BPA authorizes and consents to all use and manufacture, in performing this contract or any subcontract at any tier, of any invention described in and covered by a United States patent—

(1) Embodied in the structure or composition of any article the delivery of which is accepted by BPA under this contract; or

(2) Used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with:

(A) specifications or written provisions forming a part of this contract or

(B) specific written instructions given by the CO directing the manner of performance.

The entire liability to BPA for infringement of a United States patent shall be determined solely by the provisions of the indemnity clause, if any, included in this contract or any subcontract hereunder (including any lower-tier subcontract), and BPA assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

(b) The terms of this clause shall apply to subcontracts at any tier whether or not incorporated into such subcontracts.

(End of Clause)

Clause 17-2.1 PATENT RIGHTS -- OWNERSHIP BY THE CONTRACTOR
(Oct 11)(BPI 17.4.1.1; BPI 17.5.2.8.1)

(a) Contractor's rights.

(1) Ownership. The Contractor may retain ownership of each subject invention throughout the world in accordance with the provisions of this clause.

(2) License. The Contractor shall retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, unless the Contractor fails to disclose the invention within the times specified in paragraph (b) of this clause. The Contractor's license extends to any domestic subsidiaries and affiliates within the corporate structure of which the Contractor is a part, and includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at contract award. The license is transferable only with the written approval of the agency, except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(b) Contractor's obligations.

(1) The Contractor shall disclose in writing each subject invention to the CO within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters. The disclosure shall identify the inventor(s) and this contract under which the subject invention was made. It shall be sufficiently complete in technical detail to convey a clear understanding of the

subject invention. The disclosure shall also identify any publication, on sale (*i.e.*, sale or offer for sale), or public use of the subject invention, or whether a manuscript describing the subject invention has been submitted for publication and, if so, whether it has been accepted for publication. In addition, after disclosure to the agency, the Contractor shall promptly notify the CO of the acceptance of any manuscript describing the subject invention for publication and any on sale or public use.

(2) The Contractor shall elect in writing whether or not to retain ownership of any subject invention by notifying the Contracting Officer within 2 years of disclosure to the agency. However, in any case where publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the United States, the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor shall file either a provisional or a non-provisional patent application on an elected subject invention within 1 year after election. However, in any case where a publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the United States, the Contractor shall file the application prior to the end of that statutory period. If the Contractor files a provisional application, it shall file a non-provisional application within 10 months of the filing of the provisional application. The Contractor shall file patent applications in additional countries or international patent offices within either 10 months of the first filed patent application (whether provisional or non-provisional) or 6 months from the date permission is granted by the Commissioner of Patents to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) The Contractor may request extensions of time for disclosure, election, or filing under paragraphs (b)(1), (b)(2), and (b)(3) of this clause.

(c) Government's rights—

(1) Ownership. The Contractor shall assign to the agency, on written request, title to any subject invention—

(A) If the Contractor fails to disclose or elect ownership to the subject invention within the times specified in paragraph (b) of this clause, or elects not to retain ownership; provided, that the agency may request title only within 60 days after learning of the Contractor's failure to disclose or elect within the specified times.

(B) In those countries in which the Contractor fails to file patent applications within the times specified in paragraph (b) of this clause; provided, however, that if the Contractor has filed a patent application in a country after the times specified in paragraph (b) of this clause, but prior to its receipt of the written request of the agency, the Contractor shall continue to retain ownership in that country.

(C) In any country in which the Contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(2) License. If the Contractor retains ownership of any subject invention, the Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world.

(d) Contractor action to protect the Government's interest.

(1) The Contractor shall execute or have executed and promptly deliver to the agency all instruments necessary to—

(A) Establish or confirm the rights the Government has throughout the world in those subject inventions in which the Contractor elects to retain ownership; and

(B) Assign title to the agency when requested under paragraph (d) of this clause and to enable the Government to obtain patent protection for that subject invention in any country.

(2) The Contractor shall require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in the Contractor's format, each subject invention in

order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. The disclosure format should require, as a minimum, the information required by paragraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, as to the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The Contractor shall notify the Contracting Officer of any decisions not to file a nonprovisional patent application, continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response or filing period required by the relevant patent office.

(4) The Contractor shall include, within the specification of any United States nonprovisional patent and any patent issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under Contract # _____ awarded by _____ agency. The Government has certain rights in the invention."

(e) Reporting on utilization of subject inventions. The Contractor shall submit, on request, periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining utilization of the subject invention that are being made by the Contractor or its licensees or assignees. The reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and other data and information as the agency may reasonably specify. The Contractor also shall provide additional reports as may be requested by the agency in connection with any march-in proceeding undertaken by the agency in accordance with paragraph (f) of this clause. The Contractor also shall mark any utilization report as confidential/proprietary to help prevent inadvertent release outside the Government. As required by 35 U.S.C. 202(c)(5), the agency will not disclose that information to persons outside the Government without the Contractor's permission.

(f) March-in rights. The Contractor acknowledges that, with respect to any subject invention in which it has retained ownership, the agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c), and in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the agency in effect on the date of contract award.

(g) Subcontracts. The Contractor shall include the substance of this clause in all subcontracts.

(End of Clause)

Clause 17-2.2 PATENT RIGHTS -- OWNERSHIP BY BPA
(Oct 11)(BPI 17.4.1.1; BPI 17.5.2.8.1)

(a) **Ownership**.

(1) **Assignment to BPA.** The Contractor shall assign to BPA title throughout the world to each subject invention except to the extent that rights are retained under paragraphs (a)(2) and (c) of this clause.

(2) **Greater rights determinations.**

(A) The Contractor, or an employee-inventor after consultation with the Contractor, may request greater rights than the nonexclusive license provided in paragraph (c) of this clause. The request for a greater rights must be submitted to the Contracting Officer at the time of the first disclosure of the subject invention pursuant to paragraph (d)(2) of this clause, or not later than 8 months thereafter, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. Each determination of greater rights under this contract normally shall be subject to paragraph (b) of this clause, and to the reservations and conditions deemed to be appropriate by the agency.

(B) Upon request, the Contractor shall provide the filing date, serial number and title, a copy of the patent application (including an English-language version if filed in a language other than English), and patent number and issue date for any subject invention in any country for which the Contractor has retained title.

(C) Upon request, the Contractor shall furnish the agency an irrevocable power to inspect and make copies of the patent application file.

(b) **Minimum rights acquired by BPA.**

(1) Regarding each subject invention to which the Contractor retains ownership, the Contractor agrees as follows:

(A) BPA will have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world.

(B) The agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c) and in accordance with the procedures set forth in 37 CFR 401.6 and any supplemental regulations of the agency in effect on the date of the contract award.

(C) Upon request, the Contractor shall submit periodic reports no more frequently than annually on the utilization, or efforts to obtain utilization, of a subject invention by the Contractor or its licensees or assignees. The reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and any other data and information as the agency may reasonably specify. The Contractor also shall provide additional reports as may be requested by the agency in connection with any march-in proceedings undertaken by the agency in accordance with paragraph (b)(1)(B) of this clause. To the extent data or information supplied under this section is considered by the Contractor, or its licensees, or assignees to be privileged and confidential and is so marked, the agency, to the extent permitted by law, will not disclose such information to persons outside the Government.

(D) When licensing a subject invention, the Contractor shall—

(i) Ensure that no royalties are charged on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government;

(ii) Refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government;

(iii) Provide for this refund in any instrument transferring rights in the subject invention to any party.

(E) When transferring rights in a subject invention, the Contractor shall provide for the Government's rights set forth in paragraphs (b)(1)(A) through (b)(1)(E) of this clause.

(2) Nothing contained in paragraph (c) of this clause shall be deemed to grant to the Government rights in any invention other than a subject invention.

(c) **Minimum rights to the Contractor.**

(1) The Contractor is hereby granted a revocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government obtains title, unless the Contractor fails to disclose the subject invention within the times specified in paragraph (d)(2) of this clause. The Contractor's license extends to any of its domestic subsidiaries and affiliates within the corporate structure of which the Contractor is a part, and includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at contract award. The license is transferable only with the written approval of the agency except when transferred to the successor of that part of the Contractor's business to which the subject invention pertains.

(2) The Contractor's license may be revoked or modified by the agency to the extent necessary to achieve expeditious practical application of the subject invention in a particular country in accordance with the procedures in FAR 27.302(i)(2) and 27.304-1(f).

(3) When the Government elects not to apply for a patent in any foreign country, the Contractor retains rights in that foreign country to apply for a patent, subject to the Government's rights in paragraph (c)(1) of this clause.

(d) **Invention identification, disclosures, and reports**.

(1) The Contractor shall establish and maintain active and effective procedures to educate its employees in order to assure that subject inventions are promptly identified and disclosed to Contractor personnel responsible for patent matters. The procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and records that show the procedures for identifying and disclosing subject inventions are followed. Upon request, the Contractor shall furnish the Contracting Officer a description of these procedures for evaluation and for a determination as to their effectiveness.

(2) The Contractor shall disclose in writing each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters or, if earlier, within 6 months after the Contractor becomes aware that a subject invention has been made, but in any event before any on sale (i.e., sale or offer for sale), public use, or publication of the subject invention known to the Contractor. The disclosure shall identify the contract under which the subject invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding of the subject invention. The disclosure shall also identify any publication, on sale, or public use of the subject invention and whether a manuscript describing the subject invention has been submitted for publication and, if so, whether it has been accepted for publication. In addition, after disclosure to the agency, the Contractor shall promptly notify the Contracting Officer of the acceptance of any manuscript describing the subject invention for publication and any on sale or public use.

(3) The Contractor shall furnish the Contracting Officer the following:

(A) Interim reports every 12 months (or a longer period as may be specified by the Contracting Officer) from the date of the contract, listing subject inventions during that period, and stating that all subject inventions have been disclosed (or that there are none) and that the procedures required by paragraph (d)(1) of this clause have been followed.

(B) A final report, within 3 months after completion of the contracted work, listing all subject inventions or stating that there were none, and listing all subcontracts at any tier containing a patent rights clause or stating that there were none.

(4) The Contractor shall require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in the Contractor's format each subject invention in order that the Contractor can comply with the disclosure provisions of paragraph (d) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by paragraph (d)(2) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, as to the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(5) Subject to FAR 27.302(i), the Contractor agrees that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause.

(e) **Examination of records relating to inventions**.

(1) The Contracting Officer or any authorized representative shall, until 3 years after final payment under this contract, have the right to examine any books (including laboratory notebooks), records, and documents of the Contractor relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this contract to determine whether—

(A) Any inventions are subject inventions;

(B) The Contractor has established and maintains the procedures required by paragraphs (d)(1) and (d)(4) of this clause; and

(C) The Contractor and its inventors have complied with the procedures.

(2) The Contractor shall disclose to the Contracting Officer, for the determination of ownership rights, any unreported invention that the Contracting Officer believes may be a subject invention.

(3) Any examination of records under paragraph (e) of this clause will be subject to appropriate conditions to protect the confidentiality of the information involved.

(f) **Withholding of payment**.
(This paragraph does not apply to subcontracts.)

(1) Any time before final payment under this contract, the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding $50,000 or 5 percent of the amount of this contract, whichever is less, shall have been set aside if, in the Contracting Office's opinion, the Contractor fails to—

(A) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to paragraph (d)(1) of this clause;
(B) Disclose any subject invention pursuant to paragraph (d)(2) of this clause;
(C) Deliver acceptable interim reports pursuant to paragraph (d)(3)(A) of this clause; or
(D) Provide the information regarding subcontracts pursuant to paragraph (d)(3)(B) of this clause.

(2) The Contracting Officer will withhold the reserve or balance until the Contracting Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.

(3) The Contracting Officer will not make final payment under this contract before the Contractor delivers to the Contracting Officer, as required by this clause, all disclosures of subject inventions, an acceptable final report, and all due confirmatory instruments.

(4) The Contracting Officer may decrease or increase the sums withheld up to the maximum authorized. The Contracting Officer will not withhold any amount under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the contract. The withholding of any amount or the subsequent payment shall not be construed as a waiver of any Government rights.

(g) **Preference for United States industry**. Unless provided otherwise, neither the Contractor nor any assignee shall grant to any person the exclusive right to use or sell any subject invention in the United States unless the person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement may be waived by the agency upon a showing by the Contractor or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that, under the circumstances, domestic manufacture is not commercially feasible.

(h) **Subcontracts.** The Contractor shall include the substance of this patent rights clause in all subcontracts.

(End of Clause)

Clause 17-3 RIGHTS IN DATA -- NONCOMMERCIAL SOFTWARE
(Jul 13)(BPI 17.5.4.1.1)

(a) Title to Software and all copies and, except as specifically provided herein, to all modifications, alterations and enhancements made under this contract, shall remain with Contractor or its third party

licensors. BPA shall have no right, title, or interest in the Software or any copy, or except as specifically provided herein, in any modification, alteration or enhancement made under this contract. All modified, altered or enhanced versions of the Software shall be deemed equivalent to the Software, and shall be subject to the terms and conditions of this license. Contractor grants to BPA a fully paid-up, non-exclusive, irrevocable, world-wide license to use the Software and such modifications internally.

(b) No title or ownership of the Software or any of its parts, nor any applicable intellectual property rights therein such as patents, copyrights and trade secrets, is transferred to BPA.

(c) Unless terminated by Contractor as provided herein, the term of this license shall expire at such time as BPA discontinues use of the applicable Software. Contract agrees to support the Software for whatever time BPA pays the annual support fee. Contractor agrees to place the Software source code into escrow for the benefit of BPA, as defined in the source code escrow clause herein.

(d) Contractor shall defend, at its expense, and hold BPA harmless from any claim or suit brought against BPA alleging that Software furnished hereunder infringe a U.S. patent or copyright, violates trade secrets, rights of privacy, or any libelous or other unlawful matter contained in such Work Product, and shall pay all costs and damages finally awarded, provided Contractor is given prompt written notice of such claim and is given information, reasonable assistance, and sole authority to defend or settle the claim. In the defense of the claim, Contractor shall obtain for BPA the right to continue using the Software, replace or modify the Software to be noninfringing, or if such remedies are not reasonably available, grant BPA a refund for the Software and accept its return.

(End of Clause)

Clause 17-4 RIGHTS IN DATA -- USE OF EXISTING WORK
(Oct 11)(BPI 17.5.4.1.1)

(a) Except as otherwise provided in this contract, the Contractor grants to BPA, and others acting on its behalf, a paid-up non-exclusive, irrevocable, worldwide license to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of BPA, for all the material or subject matter called for under this contract.

(b) Contractor shall defend, at its expense, and hold BPA harmless from any claim or suit brought against BPA alleging that the Work Product furnished hereunder infringes a U.S. patent or copyright, violates trade secrets, rights of privacy, or any libelous or other unlawful matter contained in such Work Product, and shall pay all costs and damages finally awarded, provided Contractor is given prompt written notice of such claim and is given information, reasonable assistance, and sole authority to defend or settle the claim. In the defense of the claim, Contractor shall obtain for BPA the right to continue using the Work Product, replace or modify the Work Product to be noninfringing, or if such remedies are not reasonably available, grant BPA a refund for the work Product and accept its return.

(End of Clause)

Clause 17-5.1 RIGHTS IN DATA -- CREATION OF NEW WORK
(Jul 13)(BPI 17.5.4.1.1)

(a) Except as otherwise provided herein, the Contractor grants to BPA a fully paid-up, non-exclusive, irrevocable, worldwide, perpetual license to copy, prepare derivative works and perform or display publicly, by or on behalf of BPA, for all the material or subject matter produced under this contract, hereinafter referred to as Work Product. Work Product means recorded information, regardless of form or the media on which it is stored, including any other copyrightable products or materials arising from performance under this contract.

(b) Contractor shall defend, at its expense, and hold BPA harmless from any claim or suit brought against BPA alleging that the Work Product furnished hereunder infringes a U.S. patent or copyright, violates trade secrets, rights of privacy, or any libelous or other unlawful matter contained in such Work Product, and shall pay all costs and damages finally awarded, provided Contractor is given prompt written notice of such claim and is given information, reasonable assistance, and sole authority to defend or settle the claim. In the defense of the claim, Contractor shall obtain for BPA the right to continue using the Work Product, replace or modify the Work Product to be noninfringing, or if such remedies are not reasonably available, grant BPA a refund for the work Product and accept its return. The provisions of this clause do not apply to material furnished to the Contractor by BPA and incorporated in the Work Product to which this clause applies.

(End of Clause)

Clause 17-5.2 RIGHTS IN DATA -- CREATION OF NEW WORK, RESTRICTED (Jul 13)(BPI 17.5.4.1.1)

(a) Except as otherwise provided herein, the Contractor grants to BPA a fully paid-up, non-exclusive, irrevocable, worldwide, perpetual license to copy, prepare derivative works and perform or display publicly, by or on behalf of BPA, for all the material or subject matter produced under this contract, hereinafter referred to as Work Product. Work Product means data (recorded information, regardless of form or the media on which it is stored) as well as any other copyrightable products or materials arising from performance under this contract.

(b) Contractor agrees that its use of the Work Product shall be restricted as defined by BPA in the statement of work or requirements document. Contractor shall protect the Work Product from disclosure to third parties without BPA's prior written consent, except as reasonably necessary to perform the services under this contract. The obligations under this provision shall survive any termination of this contract. Contractor's obligation to protect the Work Product from disclosure shall terminate upon BPA's disclosure without further restrictions.

(c) Contractor shall defend, at its expense, and hold BPA harmless from any claim or suit brought against BPA alleging that the Work Product furnished hereunder infringes a U.S. patent or copyright, violates trade secrets, rights of privacy, or any libelous or other unlawful matter contained in such Work Product, and shall pay all costs and damages finally awarded, provided Contractor is given prompt written notice of such claim and is given information, reasonable assistance, and sole authority to defend or settle the claim. In the defense of the claim, Contractor shall obtain for BPA the right to continue using the Work Product, replace or modify the Work Product to be noninfringing, or if such remedies are not reasonably available, grant BPA a refund for the Work Product and accept its return. The provisions of this clause do not apply to material furnished to the Contractor by BPA and incorporated in the Work Product to which this clause applies.

(End of Clause)

Clause 17-6 COMMERCIAL SOFTWARE -- NO CONTRACTOR LICENSE
(Jul 13)(BPI 17.2.1.1)

(a) As used in this clause, "proprietary computer software" means any computer program, computer data base, or documentation thereof, that has been developed at private expense and either is a trade secret, is commercial or financial and confidential or privileged, or is published and copyrighted.

(b)

(1) The proprietary computer software delivered under this contract may not be used, reproduced or disclosed by BPA, except as provided in subparagraph (b)(2) of this clause or as expressly stated otherwise in this contract.

(2) The proprietary computer software may be—

(A) Used or copied for use in or with the computer or computers (or its replacements) for which it was acquired, including use at any BPA installation to which such computer or computers may be transferred;

(B) Used or copied for use in or with a backup computer if any computer for which it was acquired is inoperative;

(C) Reproduced for safekeeping (archives) or backup purposes;

(D) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software incorporating any of the delivered, proprietary computer software shall be subject to same restrictions set forth in this purchase order/contract;

(E) Disclosed to and reproduced for use by BPA support service contractors or their subcontractors, subject to the same restrictions set forth in this purchase order/contract; and

(3) If the proprietary computer software delivered under this purchase order/contract is published and copyrighted, it is licensed to BPA, without disclosure prohibitions, with the rights set forth in subparagraph (b)(2) of this clause, unless expressly stated otherwise in this purchase order/contract.

(4) To the extent feasible the Contractor shall affix a Notice substantially as follows to any proprietary computer software delivered under this purchase order/contract; or, if the Contractor does not, BPA has the right to do so: "Notice--Notwithstanding any other lease or license agreement that may pertain to, or accompany the delivery of, this computer software, the rights of BPA regarding its use, reproduction and disclosure are as set forth in BPA Contract (or Purchase Order) No _____."

(c) If any proprietary computer software is delivered under this contract with the copyright notice of 17 U.S.C. 401, it will be presumed to be published and copyrighted and licensed to the BPA in accordance with subparagraph (b)(3) of this clause, unless a statement substantially as follows accompanies such copyright notice: "Unpublished--rights reserved under the copyright laws of the United States."

(End of Clause)

Clause 17-7.1 INFRINGEMENT INDEMNIFICATION – NONCOMMERCIAL SOFTWARE (Jul 13)(BPI 17.5.3.2.1)

(a) Contractor shall defend and hold BPA harmless from any claim by a third party that the Software infringes any patent, copyright or trade secret of that third party, provided:

(1) Contractor is promptly notified of the claim;
(2) Contractor receives reasonable cooperation from BPA necessary to perform Contractor's obligations hereunder; and
(3) Contractor has sole control over the defense and all negotiations for a settlement or compromise.

The foregoing obligation of Contractor does not apply with respect to Software or portions or components thereof:

(1) not supplied by the Contractor;
(2) used in a manner not expressly authorized by this Contract;
(3) made in whole or in part in accordance with BPA's specifications;
(4) modified by BPA, if the alleged infringement relates to such modification;
(5) combined with other products (hardware or software), processes or materials where the alleged infringement would not exist but for such combination; or
(6) where BPA continues the allegedly infringing activity after being notified thereof and provided modifications that would have avoided the alleged infringement.

(b) In the event the Software is held by a court of competent jurisdiction to constitute an infringement and use of the Software is enjoined, Contractor shall do one of the following:

(1) procure for BPA the right to continue use of the Software;
(2) provide a modification to the Software so that its use becomes non-infringing;
(3) replace the Software with software which is substantially similar in functionality and performance; or
(4) if none of the foregoing alternatives is reasonably available, the Contractor shall refund the full value of the License fees paid by BPA for the infringing Software.

This clause states Contractor's sole liability and BPA's exclusive remedy for infringement claims.

(End of Clause)

Clause 17-7.2 INFRINGEMENT INDEMNIFICATION -- PATENTS (Oct 11)(BPI 17.6.4.2.1)

(a) The Contractor shall indemnify BPA and its officers, agents, and employees against liability, including costs, for infringement of any United States patent arising out of the manufacture or delivery of supplies, the performance of services, or the construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this contract, or out of the use or disposal by or for the account of BPA of such supplies or construction work.

(b) This indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by BPA of the suit or action alleging such infringement and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in its defense.

Further, this indemnity shall not apply to—

(1) An infringement resulting from compliance with specific written instructions of the CO directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract not normally used by the Contractor;
(2) An infringement resulting from addition to or change in supplies or components furnished or construction work performed that was made subsequent to delivery or performance; or
(3) A claimed infringement that is unreasonably settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction.

(End of Clause)

Clause 17-8 SOURCE CODE ESCROW -- THIRD PARTY AGENT
(Jul 13)(BPI 17.6.5.1.1)

(a) The Contractor shall provide reasonable access to its software source code and all relevant software documentation to BPA in accordance with the third party escrow agreement as attached to this contract. The intent of this requirement is to provide security to BPA in its ability to maintain and develop the software in the event that the Contractor is unable or unwilling to perform its obligations under this contract and for the purpose of auditing the internal functionality of the source code.

(b) The Contractor shall notify BPA immediately upon the occurrence of any of the triggering events as identified in section (e) below. If Contractor is unable to provide BPA with reasonable written assurances of its ability to provide continued support within thirty (30) days of any notification of a triggering event Contractor will hereby grant to BPA a license to use the applicable Source Code(s) for the product(s) as may be reasonably required for the purpose of BPA's continued use and maintenance of the product(s). BPA shall use the source code for the sole purpose of supporting and maintaining the licensed software for its internal use only.

(c) In order to ensure compliance with the foregoing, the Contractor shall deposit in escrow with an escrow agent, and update as necessary, a copy of the source code and related documentation which correspond to the most current version of each product in use by BPA. The Contractor shall provide to BPA a tripartite escrow agreement to be signed by all parties naming BPA as the beneficiary of the escrow agreement. All expenses associated with the agreement will be borne by the Contractor. The escrow agent shall be an institution or entity that routinely engages in the practice of holding software source code for the benefit of third parties licensed to use the related object code or software programs. The escrow agent and all source code materials shall be located in the United States. The escrow agent shall be financially and operationally independent of the Contractor, including the Contractor's parent company, subcontractors, subsidiaries and affiliates.

(d) Within thirty (30) calendar days from the Contractor's first delivery of software to BPA, or within thirty (30) calendar days from the delivery of changed, updated, or upgraded software to BPA, the Contractor shall deliver to the escrow agent one copy of the related source code material. Contractor agrees to deliver a copy of its build process and documentation, including materials and equipment lists, for verification purposes to BPA prior to depositing source code documentation with the escrow agent.

(e) Under the escrow agreement, the escrow agent will release the source code for the licensed software upon the occurrence of the conditions set forth in the agreement and as identified herein. BPA or its agent shall have reasonable periodic access for inspection and verification of the escrowed source code materials. In addition to any triggering events identified in the third party escrow agreement, upon the occurrence of the following "Triggering Events" the escrow agent shall release the source code and all related materials to BPA:

(1) Decision by the Contractor or its successor in interest to discontinue maintenance of the licensed software;
(2) The filing of a bankruptcy petition by or against the Contractor that is not dismissed within 60 days of its filing;
(3) Appointment of a receiver, trustee, or custodian of all or a substantial portion of Contractor's assets which is not dismissed within 60 days of such appointment;
(4) An assignment for the benefit of creditors by the Contractor of all or a substantial portion of the Contractor's assets which is not revoked within 60 days of its creation; or
(5) Receipt by the escrow agent of a notice or final order to release the source code to BPA issued by either a trustee in bankruptcy appointed for Contractor, or a court having lawful jurisdiction.

(f) After a Triggering Event, BPA shall have provided to the escrow agent:

(1) Evidence satisfactory to the escrow agent in writing that BPA has previously notified the Contractor of such Triggering Event and the contractor did not object to the release of the source code;
(2) A written demand that the source code be released and delivered to BPA;
(3) A written commitment that BPA will use the source code only as permitted under the terms of the escrow agreement; and
(4) Specific delivery instructions.

(End of Clause)

Clause 17-9 SOURCE CODE ESCROW -- BPA AS AGENT
(Jul 13)(BPI 17.6.5.2.1)

(a) The Contractor shall provide reasonable access to its software source code and all relevant software documentation to BPA. The intent of this requirement is to provide security to BPA in its ability to maintain and develop the software in the event that the Contractor is unable or unwilling to perform its obligations under this contract and for the purpose of auditing the internal functionality of the source code.

(b) The Contractor shall notify BPA immediately upon the occurrence of any of the triggering events as identified in section (d) below. If Contractor is unable to provide BPA with reasonable written assurances of its ability to provide continued support within thirty (30) days of any notification of a triggering event, Contractor hereby grants to BPA a license to use the applicable source code(s) for the product(s) as may be reasonably required for the purpose of BPA's continued use and maintenance of the product(s). BPA shall use the source code for the sole purpose of supporting and maintaining the licensed software for its internal use only.

(c) Within thirty (30) calendar days from the Contractor's first delivery to BPA of the licensed software, or within thirty (30) calendar days from the delivery of any changed, updated, or upgraded licensed software, the Contractor shall deliver to BPA one copy of the corresponding source code materials including a copy of its build process and documentation, including materials and equipment lists for verification purposes.

(d) In order to ensure compliance with the foregoing, the Contractor shall deposit in escrow with BPA, and update as necessary, a copy of the source code and related documentation which correspond to the most current version of each product in use by BPA. BPA shall preserve and protect the material collected for escrow, maintain it in a secure location completely separate from the product(s) in use, and restrict all access to the materials until the occurrence of one of the following "Triggering Events":
(1) Decision by the Contractor or its successor in interest to discontinue maintenance of the licensed software;
(2) The filing of a bankruptcy petition by or against the Contractor that is not dismissed within 60 days of its filing;
(3) Appointment of a receiver, trustee, or custodian of all or a substantial portion of Contractor's assets, which is not dismissed within 60 days of such appointment;
(4) An assignment for the benefit of creditors by the Contractor of all or a substantial portion of the Contractor's assets which is not revoked within 60 days of its creation; or
(5) BPA receives a notice or final order to release the source code, issued by either (1) a trustee in bankruptcy appointed for Contractor, or (2) a court having lawful jurisdiction.

(End of Clause)

Clause 17-10 COMMERCIAL SOFTWARE -- CONTRACTOR LICENSE
(Jul 13)(BPI 17.2.1.1)

Contractor grants a license to BPA to utilize its commercial software in compliance with the attached software license agreement. BPA shall comply with the terms of the software license agreement, or modified software agreement as appropriate.

(End of Clause)

Clause 17-11 RESERVED.

Clause 17-12 MODIFICATIONS TO COMMERCIAL SOFTWARE
(Oct 11)(BPI 17.2.5.1; BPI 17.4.1.1)

Contractor shall retain the rights to modifications to its commercial software made at BPA's expense; however, Contractor grants to BPA a fully paid-up, nonexclusive, irrevocable, world-wide license to use such modifications, provided BPA is licensed for use of the commercial software.

(End of Clause)

Clause 17-13 PATENT AND COPYRIGHT INFRINGEMENT NOTICE
(Jul 13)(BPI 17.6.4.3.1.1)

(a) The Contractor shall report to the CO, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement based on the performance of this contract of which the Contractor has knowledge.

(b) In the event of any claim or suit against BPA on account of any alleged patent or copyright infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed under this contract, the Contractor shall furnish to BPA, when requested by the CO, all evidence and information in the Contractor's possession pertaining to such claim or suit. **Such evidence and information shall be furnished at the expense of BPA except where the Contractor has agreed to indemnify BPA.**

(c) The terms of this clause shall apply to subcontracts at any tier whether or not incorporated into such subcontracts.

(End of Clause)

Clause 17-14 NONCOMMERCIAL SOFTWARE WARRANTY
(Jul 13)(BPI 17.5.3.3.1)

Contractor warrants that its product shall perform substantially in accordance with applicable technical documentation as published and provided to BPA. Contractor warrants that its products, as delivered to BPA, contain any no mal-ware or viruses developed by Contractor to disable, or erase software, hardware, or data or to perform any similar function. Additionally, no portion of Contractor's software or material prepared for BPA should contain any copyrighted or similarly protected material, other than such material that Contractor has been provided a license or other evidence from such owner of the ability to do so. Contractor warrants that its media upon which it delivers its product to BPA, if any, will be free of defects in materials and workmanship under normal use. Contractor agrees to replace defective media.

Contractor shall use its commercially reasonable efforts to correct or provide a workaround for reproducible product errors that cause a breach of this warranty, or if Contractor is unable to make its product operate as warranted within a reasonable time considering the severity of the error and its impact on BPA, BPA shall be entitled to return the product to contractor and recover fees paid for the license.

Contractor shall not be liable under this warranty to the extent that any defect or error in its product is either caused by or contributed to by improper installation of its product unless such installation is performed by Contractor or BPA's use of the product contrary to applicable technical documentation.

(End of Clause)

Clause 17-15 NONCOMMERCIAL HARDWARE AND EQUIPMENT WARRANTY
(Jul 13)(BPI 17.5.2.1.1)

Contractor warrants that its products, as delivered to BPA, contain any no mal-ware or viruses developed by Contractor to disable, or erase software, hardware, or data or to perform any similar function. Additionally, no portion of Contractor's software or material prepared for BPA should contain any copyrighted or similarly protected material, other than such material that Contractor has been provided a license or other evidence from such owner of the ability to do so.

Contractor shall use its commercially reasonable efforts to correct or provide a workaround for reproducible product errors that cause a breach of this warranty, or if Contractor is unable to make its product operate as warranted within a reasonable time considering the severity of the error and its impact on BPA, BPA shall be entitled to return the product to contractor and recover fees paid for the license. Contractor shall not be liable under this warranty to the extent that any defect or error in its product is either caused by or contributed to by improper installation of its product unless such installation is performed by Contractor or BPA's use of the product contrary to applicable technical documentation.

(End of Clause)

Clause 17-16 RESERVED.

Clause 17-17 RESERVED.

Clause 17-18 RESERVED.

Clause 17-19 SURVIVAL OF PERPETUAL LICENSE
(Jul 13)(BPI 17.2.1.1; BPI 17.2.12.1; BPI 17.5.3.3.1)

Notwithstanding any expiration of the BPA contract, any perpetual use licenses granted to BPA by Contractor shall survive the expiration of the contract.

(End of Clause)

Clause 17-20 INFORMATION ASSURANCE
(Oct 11)(BPI 17.6.1.4.1)

(a) In performance of this contract, the contractor shall protect all data and information systems under its management and control at all times commensurate with the risk and magnitude of harm that could result to Federal security interests and BPA's missions and programs resulting from a loss or unauthorized disclosure of confidentiality, availability, and integrity of these information or systems.

(b) The contractor shall maintain an information security and/or data security plan or program consistent with industry standards such as National Institute of Standards and Technology (NIST), as required by the E-Government Act (Public Law 107-347) of 2002, Title III Federal Information Security Management Act (FISMA).

(c) The BPA Chief Information Officer (CIO), or representatives, shall have the right to examine, audit, and reproduce any of the contractor's pertinent information security and/or data security plan or program.

(d) The contractor shall adhere to any additional information security requirements identified in the statement of work.

(e) The contractor, at its sole expense, shall address and correct any deficiencies and/or noncompliance with the terms of the contract as identified by BPA.

(End of Clause)

Clause 17-21 NONDISCLOSURE FOR RFO/RFQ
(Oct 11)(BPI 17.6.2.1.1)

(a) During the term of this Request for Offer (RFO) or Request for Quote (RFQ), Contractor may disclose sensitive or confidential ("Information"), to BPA. Information shall mean any information that is owned or controlled by Contractor and not generally available to the public, including but not limited to performance, sales, financial, contractual and marketing information, and ideas, technical data and concepts. It also includes information of third parties in possession of Contractor that Contractor is obligated to maintain in confidence. Information may be in intangible form, such as unrecorded knowledge, ideas or concepts or information communicated orally or by visual observation, or may be embodied in tangible form, such as a document. The term "document" includes written memoranda, drawings, training materials, specifications, notebook entries, photographs, graphic representations, firmware, computer information or software, information communicated by other electronic or magnetic media, or models. All such Information disclosed in written or tangible form shall be marked in a prominent location to indicate that it is the confidential information of the Contractor. Information which is disclosed verbally or visually shall be followed within ten (10) days by a written description of the Information disclosed and sent to BPA.

(b) BPA shall hold Contractor's Information in confidence and shall take all reasonable steps to prevent any unauthorized possession, use, copying, transfer or disclosure of such Information. BPA shall give such Information at least such protection as BPA gives its own information and data of the same general type, but in no event less than reasonable protection. BPA shall not use or make copies of the Contractor's Information for any purpose other than for the purposes of this RFO/RFQ. BPA shall not disclose the Contractor's Information to any person other than those of BPA's employees, agents, consultants, contractors and subcontractors who have a verifiable need to know in connection with this contract or as required pursuant to the Freedom of Information Act (FOIA). BPA shall, by written contract, require each person to whom, or entity to which, it discloses Contractor's Information to give such Information at least such protection as BPA itself is required to give such Information under provision. BPA's confidentiality obligations hereunder shall not apply to any portion of the Disclosing Party's Information which:

(1) has become a matter of public knowledge other than through an act or omission of the BPA;
(2) has been made known to BPA by a third party in accordance with such third party's legal rights without any restriction on disclosure;
(3) was in the possession of BPA prior to the disclosure of such Information by the Contractor and was not acquired directly or indirectly from the other party or any person or entity in a relationship of trust and confidence with the other party with respect to such Information;
(4) BPA is required by law to disclose, or is subject to FOIA;
(5) has been independently developed by BPA from information not defined as "Information" in this contract; or
(6) is subject to disclosure pursuant to the Freedom of Information Act (FOIA).

(c) BPA shall return or destroy at the Contractor's direction, all Information (including all copies thereof) to the Contractor promptly upon the earlier of either the termination of this RFO/RFQ or the Contractor's written request.

(End of Clause)

Clause 17-22 NONDISCLOSURE DURING CONTRACT PERFORMANCE

(Oct 11)(BPI 17.6.2.1.1)

(a) During the term of this contract, Contractor may disclose sensitive, confidential or for official use only information ("Information"), to BPA. Information shall mean any information that is owned or controlled by Contractor and not generally available to the public, including but not limited to performance, sales, financial, contractual and marketing information, and ideas, technical data and concepts. It also includes information of third parties in possession of Contractor that Contractor is obligated to maintain in confidence. Information may be in intangible form, such as unrecorded knowledge, ideas or concepts or information communicated orally or by visual observation, or may be embodied in tangible form, such as a document. The term "document" includes written memoranda, drawings, training materials, specifications, notebook entries, photographs, graphic representations, firmware, computer information or software, information communicated by other electronic or magnetic media, or models. All such Information disclosed in written or tangible form shall be marked in a prominent location to indicate that it is the confidential information of the Contractor. Information which is disclosed verbally or visually shall be followed within ten (10) days by a written description of the Information disclosed and sent to BPA.

(b) BPA shall hold Contractor's Information in confidence and shall take all reasonable steps to prevent any unauthorized possession, use, copying, transfer or disclosure of such Information. BPA shall give such Information at least such protection as BPA gives its own information and data of the same general type, but in no event less than reasonable protection. BPA shall not use or make copies of the Contractor's Information for any purpose other than as contemplated by the terms of this contract. BPA shall not disclose the Contractor's Information to any person other than those of BPA's employees, agents, consultants, contractors and subcontractors who have a verifiable need to know in connection with this contract or as required pursuant to the Freedom of Information Act (FOIA). BPA shall, by written contract, require each person to whom, or entity to which, it discloses Contractor's Information to give such Information at least such protection as BPA itself is required to give such Information under this contract. BPA's confidentiality obligations hereunder shall not apply to any portion of Contractor's Information which:

(1) has become a matter of public knowledge other than through an act or omission of the BPA;
(2) has been made known to BPA by a third party in accordance with such third party's legal rights without any restriction on disclosure;
(3) was in the possession of BPA prior to the disclosure of such Information by the Contractor and was not acquired directly or indirectly from the other party or any person or entity in a relationship of trust and confidence with the other party with respect to such Information;
(4) BPA is required by law to disclose, or is subject to FOIA;
(5) has been independently developed by BPA from information not defined as "Information" in this contract; or
(6) is subject to disclosure pursuant to the Freedom of Information Act (FOIA).

(c) BPA shall return or destroy at the Contractor's direction, all Information (including all copies thereof) to the Contractor promptly upon the earliest of any termination of this contract or the Contractor's written request.

(End of Clause)

PART 18 QUALITY ASSURANCE

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18.1 RESPONSIBILITY FOR QUALITY.

POLICY: The Contractor is responsible for quality. BPA is not obligated to pay for the Contractor's cost of correcting work (including work performed under cost reimbursement contracts) which does not meet the requirements of the contract. Therefore, specifications or statements of work should clearly state the standards of acceptance by which the Contractor's work will be measured.

18.2 RESERVED.

18.3 INSPECTION AND ACCEPTANCE.

INFORMATION: "Inspection" is the act of determining whether deliverables conform to the contract requirements. "Acceptance" is the recognition that deliverables conform to the contract and the passing of responsibility for the product or service from the Contractor to BPA. Other contract clauses sometimes refer to "the date of acceptance" as a benchmark for taking action (e.g., payment, warranty, latent defects, consequential damages, etc.) When this is the case, it is important that the CO clearly describe in the contract the timing and conditions of acceptance, unless the risk of negative consequences is low.

18.3.1 Clause Usage Prescriptions.

PROCEDURE:

(a) Reserved.

(b) The CO shall include a clause similar to that at 18-2, Inspection - Supplies, in solicitations and contracts for noncommercial supplies which will be manufactured in accordance with a BPA specification. The CO may substitute a paragraph similar to (d) of Alternate I if, based on past history, the CO wants the right to make immediate correction of non-conforming supplies without notice to the Contractor and charge the Contractor for BPA's costs. For commercial acquisitions, Clause 18-2 shall not be included in the solicitation or contract; the requirement is addressed in the inspection/acceptance clauses, Clause 28-5.1 and 28-5.2.

(c) The CO shall include a clause similar to that at 18-3, Acceptance - Supplies, in solicitations and contracts for noncommercial supplies which will be manufactured in accordance with a BPA specification. The CO should consider increasing the 60 day constructive acceptance period cited in the clause if freight terms are FOB origin and shipment will require more than a few days. For commercial acquisitions, Clause 18-3 shall not be included in the solicitation or contract; the requirement is addressed in the inspection/acceptance clauses, Clause 28-5.1 and 28-5.2.

(d) Reserved.

(e) The CO shall include a clause similar to that at 18-5, Inspection and Acceptance - Construction, in all contracts for construction. For commercial acquisitions, Clause 18-5 shall not be included in the solicitation or contract; the requirement is addressed in the inspection/acceptance clauses, Clause 28-5.1 and 28-5.2.

18.4 RESPONSIBILITY FOR DAMAGE OR LOSS OF SUPPLIES.

(a) ***POLICY:*** The CO shall specify the FOB point in supply contracts based on the particular risks associated with the purchase.

(b) ***INFORMATION:*** Where FOB destination is specified, the Contractor retains responsibility for damage or loss of supplies until delivery to BPA. BPA is responsible for any damage or loss to conforming goods after delivery (including the period between delivery and acceptance or rejection.) Although FOB destination is typically more advantageous to BPA where loss or damage of the supplies would result in substantial cost to BPA, other terms may be appropriate for low dollar transactions or in other instances if the CO deems appropriate. Special FOB terms are appropriate for Design-Supply-Construct contracts and Furnish-and-Install contracts because the Contractor should retain responsibility for damage or loss of supplies after delivery to the site but before acceptance.

18.4.1 Clause Usage Prescriptions.

PROCEDURE: The CO shall include a clause similar to Clause 18-6, Responsibility For Damage Or Loss Of Supplies, in Design-Supply-Construct contracts and Furnish-and-Install solicitations and contracts over $50,000. For commercial acquisitions, Clause 18-6 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-15 Risk of Loss.

18.5 WARRANTIES.

(a) ***INFORMATION:*** The Uniform Commercial Code (UCC) provides substantial warranty protection to buyers. Most commercial Contractors are familiar with its provisions. Although the UCC has been written for the purchase of supplies, it can be applied to services as well. The BPI takes advantage of the UCC's warranty provisions by using them for purchases of commercial supplies and services. This is the only portion of UCC incorporated into BPA contracts.

(b) ***INFORMATION:*** Special warranty clauses whose terms substantially differ from those typically offered by suppliers to their customers will likely result in a higher contract cost/price. The decision to include a special warranty provision in a contract is a business decision. COs should consider the standard market practices for each commodity as well as the costs and benefits to BPA when making that decision. Most special warranty clauses described in the BPI for use with supplies or equipment use the date of receipt (rather than the date of acceptance) to start the warranty period. COs should be aware of this when drafting contracts.

(c) ***POLICY:*** When purchasing commercial supplies or services, BPA will generally rely on the warranty provisions of the Uniform Commercial Code. See BPI 28.4.3.

(d) ***INFORMATION:*** The following selected portions of the UCC apply to warranties of merchantability and suitability for a particular purpose. They have not been edited. See Section 2 of UCC for additional information.

UCC §2-314. Implied Warranty: Merchantability; Usage of Trade.

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.
(2) Goods to be merchantable must be at least such as:
(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; and
(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and
(e) are adequately contained, packaged, and labeled as the agreement may require; and
(f) conform to the promises or affirmations of fact made on the container or label if any.
(3) Unless excluded or modified (Section 2-316), other implied warranties may arise from course of dealing or usage of trade.

UCC § 2-315. Implied Warranty: Fitness for Particular Purpose.

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is, unless excluded or modified under the next section (Section 2-316), an implied warranty that the goods shall be fit for such purpose.

18.5.1 Clause Usage Prescriptions.

PROCEDURE:

(a) Reserved.

(b) The CO shall include a clause similar to that at 18-8, Warranty – Supplies, in solicitations and contracts for supplies other than heavy electrical supplies, tower steel, or commercial supplies and services. For Design-Supply-Construct contracts and Furnish-and-Install contracts, the clause should be modified so that the warranty begins upon acceptance rather than delivery. For commercial acquisitions, Clause 18-8 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-11 Warranty.

(c) The CO shall include a clause similar to that at 18-9, Warranty - Heavy Electrical Equipment, in solicitations and contracts for heavy electrical equipment or other circumstances where BPA wants to retain the ability to correct defective equipment itself rather than require the Contractor to do so. The clause may be modified to shift responsibility for transit of the equipment or removal of adjacent equipment to BPA rather than the Contractor. For Design-Supply-Construct contracts and Furnish-and-Install contracts, the clause should be modified so that the warranty begins upon acceptance rather than delivery (Fill-in current BPA overhead percentages).Clause 18-9 shall not be included in solicitations and contracts for commercial items and services.

(d) The CO shall include a clause similar to that at 18-10, Warranty - Tower Steel, in solicitations and contracts for tower steel.Clause 18-10 shall not be included in solicitations and contracts for commercial items and services.

(e) The CO may include a clause similar to that at 18-11, Warranty - Services, in solicitations and contracts for services exceeding $50,000. For commercial acquisitions, Clause 18-11 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-11 Warranty.

(f) The CO shall include a clause similar to either that at 18-12, Warranty - Construction, or that at 18-13, Warranty - Small Construction Contracts, in solicitations and contracts for construction.

18.6 DEFECTS AND CONSEQUENTIAL DAMAGES.

(a) ***DEFINITIONS:***

"Patent defects" are defects which are plainly visible or which can be discovered by reasonable inspection or customary tests. An example would be the delivery of incorrectly-colored suspension insulators. After payment has been made, BPA is only able to recover for patent defects if the contract includes a warranty clause. This places significant importance on the inspection conducted before supplies or services are accepted. If reasonable inspection should have detected the defect, and it did not, BPA may bear the risk of loss.

"Latent defects" are defects which are not plainly visible and which cannot be determined by reasonable inspection or customary tests, and which are unknown to BPA when the item is accepted. An example would be the use of the wrong electronic component in a computer system. If reasonable inspection would not have detected the defect, the Contractor bears the risk of loss. This concept protects BPA from the risk of accepting supplies/services that contain hidden defects that cannot easily be located or identified.

"Consequential damages" are damages that result indirectly from either patent or latent defects. An example would be damage to a piece of equipment due to failure of another piece of equipment.

(b) ***INFORMATION:*** Unless BPA has another contract with a vendor from which to offset the costs, or access to another administrative offset, in most cases, BPA can make a claim for latent defects and consequential damages discovered after acceptance, only if the claim is made within six (6) years after the date the defect is discovered or should have been discovered, which ever occurs first. A clause is not required in the contract in order for BPA to exercise this right. In certain instances, the long service life of some types of equipment results in a high risk of loss to manufacturers from a latent defect. As a result, some offerors may include a contingency factor in their offers to cover such potential liabilities. Placing a limitation in the contract on the Contractor's liability for latent defects and for consequential damages clarifies and limits the offeror's potential exposure. This should result in the lowering of offered cost/price.

(c) ***PROCEDURE:*** The CO shall consult with general counsel and risk management office prior to making a claim for a latent defect and for consequential damages. The CO may consult with general counsel and risk management to determine whether to limit the Contractor's liability for latent defects, or to limit their liability for consequential damages, or both.

18.6.1 Clause Usage Prescriptions.

PROCEDURE:

(a) The CO may include a clause similar to that at 18-14, Limitation Of Liability For Latent Defects, in contracts if, during negotiations, the offeror raises the issue and the CO agrees that their liability should be limited. Clause 18-14 shall not be included in commercial acquisitions. Clause 28-12 Limitation of Liability shall be used for commercial acquisitions.

(b) The CO may include a clause similar to that at 18-15, Limitation of Liability for Consequential Damages, if, during negotiations, the offeror raises the issue and the CO agrees that their liability should be limited. Clause 18-14 shall not be included in commercial acquisitions. Clause 28-12 Limitation of Liability shall be used for commercial acquisitions

18.50 TEXT OF CLAUSES.
The following clauses are referred to in BPI Part 18:

Clause 18-1 RESERVED. 5
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Clause 18-3 ACCEPTANCE - SUPPLIES..... 7
Clause 18-4 RESERVED. 7
Clause 18-5 INSPECTION AND ACCEPTANCE - CONSTRUCTION 7
Clause 18-6 RESPONSIBILITY FOR DAMAGE OR LOSS OF SUPPLIES 8
Clause 18-7 RESERVED. 8
Clause 18-8 WARRANTY - SUPPLIES..... 8
Clause 18-9 WARRANTY - HEAVY ELECTRICAL EQUIPMENT 9
Clause 18-10 WARRANTY - TOWER STEEL 9
Clause 18-11 WARRANTY - SERVICES 10
Clause 18-12 WARRANTY - CONSTRUCTION 10
Clause 18-13 WARRANTY - SMALL CONSTRUCTION CONTRACTS..... 11
Clause 18-14 LIMITATION OF LIABILITY FOR LATENT DEFECTS..... 11
Clause 18-15 LIMITATION OF LIABILITY FOR CONSEQUENTIAL DAMAGES..... 12

Clause 18-1 RESERVED.

Clause 18-2 INSPECTION - SUPPLIES (Jul 13)(BPI 18.3.1)

(a) The Contractor shall provide and maintain a quality system covering supplies ("supplies" includes equipment, fabrication processes, raw materials, and intermediate assemblies) in accordance with Unit 4 of this contract.

(b) BPA may inspect and test all supplies called for by the contract at any place and time. If inspection and tests are performed on the Contractors' site, the Contractor shall provide BPA reasonable facilities and assistance. Except as otherwise provided in the contract, BPA shall bear the expense of BPA inspections or tests made at other than the Contractor's or subcontractor's premises; provided that, in case of rejection, BPA shall not be liable for any reduction in the value of inspection or test samples. BPA is not obligated to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in this contract. BPA will perform inspections and tests in a manner that will not unduly delay the work.

(c) The Contractor may be charged for BPA's costs of inspection if supplies are not ready at the time specified by the contract for inspection and tests or where prior rejection makes reinspection and retesting necessary. If the Contractor fails to perform tests required by the contract, BPA may perform the tests and charge the Contractor for the costs of such.

(d) BPA may either reject or require correction of nonconforming supplies.

(e) If this contract provides for inspection at the factory (see Unit 4), supplies shall not be shipped until all factory tests and inspections have been made and the supplies released by BPA's Contracting Officer's Technical Representative (COTR), unless waived in writing by the Contracting Officer or an authorized representative.

(1) If the BPA COTR exercises BPA's right of inspection at the factory, then the materials and equipment will not be reinspected at destination other than for shipping damage and shortages; however, this will apply only to (i) those items specifically inspected at the factory, and (ii) those characteristics and attributes which are verified during factory inspection.

(2) Factory inspection and release for shipment shall not constitute acceptance of the contract items by BPA.

(f) Inspections and tests by BPA do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Lack of inspection by BPA shall not relieve the Contractor of any obligations under this contract.

(End of clause)

Alternate I (Oct 05)

(d) BPA may either reject or require correction of nonconforming supplies. If immediate correction of nonconforming supplies would tend to mitigate damages, or if time limitations will not permit correction by the Contractor, BPA may proceed with such necessary correction, without prior notice to the Contractor of action taken, and the contract price shall be reduced by the total amount of the costs for correcting the supplies or equipment as determined by BPA. Such contract price reduction shall be based on BPA's direct labor and material costs for the corrective work plus the labor and material overhead rates in effect at the time work is performed.

(End of Alternate I)

Clause 18-3 ACCEPTANCE - SUPPLIES (Jul 13)(BPI 18.3.1)

Unless explicitly accepted or rejected earlier, acceptance shall occur 60 days after date of delivery. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in this contract.

(End of clause)

Clause 18-4 RESERVED.

Clause 18-5 INSPECTION AND ACCEPTANCE - CONSTRUCTION **(Jul 13)(BPI 18.3.1)**

(a) Definition. "Work" includes, but is not limited to, materials, workmanship, and manufacture and fabrication of components.

(b) The Contractor shall maintain an adequate inspection system and perform such inspections as will ensure that the work performed under the contract conforms to contract requirements. The Contractor shall maintain complete inspection records and make them available to BPA. All work shall be conducted under the general direction of the Contracting Officer and is subject to BPA inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.

(c) BPA inspections and tests are for the sole benefit of BPA and do not--
(1) Relieve the Contractor of responsibility for providing adequate quality control measures;
(2) Relieve the Contractor of responsibility for damage to or loss of the material before acceptance;
(3) Constitute or imply acceptance; or
(4) Affect the continuing rights of BPA after acceptance of the completed work under paragraph (i) below.

(d) The presence or absence of a BPA inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the Contracting Officer's written authorization.

(e) The Contractor shall promptly furnish, without additional charge, all facilities, labor, and material reasonably needed for performing such safe and convenient inspections and tests as may be required by the Contracting Officer. BPA may charge to the Contractor any additional cost of inspection or test when work is not ready at the time specified by the Contractor for inspection or test, or when prior rejection makes reinspection or retest necessary. BPA shall perform all inspections and tests in a manner that will not unnecessarily delay the work. Special, full size, and performance tests shall be performed as described in the contract.

(f) The Contractor shall, without charge, replace or correct work found by BPA not to conform to contract requirements, unless in the public interest BPA consents to accept the work with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from BPA property.

(g) If the Contractor does not promptly replace or correct rejected work, BPA may (1) by contract or otherwise, replace or correct the work and charge the cost to the Contractor, and may (2) terminate for default the Contractor's right to proceed.

(h) If, before acceptance of the entire work, BPA decides to examine already completed work by removing it or tearing it out, the Contractor, on request, shall promptly furnish all necessary facilities, labor, and material. If the work is found to be defective or nonconforming in any material respect due to the fault of the Contractor or its subcontractors, the Contractor shall defray the expenses of the examination and of satisfactory reconstruction. However, if the work is found to meet contract

requirements, the Contracting Officer shall make an equitable adjustment for the additional services involved in the examination and reconstruction, including, if completion of the work was thereby delayed, an extension of time.

(i) Unless otherwise specified in the contract, acceptance by BPA will be in writing and shall be made as promptly as practicable after completion and inspection of all work required by the contract or that portion of the work the Contracting Officer determines can be accepted separately. Acceptance shall be final and conclusive except for latent defects, fraud, gross mistakes amounting to fraud, or BPA's rights under any warranty or guarantee.

(End of clause)

Clause 18-6 RESPONSIBILITY FOR DAMAGE OR LOSS OF SUPPLIES (Jul 13)(BPI 18.4.1)

(a) The Contractor shall be responsible for the supplies covered by this contract until acceptance, at the designated site, regardless of the point of inspection.

(b) After delivery and installation at the designated site and prior to acceptance or rejection, BPA shall be responsible for the loss, destruction, or damage to the supplies only if such loss, destruction, or damage results from the negligence of officers, agents, or employees of BPA acting within the scope of their employment.

(c) The Contractor shall bear all risks as to rejected supplies after notice of rejection, except that BPA shall be responsible for the loss, or destruction of, or damage to the supplies only if such loss, destruction or damage results from the gross negligence of officers, agents, or employees of BPA acting within the scope of their employment.

(End of clause)

Clause 18-7 RESERVED.

Clause 18-8 WARRANTY - SUPPLIES (Jul 13)(BPI 18.5.1)

(a) The Contractor warrants that the supplies ("supplies" includes equipment, fabrication processes, raw or finished materials, and intermediate assemblies) conform to contract requirements. The Contractor also warrants that supplies are free of design defects (except defects in BPA-provided final designs) and defects in materials or workmanship.

(b) The Contractor shall replace or repair any supplies which fail in operation within 12 months from the date of receipt. The Contracting Officer will give written notice of any defect or nonconformance to the Contractor within a reasonable period of time after discovery. Replacements of contract items shall be made promptly and on an FOB destination basis. BPA will install replacements at no expense to the Contractor.

(c) Supplies replaced under the provisions of this warranty shall remain the property of BPA unless the Contractor wishes to obtain ownership. In this case, the Contractor shall notify BPA of such in writing not later than the date of receipt by BPA of the replacement supplies. The Contractor is responsible for packaging and shipping costs.

(d) The rights and remedies of BPA provided in this clause are in addition to and do not limit any rights afforded to BPA by any other clause of this contract or under applicable Federal or State law, including the Uniform Commercial Code.

(End of clause)

Clause 18-9 WARRANTY - HEAVY ELECTRICAL EQUIPMENT (Jul 13)(BPI 18.5.1)

(a) The Contractor warrants that all materials, equipment, and supplies (including replacements and corrective repairs) will conform to the requirements of this contract, will be reasonably fit for their intended use, and will be free from defects in materials, workmanship, and**,** design (except BPA designs). The Contractor will not be liable for any deficiencies not discovered within 1 year from the date the equipment was placed in service. If installation of the equipment is delayed through no fault of the Contractor, the date of placing the equipment in service shall be presumed to be 240 days after the date the equipment was received at the specified contract destination.

(b) Correction or Replacement--
(1) Promptly after notice of deficiencies, the Contractor shall, as directed by BPA, either remove the materials, equipment, or supplies referred to in the notice and correct or replace and retest them, or correct and retest them in place.
(2) If immediate correction would tend to mitigate damages or if time limitations will not permit correction by the Contractor, BPA may proceed with such necessary correction, without prior notice to the Contractor.

(c) The Contractor shall bear the expense of removal, correction or replacement, transportation charges, and reinstallation and retesting, whether incurred by or on behalf of BPA or the Contractor. The cost of removal of any appurtenant equipment shall be the responsibility of the Contractor. If BPA performs the corrective work, the Contractor shall reimburse BPA for direct for the corrective work plus the labor and material overhead rates that are in effect at the time work is performed.

(d) The rights and remedies of BPA provided in this clause are in addition to and do not limit any rights afforded to BPA by any other clause of this contract or under applicable Federal or State law, including the Uniform Commercial Code.

(End of clause)

Clause 18-10 WARRANTY - TOWER STEEL (Jul 13)(BPI 18.5.1)

(a) The Contractor warrants that the supplies furnished under this contract are free of defects as to design, materials, or workmanship. The period of this warranty shall extend for 24 months after the last date of receipt of supplies.

(b) The Contractor shall replace or repair defective supplies and shall provide replacements for shortages discovered during the warranty period. The Contracting Officer will give written notice of any defect to the Contractor within a reasonable period of time after discovery.

(c) If immediate correction of non-conforming supplies would tend to mitigate damages, or if time limitations will not permit correction by the Contractor, BPA may make corrections without prior notice to the Contractor. The Contracting Officer will notify the Contractor immediately after such corrections are initiated. The contract price shall be reduced (using the following formulas) for correcting each piece mark.

(1) Deficiencies found prior to issuance to Construction Contractor.
  (A) Minor Correction: 1.0 x Weight of piece mark (lbs.) x Supply Contract price/lb.
  (B) Replace: 2.5 x Weight of piece mark (lbs.) x Supply Contract price/lb
(2) Deficiencies found during assembly:
  (A) Minor Correction: 1.25 x Cost per each minor correction (see Note 1)
  (B) Replace: 5.0 x Weight of piece mark (lbs.) x Supply Contract price/lb.
(3) Deficiencies found during or after erection:
  (A) Minor Correction: 1.25 x Cost per each minor correction (see Note 1)
  (B) Replace: 10.0 x Weight of piece mark (lbs.) x Supply Contract price/lb.

Note 1. Cost per each minor correction: A minor correction is defined as (a) drilling or punching one hole, (b) enlarging one undersized hole by one-eighth inch or more, or (c) cutting one clip or one cope. BPA Line Construction Contracts provide for payment to the Construction Contractor for each minor correction as follows. These costs (with multiplier) are the responsibility of the Supply Contractor.

Thickness of Steel	Amount per Operation
3/16” through 7/16”	$30.00
1/2" through 15/16”	$50.00
1” or Greater	$75.00

(d) Supplies replaced under the provisions of this warranty shall remain the property of BPA unless the Contractor wishes to obtain ownership. In this case, the Contractor shall notify BPA of such in writing not later than the date of receipt by BPA of the replacement supplies. The Contractor is responsible for packaging and shipping costs.

(e) The rights and remedies of BPA provided in this clause are in addition to and do not limit any rights afforded to BPA by any other clause of this contract or under applicable Federal or State law, including the Uniform Commercial Code.

(End of clause)

Clause 18-11 WARRANTY - SERVICES (Jul 13)(BPI 18.5.1)

(a) The Contractor warrants that all services performed under this contract will be performed in a professional manner, be free from defects in workmanship and conform to the requirements of this contract. The Contractor further warrants that any materials provided will be free from defects. This warranty is valid for 1 year from date of acceptance by BPA. The Contracting Officer will give written notice of any defect or nonconformance to the Contractor within a reasonable period of time after discovery.

(b) Corrections shall be at no cost to BPA, and any services or materials corrected or reperformed by the Contractor shall be subject to this clause to the same extent as work initially performed.

(End of clause)

Clause 18-12 WARRANTY - CONSTRUCTION (Sep 98)(BPI 18.5.1)

(a) In addition to any other warranties in this contract, the Contractor warrants, except as provided in paragraph (i) of this clause, that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Contractor or any subcontractor or supplier at any tier.

(b) This warranty shall continue for a period of 1 year from the date of final acceptance of the work. If BPA takes possession of any part of the work before final acceptance, this warranty shall continue for a period of 1 year from the date BPA takes possession.

(c) The Contractor shall remedy at the Contractor's expense any failure to conform, or any defect. In addition, the Contractor shall remedy at the Contractor's expense any damage to Government-owned or controlled real or personal property, when that damage is the result of -

(1) The Contractor's failure to conform to contract requirements; or
(2) Any defect of equipment, material, workmanship, or design furnished by the Contractor.

(d) The Contractor shall restore any work damaged in fulfilling the terms and conditions of this clause. The Contractor's warranty with respect to work repaired or replaced will run for 1 year from the date of repair or replacement.

(e) The Contracting Officer shall notify the Contractor, in writing, within a reasonable time after the discovery of any failure, defect, or damage.

(f) If the Contractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, BPA shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Contractor's expense.

(g) With respect to all warranties, express or implied, from subcontractors, manufacturers, or suppliers for work performed and materials furnished under this contract, the Contractor shall--

(1) Obtain all warranties that would be given in normal commercial practice;
(2) Require all warranties to be executed, in writing, for the benefit of BPA, if directed by the Contracting Officer; and
(3) Enforce all warranties for the benefit of BPA, if directed by the Contracting Officer.

(h) Unless a defect is caused by the negligence of the Contractor or subcontractor or supplier at any tier, the Contractor shall not be liable for the repair of any defects of material or design furnished by BPA nor for the repair of any damage that results from any defect in Government-furnished material or design.

(i) This warranty shall not limit BPA's rights under the Inspection and Acceptance clause of this contract with respect to latent defects, gross mistakes, or fraud.

(End of clause)

Clause 18-13 WARRANTY - SMALL CONSTRUCTION CONTRACTS
(Sep 98)(BPI 18.5.1)

(a) The Contractor warrants that work performed under this contract conforms to the contract requirements and is free of any defect in equipment, material, or design furnished, or workmanship performed by the Contractor or any subcontractor or supplier at any tier.

(b) This warranty shall continue for a period of 1 year from the date of final acceptance of the work.

(c) The Contractor shall remedy at the Contractor's expense any failure to conform or any defect. If the Contractor fails to remedy any failure, defect, or damage within a reasonable time after receipt of notice, BPA shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Contractor's expense.

(End of clause)

Clause 18-14 LIMITATION OF LIABILITY FOR LATENT DEFECTS
(Jul 13)(BPI 18.6.1)

Unless otherwise specifically provided in this contract, the Contractor shall not be liable for latent defects discovered more than three years after the date of expiration of the warranty. BPA will notify the Contractor of any latent defects within a reasonable period after discovery.

(End of clause)

Clause 18-15 LIMITATION OF LIABILITY FOR CONSEQUENTIAL DAMAGES (Jul 13)(BPI 18.6.1)

The Contractor's liability for consequential damages shall be limited to the contract cost of the item, and from the date of receipt to the end of the three-year period following the expiration of the warranty. In the event that more than one item is furnished on a contract, the foregoing provision shall apply separately to each item. Consequential damages shall not include loss of revenue.

(End of clause)

PART 19 PROPERTY MANAGEMENT

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19.1 GOVERNMENT-FURNISHED PROPERTY (GENERAL).

INFORMATION: This part prescribes policies and procedures for providing Government--herein after referred to as the Bonneville Power Administration (BPA)--personal property to contractors, for contractor's use and management of BPA personal property, and for reporting, redistributing, and disposing of contractor inventory.

19.2 DEFINITIONS.

INFORMATION:

“Adjusted Depreciated Value” means the final adjusted value of an asset taking into account the depreciated value and the asset’s physical condition.

"Asset Center Representative (ACR)" means an individual who has been designated by BPA to be responsible for managing a particular category of equipment, i.e. ADP, office equipment, communication equipment, etc. See BPA Personal Property Instruction (PPI) for a listing of ACR’s.

"BPA-furnished Property" means property in the possession of or directly acquired by BPA and subsequently made available to the contractor.

"BPA Property" means all property and materials owned by or leased to BPA, or acquired by BPA under the terms of the contract. It includes both BPA-furnished property and contractor-acquired property as defined in this section.

"Capitalized Equipment" means personal property items having a unit acquisition cost of $10,000 or more with a useful service life of one year or more, and generally has a property tracking number assigned and is carried on the financial ledger as an asset (i.e., not expendable due to use.)

"Contract Inventory" means:

(a) Any property acquired by and in the possession of a contractor or subcontractor under a contract for which title is vested in BPA.

(b) Any property to which BPA is obligated or has the option to take title to under any type of contract as a result either of any changes in the specifications or plans or of the termination of the contract (or subcontract thereunder), prior to completion of the work; and

(c) BPA-furnished property that exceeds the amounts needed to complete full performance under the entire contract.

"Contractor-acquired property" means property acquired, by whatever means, by the contractor for performance of a contact, to which BPA has title or the right to take title under the contract terms.

"Custodial records" means any document or electronic record such as requisitions, property receipts, issue documents, tool checks, stock record books, etc.

"Excess" means any property that is no longer used, needed, or required by BPA.

“Expendable Property” means property or material, which when put to use, are consumed, lose their identity, or become an integral part of other property.

"Material" means property which may be incorporated into or attached to a deliverable end item or which may be consumed or expended in the performance of a contract. It includes assemblies, components, parts, raw and processed materials, and small tools and supplies that may be consumed in normal use in the performance of a contract.

"Non-Expendable Equipment" means property which has continuing usefulness as a self contained unit, is not consumed in use, and does not lose its identity when put to use or does not ordinarily become a component of other equipment or plant. It may or may not be capitalized.

"Personal Property" is all property other than real property, property that becomes permanently affixed to real property, or property that becomes a component part to another asset.

"Physical Inventory" means the actual observation and count of the property to be reconciled with custodial records.

"Property" means all property, both real and personal. It includes facilities, material, special tooling, special test equipment, and agency-peculiar property.

"Real Property" means land and rights in land, ground improvements, installed utilities, and buildings and other structures.

"Salvage" means property that has some value in excess of its basic content, but which is in such condition that it has no reasonable use for any purpose as a unit, and its repair or rehabilitation is clearly impractical or uneconomical.

"Scrap" means property that has no reasonable value except for the recovery value of its basic material/mineral content.

“Sensitive property” means items, regardless of value, requiring special control and accountability because of susceptibility to unusual rates of loss, theft, or misuse, or due to National Security and Export Control considerations

"Surplus" means inventory excess to the contract that is not required by other Federal agencies.

"Termination Inventory" means any property purchased, supplied, manufactured, furnished, or otherwise acquired for the performance of a contract subsequently terminated and properly allocable to the terminated portion of the contract.

19.3 POLICY.
Contractors are ordinarily required to furnish all property necessary to perform BPA contracts. However, if contractors possess BPA property, BPA shall minimize to the extent practical any competitive advantage that might arise from using such property. BPA shall also:

(a) Require contractors to use available BPA property to the maximum practical extent in performing BPA contracts to avoid duplicate and unwarranted purchases;

(b) Permit the property to be used on non-BPA contracts only when prior written consent of the CO is obtained, and such use is in the best interest of BPA;

(c) Require contractors to be responsible for, and to keep official records of, BPA property in their possession or control, as provided for in the contract;

(d) Determine, in consultation with the requisitioner and the appropriate ACR’s prior to award, whether BPA property will be returned to BPA upon completion of the contract. If a determination is made to not require the return of the property upon contract completion, the contract shall either state the disposition of the property or stipulate that the CO will provide disposition instructions for the property upon contract completion;

(e) Require the COTR to maintain a file of all invoices and supporting receipts identifying all contractor-acquired property;

(f) Require contractors to use all government furnished and contractor acquired property for official business only.

19.4 CLAUSE USAGE PRESCRIPTIONS.
PROCEDURE: The CO shall include a clause similar to 19-1, BPA-Furnished/Contractor-Acquired Property, in solicitations and contracts when BPA will furnish property for use on the contract, or when BPA will reimburse the contractor for the cost of purchasing property as an item of direct cost. See 19.9 for Clause 19-4, BPA Property to be Transferred to the Contractor, to be used when transferring BPA property to contractors.

19.5 CONTRACTING OFFICER'S RESPONSIBILITY.
PROCEDURE:

(a) The CO should advise the contractor prior to award regarding its responsibility for managing BPA-furnished and contractor-acquired property. If the CO determines that there is a need to provide the

contractor written instructions, the CO shall furnish the contractor with a copy of BPI Appendix 19-A, Property Management Procedures for Contractors, prior to final negotiation of the contract price.

(b) The CO shall ensure the contractor's property control system is in compliance with the property provisions in the contract.

(c) The CO should notify the contractor in writing when its property control system does not comply with contract requirements, and shall request prompt correction of deficiencies. If the contractor does not correct the deficiencies within a reasonable period, the CO shall --

(1) Notify the contractor in writing of any required corrections and establish a schedule for completion of actions;

(2) Caution the contractor that failure to take the required corrective actions within the time specified will result in withholding or withdrawal of system approval; and

(3) Advise the contractor that its liability for loss or damage to Government property may increase if the property control system approval is withheld or withdrawn.

(d) The CO should provide the appropriate Asset Center Representative with a listing of personal property that is no longer required at the end of the contract.

(e) The CO should request assistance or guidance from the Organizational Property Management Officer (OPMO) when necessary, on such issues as: contractor property control system; periodic contractor property system surveys; assignment of contractor liability or relief from liability for BPA property lost, stolen, damaged, or destroyed; and disposition of property. The CO shall notify the OPMO in writing, with a copy to the ACR, of any tagged and tracked BPA-furnished property that is no longer available as a result of loss, theft, or damage.

19.6 BPA-FURNISHED MATERIALS.

PROCEDURE:

(a) BPA contractors shall ordinarily furnish all material for the performance of BPA contracts. However, BPA will provide material to a contractor when necessary to achieve significant economy, standardization, expedited production, or when it is otherwise in BPA's interest.

(b) Solicitations shall specify material that BPA will furnish in sufficient detail to enable offerors to evaluate it accurately.

19.7 PROVIDING BPA PROPERTY "AS IS."

INFORMATION: Ordinarily when BPA provides material (property) to a contractor for the performance of a BPA contract, such property must be suitable for its intended contract use. Failing to provide suitable material may entitle the contractor to an equitable contract adjustment per the Changes clause (see clause 19-1, BPA-Furnished/Contractor-Acquired Property). However, the contractor may benefit in the performance of the contract from BPA-furnished property for which BPA makes no warranty with respect to its condition, and is furnished “as is.”

19.7.1 Clause Usage Prescriptions.

PROCEDURE: The CO shall include clause 19-2, BPA Property Furnished "As Is", in solicitations and contracts when BPA property is to be furnished in "as is" condition. The CO shall insert the appropriate information in the clause to identify and describe the “as is” condition (or availability for inspection of condition) of the property to be transferred, or a clause similar to 19-4, BPA Property to be Transferred to the Contractor, modified as necessary to distinguish “as is” property from other property to be furnished to the contractor.

19.8 PROVIDING MOTOR VEHICLES.

POLICY: Contractors shall not be furnished Government motor vehicles for use in the performance of BPA contracts, due to potential liability against BPA in the event of an accident, unless the CO has

determined that it is in the best interest of BPA to do so. Such a determination shall be documented in the official file.

19.8.1 Clause Usage Prescriptions.
The CO shall include clause 19-3, Contractor Use of Government-owned Vehicles, in solicitations and contracts where the contractor will be permitted to use Government-owned vehicles. See 16.3.1 for insurance requirements for automobile liability.

19.9 TRANSFER OF BPA PROPERTY TO THE CONTRACTOR.
(a) ***INFORMATION:*** It may be in BPA's interest to authorize the transfer of title of BPA-funded, contractor-acquired property to the contractor. This would typically be the case when the value of the property at the end of the contract would be minimal, technology would be obsolete, the equipment is of such a specialized nature that it would be of no use to BPA, etc.

(b) ***POLICY:*** Contractor-acquired BPA property may be transferred to the contractor either at the time of acquisition or at contract completion when it has been determined by the program office, CO and the ACR that it is BPA's interest to do so. Whenever possible, this determination should be made prior to contract award. The material to be transferred and the time of transfer shall be specified in the contract. If the property being transferred is electronic equipment, the Contractor is required to dispose of this property at the end of its useful life, in accordance with all Federal, State, and local government laws and regulations.

(c) ***INFORMATION:*** When BPA property is transferred to other federal agencies, BPA may receive credit against its outstanding treasury debt. The credit would be equal to the adjusted depreciated value of the property at time of transfer, which is determined by the condition of the property, or acquisition cost if transferred at time of acquisition. When such a transaction is contemplated, contact the OPMO for further information.

19.9.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include a paragraph similar to clause 19-4, BPA Property to be Transferred to the Contractor, when BPA property is to be transferred to the contractor. The CO shall insert the appropriate information in the clause to identify the property to be transferred.

19.10 DISPOSITION OPTIONS.
PROCEDURE:

The contractor may be directed or authorized by the CO to dispose of BPA property in the following sequence:

(a) Deliver the contract inventory to BPA.

(b) Transfer title of property to the contractor in accordance with 19.9(b) above.

(c) Return excess contractor-acquired property to suppliers for full credit less the supplier's normal restocking charge. The cost of returning contractor-acquired property to suppliers shall not be included in any claim for reimbursement.

(d) Return to BPA for reutilization, or disposal in accordance with the BPA Personal Property Instruction. The CO shall provide the appropriate Asset Center Representatives (ACR) a listing of the un-required property. The listing should contain the nomenclature, identification number (if any), quantity, and property condition. The ACR will determine if the equipment is required or should be reported as excess property to asset recovery. The ACR shall provide instructions to the CO on the handling of returned property.

(e) Destruction or abandonment. Surplus property may be destroyed or abandoned only after every effort has been made to dispose of it by other authorized methods. Unless permitted by the contract,

no contractor inventory shall be abandoned on the contractor's premises without the contractor's written consent. Before authorizing destruction or abandonment, the CO shall determine in writing that:

(1) The property has no commercial value and no value to BPA;
(2) The estimated cost of care and handling is greater than the probable sale price; or
(3) The property does not constitute a danger to public health, safety, or welfare.

(f) If the determination has been made under subparagraph (e)(1) or (2) above, the property may be donated to public bodies or educational institutions in lieu of abandonment or destruction. All costs incident to donation shall be borne by the contractor.

19.11 ALTERNATE METHOD FOR DISPOSAL OF MATERIALS.

(a) ***INFORMATION:*** Occasionally a BPA project will involve replacing old materials and equipment with new materials and equipment. When the removed materials and equipment are released to the contractor as part consideration for removal and construction work performed by the contractor, BPA derives the benefit of the salvage without the necessity of handling, accounting for, inspecting, storing, or performing the involved process of disposal of salvaged materials or equipment. COs should consult with Investment Recovery or HazMat, as appropriate, for advice concerning the disposal of such materials.

(b) ***POLICY:*** It is BPA's policy to evaluate the cost/benefit of retaining title versus releasing the removed materials and equipment to the contractor for disposal as part consideration for the removal of the facility and the construction of the new facility. See BPI Part 24.3 for additional policy discussion.

(c) ***PROCEDURE:*** When negotiating the contract, the CO shall consult with the project manager to determine the merits of incorporating the above policy into the contract terms. See BPI Part 24.3 for additional procedural guidance. If hazardous materials may be involved, see BPI Part 15.3 and paragraph (a) above. If the project manager and the CO mutually decide that BPA should retain title to the removed materials and equipment, the CO shall document the decision in the official file.

19.50 TEXT OF CLAUSES.

The following clauses are referenced in BPI Part 19:

Clause 19-1 BPA-FURNISHED/CONTRACTOR-ACQUIRED PROPERTY 6
Clause 19-2 BPA PROPERTY FURNISHED "AS IS" 7
Clause 19-3 CONTRACTOR USE OF GOVERNMENT-OWNED VEHICLES 8
Clause 19-4 BPA PROPERTY TO BE TRANSFERRED TO THE CONTRACTOR 8

Clause 19-1 BPA-FURNISHED/CONTRACTOR-ACQUIRED PROPERTY (Dec 12)(BPI 19.4)

(a) The Contractor shall manage BPA-furnished, contractor-acquired property in accordance with BPI Appendix 19-A if that appendix is made a part of this contract. If Appendix 19-A is not made a part of this contract, property should be managed in accordance with ASTM Property Management Standards and/or sound industry practices. All contractors shall use government furnished and contractor acquired property for official business use only.

(b) BPA shall deliver to the Contractor, at the time and locations stated in this contract, BPA-furnished property described in the Schedule, statement of work, or specifications. If that property, suitable for its intended use, is not delivered to the Contractor, the Contracting Officer shall equitably adjust affected provisions of this contract in accordance with the Changes clause of the contract when--

(1) The Contractor submits a timely written request for an equitable adjustment; and
(2) The facts warrant an equitable adjustment.

(c) Title to BPA-furnished property shall remain with BPA, unless specifically identified elsewhere in this contract. The Contractor shall use BPA-furnished property, except as provided for in BPI subpart 19.3, only in connection with this contract. The Contractor shall maintain adequate property control records in

accordance with sound industry practices and will make such records available for BPA inspection at all reasonable times.

(d) Upon delivery of BPA-furnished property to the Contractor, the Contractor assumes the risk and responsibility for its loss or damage, except--

(1) For reasonable wear and tear;
(2) To the extent property is consumed in the performance of this contract; or
(3) As otherwise provided for by the provisions of this contract.

(e) Unless specified elsewhere in this contract, title to all property purchased by the Contractor for which the Contractor is entitled to be reimbursed as a direct item of cost under this contract shall pass to and vest in BPA upon the supplier's delivery of such property to the contractor.

(f) Title to BPA property shall not be affected by its incorporation into or attachment to any property not owned by BPA, nor shall BPA property become a fixture or lose its identity as personal property by being attached to any real property.

(g) Upon completion of this contract, the Contractor shall follow the instructions of the Contracting Officer regarding the disposition of all property, title to which is held by BPA, which was not consumed in the performance of this contract or previously delivered to BPA. For the disposal of electronic property, the Contractor is required to follow all Federal, State, and local laws and regulations. The Contractor shall prepare for shipment, deliver f.o.b. origin, or dispose of BPA property, as may be directed or authorized by the Contracting Officer. The net proceeds of any such disposal shall be credited to the contract price or shall be paid to BPA as directed by the Contracting Officer.

(End of clause)

Clause 19-2 BPA PROPERTY FURNISHED "AS IS" (Sep 98)(BPI 19.7.1)

(a) BPA makes no warranty whatsoever with respect to BPA property furnished "as is", except that the property is in the same condition when placed at the f.o.b. point specified in the solicitation as when inspected by the Contractor pursuant to the solicitation, or if not inspected by the Contractor, as when last available for inspection under the solicitation.

(b) The Contractor may repair any property made available on an "as is" basis. Such repair will be at the Contractor's expense except as otherwise provided in this clause. Such property may be modified at the Contractor's expense, but only with the written permission of the Contracting Officer. Any repair or modification of property furnished "as is" shall not affect the title of BPA.

(c) If there is any change in the condition of BPA property furnished "as is," from the time inspected or last available for inspection under the solicitation to the time placed on board at the location specified in the solicitation, and such change will adversely affect the Contractor, the Contractor shall, upon receipt of the property, notify the CO detailing the facts, and, as directed by the CO, either (1) return the property at BPA's expense or otherwise dispose of the property, or (2) effect repairs to return the property to its condition when inspected under the solicitation, or if not inspected, its condition when last available for inspection under the solicitation. After completion of the directed action and upon written request of the Contractor, the CO will equitably adjust any contractual provisions affected by the return, disposition or repair, in accordance with the procedures provided for in the Changes clause of this contract. The foregoing provisions for adjustment are the exclusive remedy available to the Contractor and BPA shall not be otherwise liable for any delivery of BPA property furnished "as is" in a condition other than that in which it was originally offered.

(End of clause)

Clause 19-3 CONTRACTOR USE OF GOVERNMENT-OWNED VEHICLES (Sep 98)(BPI 19.8.1)

In those instances where BPA provides access to sources of Government-owned vehicles for the Contractor's use, the Contractor agrees to indemnify and save and hold harmless BPA from any and all claims and damages or other costs where BPA was not at fault.

(End of clause)

Clause 19-4 BPA PROPERTY TO BE TRANSFERRED TO THE CONTRACTOR (Dec 12)(BPI 19.9.1)

BPA transfers title to the BPA furnished, or contractor-acquired property listed below to the contractor at the time specified. At the time of disposal, BPA requires that transferred property be disposed of in accordance with all Federal, State, and local laws and regulations.

Property to be Transferred	Time of Transfer
(CO insert appropriate information)	(CO insert appropriate information)

(End of Clause)

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20.1 GENERAL DISCUSSION.

20.1.1 General Policies.

(a) It is BPA policy that all reasonable efforts will be made to achieve full and complete performance on all contracts. However, when circumstances dictate that contract performance is not possible or not in BPA's best interest, the directives of this BPI Part 20 shall be followed.

(b) Every contract shall have at least one termination clause in it. That will be Clause 20-2 Termination for Convenience of BPA.

(c) Most contracts shall have two termination clauses. Clause 20-2 Termination for the Convenience of BPA and Clause 20-3 Termination for Default.

(d) Clause 20-1 Termination for the Convenience of Either Party is reserved for Intergovernmental Contracts (IGCs).

(e) General. The CO shall terminate contracts orally, or in writing. Oral terminations may be used when time is critical, but must be followed by a written contract modification. The written notice shall be sent by any method which provides a written acknowledgment of receipt. The CO shall send the termination notice to the contractor, with copies to the same persons who received the basic contract.

(f) Amendment of termination notice. The CO may amend a termination notice as needed if circumstances change after the original notice was issued.

(g) Reinstatement of terminated contracts. The CO may, with the written consent of the contractor, reinstate the terminated portion of a contract in whole or in part by amending the notice of termination, if such an action is in the interest of BPA. The reasons for doing so shall be documented in the contract file.

(h) Termination of contracts for commercial items or services shall be conducted under BPI Part 28. The requirements and policies of Part 20 do not apply when terminating contracts for commercial items and services. Contracting Officers may use Part 20 as guidance to the extent that Part 20 does not conflict with the termination policies of Part 28.

20.1.2 Types of Termination Actions.

INFORMATION There are four types of termination actions described in this part. The CO may choose to include one or more clauses into any contract when it is desirable for BPA to reserve the right to terminate the contract under certain circumstances. Unless the CO inserts a clause into a contract reserving the right to terminate for convenience, that action may not be taken. The following types of termination actions are described in this Part::

(a) Termination by mutual consent (See 20.2);

(b) Termination for the convenience by either party (See 20.3);

(c) Termination for the convenience of BPA (See 20.4); and

(d) Termination for default (See 20.5).

20.1.3 Points to Consider Prior to Beginning Termination Action.
INFORMATION: Before initiating action to terminate a contract, the CO should consider the impact of such action. Factors to consider include:

(a) Impact on the project completion schedule;
(b) Impact on the contractor's work force, financial position, reputation, etc.;
(c) Whether BPA contributed in a substantial way to problems encountered in contract performance;
(d) Whether the contractor has made a good-faith effort to correct problems;
(e) Whether permitting continued performance will result in a successful project; and
(f) Maintenance of long term BPA-supplier relationships.

20.2 TERMINATION BY MUTUAL CONSENT.
(a) ***INFORMATION:*** A termination by mutual consent is an agreement between BPA and the contractor to cease work under the contract. Such a termination would be used in a situation where mutual problems make it undesirable to continue the work, but in which assessing responsibility to either party would not be fair or reasonable under the circumstances. There usually will not be a clear indication of failure on the part of either party, and thus a payment by one party to the other to cover the costs of termination is generally not appropriate. The CO should consider using such a termination in lieu of issuing a convenience or default termination when the contractor has not incurred costs for the terminated portion of the contract or the contractor is willing to waive the costs incurred. Since this type of termination is not a unilateral right of BPA under the contract, it must be negotiated between the parties, and no contract clause is used.

(b) ***PROCEDURE:*** Termination by mutual consent may be initiated by either party, by oral or written means. However it is initiated, the CO shall ensure that there is a mutual agreement to terminate before proceeding with the action. The CO shall document the contract file with the reasons for the termination and the basis for the settlement. The settlement shall be documented as a contract modification, and shall include the following information modified as appropriate to reflect partial or complete terminations:

TERMINATION BY MUTUAL CONSENT – SETTLEMENT AGREEMENT

(1) This supplemental agreement modifies the contract to reflect a partial termination by mutual consent.
(2) The terminated portion of the contract is as follows: (Specify item numbers, descriptions, quantity terminated, unit and total price of terminated items, and any other explanation necessary to avoid uncertainty or misunderstanding.)
(3) The Contractor unconditionally waives any claim against BPA arising under the terminated portion of the contract or by reason of its termination, including, without limitation, all obligations of BPA to make further payments or to carry out any further undertakings under the terminated portion of the contract.
(4) BPA acknowledges that the Contractor has no obligation to perform further work or services or to make further deliveries under the terminated portion of the contract.
(5) Under the terminated portion of the contract, the following rights and liabilities of the parties are reserved:

(List reserved or excepted rights and liabilities)

(End of agreement)

20.3 TERMINATION FOR CONVENIENCE BY EITHER PARTY.
INFORMATION: This form of termination is reserved for Intergovernmental Contracts when the CO agrees with the contractor proposal for the need for such right to establish a viable business agreement, and when such an agreement is advantageous to BPA. This concept may be used at the discretion of the CO, but should only be used if requested by the supplier.

20.3.1 Clause Usage Prescriptions.
PROCEDURE:

(a) The CO may include Clause 20-1, Termination for Convenience by Either Party, in Intergovernmental Contracts (IGCs) to specify the rights of the parties, unless Clause 20-2, Termination for the Convenience of BPA, is used. The CO may change the number of days of written notice to suit the situation. For commercial acquisitions, Clause 20-1 shall not be included in the solicitation or contract.

(b) No format is prescribed for the contractor to use in exercising this right under the contract, but the notice must be in writing. However, the CO shall formally document the termination and its terms and conditions by executing a contract modification including language similar to that shown in 20.4.6.1.

(c) The CO should use procedures similar to those described under 20.4, Termination for Convenience of BPA, when exercising the rights under this section.

20.4 TERMINATION FOR THE CONVENIENCE OF BPA.
INFORMATION: The CO may determine that for a specific contract BPA should retain the right to terminate the contract for its convenience. Most often this is done when it is possible that complete performance by the contractor may not be needed, or when it is possible that BPA's requirements may change to such an extent that continued performance is not in the interest of BPA. This right is generally not used for contracts less than $100,000, for off-the-shelf items, or for contracts with short delivery times. When a contract is terminated for the convenience of BPA, the CO shall negotiate a settlement which compensates the contractor for work performed, and reimburses the contractor's termination expenses.

20.4.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include Clause 20-2, Termination for the Convenience of BPA, in all solicitations and contracts for noncommercial acquisitions. Clause 20-2 shall not be included in solicitations and contracts for commercial acquisitions. Clause 20-2 shall not be included if Clause 20-1, Termination for the Convenience of Either Party is used. For commercial acquisitions, Clause 20-2 shall not be included in the solicitation or contract; the requirement is addressed in the termination for BPA's convenience clauses in Clauses 28-10.1 and 28-10.2.

20.4.2 Fixed-Price Contracts.
20.4.2.1 Profit.
POLICY:

(a) The CO shall allow profit on costs incurred by the contractor for the terminated portion of the contract, but not on the settlement expenses. Anticipatory profits and consequential damages shall not be allowed. Profit shall not be allowed the contractor for material or services that, as of the effective date of termination, have not been delivered by a subcontractor, regardless of the percentage of completion. The CO may use any reasonable method to arrive at a fair profit.

(b) In the negotiation or determination of any settlement, the CO shall not allow profit if it appears that the contractor would have incurred a loss had the entire contract been completed.

20.4.2.2 Completed End Items.
PROCEDURE:

(a) Promptly after the effective date of termination, the CO shall have all undelivered completed end items inspected and accepted if they comply with the contract requirements, and shall determine which accepted end items are to be delivered under the contract. The contractor shall invoice accepted and delivered end items at the contract price in the usual manner and shall not include them in the termination claim. When completed end items, though accepted, are not to be delivered under the contract, the contractor shall include them in the settlement proposal at the contract price, adjusted for any saving of freight or other charges, together with any credits for their purchase, retention, or sale.

(b) Work in place accepted by BPA under a construction contract is not considered a completed item until final acceptance of the item, even though that work may have been paid for at unit prices specified in the contract.

20.4.3 Cost-Reimbursement Contracts.
POLICY: Adjustment of fee. The CO shall determine the adjusted fee to be paid based on a percentage of completion of the contract or of the terminated portion. When this basis is used, factors such as the extent and difficulty of the work performed by the contractor (e.g., planning scheduling, technical study, engineering work production and supervision, placing and supervising subcontracts, and work performed by the contractor in (1) stopping performance, (2) settling claims of subcontractors, and (3) disposing of termination inventory) should be compared with the total work required by the contract or by the terminated portion. The contractor's adjusted fee should not include an allowance for fee for subcontract effort included in subcontractors' termination claims.

20.4.4 Settling Contracts Terminated for Convenience.
PROCEDURE: Consistent with the termination clause and the notice of termination, the CO shall-

(a) Consider holding a conference with the contractor to develop a definite program for effecting the settlement.

(b) Direct the action required of the prime contractor;

(c) Examine the settlement proposal of the prime contractor and, when appropriate, the settlement proposals of subcontractors;

(d) Determine disposition of BPA-furnished property and other property to which BPA is entitled;

(e) Promptly negotiate settlement with the contractor and enter into a settlement agreement; and

(f) Promptly settle the contractor's claim by determination of the elements that cannot be agreed on, if unable to negotiate a complete settlement.

20.4.4.1 General Termination Settlement Principles.
(a) ***INFORMATION:*** A settlement should compensate the contractor fairly for the work accomplished and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgment, and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a fair settlement.

(b) ***INFORMATION:*** The COs primary objective is to negotiate a settlement by agreement. The parties may agree upon a total amount to be paid the contractor without agreeing on or segregating the particular elements of costs or profit comprising this amount.

(c) ***INFORMATION:*** Cost and accounting data may provide guides, but are not rigid measures for ascertaining fair compensation. In appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement. Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation. The amount of record-keeping, reporting and accounting

related to the settlement of termination claims should be kept to a minimum, compatible with the reasonable protection of the public interest.

(d) ***PROCEDURE:*** The CO shall estimate the funds required to settle the termination claim at the earliest practical date. Based on this estimate, the CO shall, because of possible budgeting impacts, coordinate with the program office on the estimated date of payment, ensuring the availability of funds to be paid as a result of the termination settlement.

(e) ***PROCEDURE:*** The CO shall maintain the termination documentation in the contract file, unless the volume requires that a separate case file be established.

(f) ***PROCEDURE:*** For terminated construction contracts, the CO shall direct action to ensure the cleanup of the site, protection of serviceable materials, removal of hazards, and other actions necessary to leave a safe and healthful site.

(g) ***PROCEDURE:*** If the CO suspects fraud or other criminal conduct related to the settlement of a terminated contract, the CO shall discontinue negotiations and report the facts to the HCA.

20.4.4.2 Audit of Settlement Proposals.
INFORMATION:

(a) The CO may refer settlement proposals to the BPA Internal Audit Staff or other Government auditors for review and recommendations. Referrals shall include any specific information or data the CO deems appropriate, including any facts and circumstances that will assist the Internal Audit Staff in performing its function.

(b) The audit report is advisory only, and is for the CO's use in negotiating a settlement or issuing a unilateral determination. Government personnel handling audit reports must be careful not to reveal privileged information or information that will jeopardize the negotiation positions of BPA, the prime contractor, or a higher-tier subcontractor. Consistent with this, and when in BPA's interest, the CO may furnish audit reports to prime and higher-tier subcontractors for their use in settling subcontract claims.

20.4.4.3 Settlement of Subcontract Claims.
INFORMATION: A subcontractor has no contractual rights against BPA upon the termination of a prime contract. A subcontractor may have rights against the prime contractor or intermediate subcontractor with whom it has contracted. Upon termination of a prime contract, the prime contractor and each subcontractor are responsible for the prompt settlement of the termination claims of their immediate subcontractors. The contractor has the burden of establishing, by proof satisfactory to the CO, the amount claimed. The CO may request that the contractor submit additional documents and data, and may request appropriate accounting, investigations, and audits.

20.4.4.4 Settlement Agreements.
INFORMATION:

(a) Before execution of a settlement agreement, the CO shall determine the accuracy of the BPA property account for the terminated contract. If an audit discloses property for which the contractor cannot account, the CO shall reserve in the settlement agreement BPA's rights regarding that property, or make an appropriate deduction from the amount otherwise due the contractor.

(b) When a termination settlement has been negotiated and all required reviews have been obtained, the contractor and the CO shall execute a settlement agreement as a contract modification. The settlement shall cover (a) any setoffs and counterclaims that BPA has against the contractor that may be applied against the terminated contract and (b) all claims of subcontractors, except claims that are specifically excepted from the agreement and reserved for separate settlement.

(c) The CO should attempt to settle in one agreement all rights and liabilities of the parties under the contract except those arising from any continued portion of the contract. Generally, the CO shall not attempt to make partial settlements covering particular items of the prime contractor's settlement proposal. However, if a CO cannot promptly complete settlement under the terminated contract, a partial settlement may be entered into if (a) the issues on which agreement has been reached are clearly severable from other issues and (b) the partial settlement will not prejudice the interest of BPA or the contractor in disposing of the unsettled part of the claim.

20.4.5 Settlement by Determination.
PROCEDURE:

(a) General. If the contractor and CO cannot agree on a termination settlement, or if a claim is not submitted within the period required by the termination clause, the CO shall issue a determination of the amount due consistent with the termination clause, including any cost principles incorporated by reference. The CO shall use this 20.4.5 and 21.3.8 as guides in making a settlement by determination. Copies of determinations shall receive the same distribution as other contract modifications.

(b) Notice to contractor. Before issuing a determination of the amount due the contractor, the CO shall give the contractor at least 15-days notice by a method of delivery which obtains a receipt documenting delivery to submit, on or before a stated date, and provides written evidence substantiating the amount claimed.

(c) Determinations. After reviewing the available information, the CO shall determine the amount due and transmit a copy of the determination to the contractor by certified mail (return receipt requested). The transmittal letter shall advise the contractor that the determination is a final decision, which the contractor may appeal under the Disputes clause. The determination shall specify the amount due the contractor, and shall be supported by detailed schedules and additional information, and other analyses as appropriate. The CO shall explain each major item of disallowance. The CO need not reconsider any other action relating to the terminated portion of the contract that was ratified or approved by the CO or another CO.

(d) Appeals. The contractor may appeal, under the Disputes clause, any settlement by determination, except when the contractor has failed to submit the settlement proposal within the time provided in the contract and has failed to request a time extension. The existence of an appeal shall not affect the authority of the CO to settle the termination claim or any part by negotiation with the contractor at any time before the appeal is decided.

(e) Decision on the contractor's appeal. The CO shall effect a decision of the Court of Federal Claims, or a board of contract appeals, when necessary, by a supplement to the contract. When appropriate, the CO should obtain a release from the contractor. COs are authorized to modify the format of the typical settlement agreement in 20.4.6.1 to agree with this provision.

20.4.6 Documentation of Settlement Decision.
PROCEDURE:

(a) The CO shall retain in the contract file all written evidence and data relied upon in making a settlement or determination.

(b) The CO shall, at the conclusion of negotiations, document the principal elements of the settlement or determination for inclusion in the contract file.

(c) If the settlement or determination was based on individual items, the CO should describe the factors considered for each item. If the settlement was based on an overall lump-sum basis, the CO need not evaluate each item or group of items individually, but should support the total amount of the recommended settlement in reasonable detail. The memorandum should include explanations of matters involving differences and doubtful questions settled by agreement, and the factors considered

20.4.6.1 Sample Settlement Agreement.
PROCEDURE: (Insert the following on the contract modification. The contents should be tailored to each situation.)

(a) This supplemental agreement documents the termination settlement resulting from the Notice of Termination dated .....

(b) The parties agree to the following:

(1) The Contractor certifies that all contract termination inventory (including scrap) has been retained or acquired by the Contractor, sold to third parties, returned to suppliers, delivered to or stored for BPA, or otherwise properly accounted for, and that all proceeds and retention credits have been used in arriving at this agreement.

(2) The Contractor certifies that each immediate subcontractor whose proposal is included in the proposal settled by this agreement has furnished the Contractor a certificate stating (i) that all subcontract termination inventory (including scrap) has been retained or acquired by the subcontractor, sold to third parties, returned to suppliers, delivered to or stored for BPA, or otherwise properly accounted for, and that all proceeds and retention credits were used in arriving at the settlement of the subcontract, and (ii) that the subcontractor has received a similar certificate from each immediate subcontractor whose proposal was included in its proposal.

(3) The Contractor certifies that all items of termination inventory, the costs of which were used in arriving at the amount of this settlement or the settlement of any subcontract proposal included in this settlement, (i) are properly allocable to the terminated portion of the contract; (ii) do not exceed the reasonable quantitative requirements of the terminated portion of the contract, and (iii) do not include any items reasonably usable without loss to the Contractor in its other work. The Contractor further certifies that the Contracting Officer has been informed of any substantial change in the status of the items between the dates of the termination inventory schedules and the date of this agreement.

(4) The Contractor transfers, conveys, and assigns to BPA all the right, title, and interest, if any, that the Contractor has received or is entitled to receive, in and to subcontract termination inventory not otherwise properly accounted for.

(5) The Contractor shall, within 10 days after receipt of the payment specified in this agreement, pay to each of its immediate subcontractors (or their respective assignees)the amounts to which they are entitled, after deducting any prior payments and, if the Contractor so elects, any amounts due and payable to the Contractor by those subcontractors.

(6)(i) The Contractor has received $..... for work and services performed, or items delivered, under the completed portion of the contract. BPA confirms the right of the Contractor, subject to paragraph (7), below, to retain this sum and agrees that it constitutes a portion of the total amount to which the Contractor is entitled in settlement of the contract.

(ii) Further, BPA agrees to pay to the Contractor or its assignee, upon presentation of a proper invoice or voucher, the sum of $..... (insert net amount of settlement), arrived at by deducting from the sum of $..... (for proposals on an inventory basis insert gross amount of settlement; for proposals on a total cost basis, insert gross amount of settlement less amount shown in subdivision (6)(i), above), (A) the amount of $.....for all un-liquidated partial or progress payments previously made to the Contractor or its assignee and all un-liquidated advance payments (with any interest) and (B) the amount of $..... for all applicable property disposal credits (insert if appropriate, "and (C) the amount of $..... for all other amounts due BPA under this contract except as provided in subparagraph (7) below").

(iii) The net settlement of $..... in subdivision (ii), above, together with sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor for the complete termination of the contract and of all other claims and liabilities of the Contractor and BPA under the contract, except as provided in paragraph (7) below.

(7) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved:

(The following list of reserved or excepted rights and liabilities is intended to cover those that should most frequently be reserved and that should be scrutinized at the time a settlement agreement is negotiated. The suggested language of the excepted items on the list may be varied at the discretion of the CO. If accuracy or completeness can be achieved by referencing the number of a contract clause or provision covering the matter in question, then follow that method of enumerating reserved rights and liabilities. Omit any of the following rights or liabilities that are not applicable and add any additional exceptions or reservations required.)

(i) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive Orders, including, without limitation, any applicable clauses relating to: labor law, contingent fees, domestic articles, employment of aliens, and "officials not to benefit." (If the contract contains clauses of this character inserted for other reasons, the suggested language should be appropriately modified.)

(ii) All rights and liabilities of the parties arising under the contract and relating to reproduction rights, patent infringements, inventions, or applications for patents, including rights to assignments, invention reports, licenses, covenants of indemnity against patent risks, and bonds for patent indemnity obligations, together with all rights and liabilities under the bonds.

(iii) All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to BPA by the Contractor under the contract or this agreement.

(iv) All rights and liabilities of the parties under the contract relating to any contract termination inventory stored for BPA.

(v) All rights and liabilities of the parties under agreements relating to the future care and disposition by the Contractor of BPA-owned property remaining in the Contractor's custody.

(vi) All rights and liabilities of the parties relating to BPA property furnished to the Contractor for the performance of this contract.

(vii) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), covenants not to compete, and covenants of indemnity.

(End of Agreement)

20.4.7 Procedures for Termination for Convenience of BPA.
PROCEDURE: Initial notice of a termination for the convenience of BPA may be given to the contractor orally or by fax, but must be followed up with a written Notice of Termination. This written notice may be the contract modification used to document the termination. The following sample notice should be modified by the CO to suit the specific situation. Modifications may have to be made to reflect partial terminations, differences between fixed price and cost-type contracts, and supply, service, and construction contracts. The notice should be sent by certified mail, return receipt requested.

NOTICE OF TERMINATION

(At the top of the notice, set out all special details relating to the particular termination; e.g., name and address of company, contract number of terminated contract, items, etc.)

(a) Effective date of termination. This confirms BPA's oral (or fax) notice to you dated ....., 19...., terminating .....(insert "completely" or "in part") Contract No. .....(referred to as "the contract") for BPA's convenience under the clause entitled .....(insert title of appropriate termination clause). The termination is effective on .....(enter date).

(b) Cessation of work and notification to immediate subcontractors. You shall take the following steps:
(1) Stop all work, make no further shipments, and place no further orders relating to the contract, except for --
(i) The continued portion of the contract, if any;
(ii) Work-in-process or other materials that you may wish to retain for your own use; or
(iii) Work-in-process that the Contracting Officer authorizes you to continue (A) for safety precautions, (B) to clear or avoid damage to equipment, (C) to avoid immediate complete spoilage of work-in-process having a definite commercial value, or (D) to prevent any other undue loss to BPA. (If you believe this authorization is necessary or advisable, immediately notify the Contracting Officer.)
(2) Furnish notice of termination to each immediate subcontractor and supplier that will be affected by this termination. In the notice --
(i) Specify your BPA contract number;
(ii) State whether the contract has been terminated completely or partially;
(iii) Provide instructions to stop all work, make no further shipments, place no further orders, and terminate all subcontracts under the contract, subject to the exceptions in subparagraph (1) above;
(iv) Provide instructions to submit any settlement proposal promptly; and
(v) Request that similar notices and instructions be given to its immediate subcontractors.
(3) Notify the Contracting Officer of all pending legal proceedings that are based on subcontracts or purchase orders under the contract, or in which a lien has been or may be placed against termination inventory to be reported to BPA. Also, promptly notify the Contracting Officer of any such proceedings that are filed after receipt of this notice.
(4) Take any other action required by the Contracting Officer or under the termination clause in the contract.

(c) Settlements with subcontractors. You remain liable to your subcontractors and suppliers for proposals arising because of the termination of their subcontracts or orders. You are requested to settle these termination proposals as promptly as possible. For purposes of reimbursement by BPA, settlements will be governed by the provisions of Part 20 of the BPI.

(d) Completed end items.
(1) Notify the Contracting Officer of the number of items completed under the contract and still on hand, and arrange for their delivery or other disposal.
(2) Invoice acceptable completed end items under the contract in the usual way, and do not include them in the settlement proposal

NOTICE OF TERMINATION (Continued)

(e) Patents. If required by the contract, promptly forward the following to the Contracting Officer:

(1) Disclosure of all inventions, discoveries, and patent applications made in the performance of the contract.

(2) Instruments of license or assignment on all inventions, discoveries, and patent applications made in the performance of the contract.

(f) Other. Matters not covered by this notice should be brought to the attention of the Contracting Officer.

(g) Please acknowledge receipt of this notice as provided below.

.....
(Contracting Officer)
.....
(Name of Office)
.....
(Address)

Acknowledgment of Notice

The undersigned acknowledges receipt of a signed copy of this notice on

_____, two signed copies of this notice are returned.
(DATE)

.....
(Name of Contractor)
By.....
(Name)
.....
(Title)

(End of notice)

20.5 TERMINATION FOR DEFAULT.
POLICY:

(a) BPA has the right to terminate the contract completely or partially for default if the contractor fails to make delivery of the supplies or perform the services within the time specified in the contract, fails to perform any other provision of the contract, or fails to make progress and that failure endangers performance of the contract. After a default determination, BPA may assess the contractor any excess costs incurred in repurchasing the contract items or services from another source.

(b) Depending upon specific circumstances, the following should be considered before proceeding with a default termination:

(1) If BPA has a continuing need for the goods or services provided under the contract, and it is likely that the contractor will adequately perform in the same period of time that it would take a re-procurement contractor to perform, the CO should consider continuing with the present contractor.

(2) If BPA no longer needs the goods or services provided under the contract, the CO should consider a convenience termination.

(c) Where there has been an actual breach, i.e., the time allotted for performance has expired and the contractor has not properly performed, BPA has the right (under the Default clause) to immediately terminate the contract without giving the contractor advance notice to cure the failure.

(d) If the contractor can establish that the failure to perform is excusable; i.e., that it arose from unforeseeable causes beyond the control and without the fault or negligence of the contractor, the default clauses provide that a termination for default will be considered to have been a termination for the convenience of BPA, and the rights and obligations of the parties governed accordingly.

(e) Failure to make progress constitutes grounds for termination if it becomes impossible, or highly unlikely, that the contractor can perform the contract on schedule. The timely performance of a contract is considered to be endangered when it is determined by the nature of the contract, the time normally required to perform, and the contractor's capacity to perform, that there is no reasonable possibility it can be completed on schedule.

(f) Terminations based upon the express repudiation of the contractor can be made without prior notice to the contractor.

(g) Terminations for progress failure must be preceded by a ten-day cure notice. (See BPI 20.5.4).

(h) Notwithstanding the provisions of this subpart, the contract may be reinstated by mutual agreement if such action is in BPA's interest.

20.5.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include Clause 20-3, Termination for Default, in all solicitations and contracts, for noncommercial acquisitions, including cost-reimbursable or time and materials contracts, unless the CO otherwise determines that BPA’s interests are adequately protected regarding failure of the Contractor to perform, and documents the award file in writing of a determination to not include the default clause. Use the clause with its Alternate I for fixed-price contracts. When using the Alternate I, add paragraph (c) to the basic clause. For commercial acquisitions, Clause 20-3 shall not be included in the solicitation or contract; the requirement is addressed in the termination for cause clauses in Clauses 28-9.1 and 28-9.2.

20.5.2 Effect of Termination for Default.
INFORMATION: Under a termination for default, BPA is not liable for the contractor's costs on undelivered work, and is entitled to the repayment of advance and progress payments, if any, applicable to that work. BPA may elect, under the Default clause, to require the contractor to transfer title and deliver to BPA completed supplies and manufacturing materials, as directed by the CO.

20.5.3 Procedure for Default.
PROCEDURE:

(a) A CO's decision to terminate a contract for default is an important action. The CO must demonstrate that the matter has been carefully reviewed. Moreover, a thorough analysis of the matter by the CO in the findings of fact should provide an opportunity to objectively review all facts surrounding a dispute.

(b) The CO shall decide to pursue a termination for default only after review by contracting, technical, and Office of General Counsel personnel to ensure the propriety of the proposed action.

(c) The CO may wish to give the contractor an opportunity to show cause why the contract should not be terminated for default. A format for a show cause notice is in 20.5.5.

(d) When a termination for default appears imminent, the CO shall provide a written notification to the surety, if any.

(e) Default terminations shall be documented on a contract modification. COs may provide advance notice of termination action by phone, fax or letter if desired.

(f) The CO shall distribute the termination notice and the CO's decision as the contract was originally distributed. A copy shall also be furnished to the contractor's surety, if any, when the notice is furnished to the contractor. The surety should be requested to advise BPA if it desires to arrange for completion of the work. In addition, in the case of fixed-price contracts, the CO may notify the disbursing officer to withhold further payments under the terminated contract, pending further advice. Such advice should be furnished at the earliest practicable time.

(g) In the case of a construction contract, promptly after issuance of the termination notice and the CO's decision, the CO shall determine the manner in which the work is to be completed and whether the materials and equipment that are on the site will be needed.

(h) If, before issuing the termination notice, the CO determines that the failure to perform is excusable, the contract shall not be terminated for default. If termination is in the best interest of BPA, the CO may terminate the contract for the convenience of BPA.

(i) If the CO has not been able to determine whether the contractor's failure to perform is excusable before issuing the notice of termination, the CO shall make a written decision on that point as soon as practicable after issuance of the notice of termination. The decision shall be delivered promptly to the contractor, with a notification that the contractor has the right to appeal the termination action.

(j) If, after compliance with the procedures in this 20.5.3, the CO determines that a termination for default is proper, the CO shall issue a Notice of Termination stating --

(1) The contract number and date;
(2) The acts or omissions constituting the default;
(3) That the contractor's right to proceed further under the contract (or a specified portion of the contract) is terminated;
(4) That the supplies or services terminated may be purchased elsewhere, and that the contractor will be held liable for any excess costs;
(5) That BPA reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and
(6) That the CO's final decision will be sent later.

20.5.4 Cure Notices.

PROCEDURE: If the CO is considering terminating a contract for default before the delivery date, the use of a "Cure Notice" is generally advisable. Before using this notice, it must be determined whether or not an amount of time equal to or greater than the period of "cure" remains in the contract delivery schedule. If the time remaining in the delivery schedule is not sufficient to permit a realistic "cure" period (generally 10 days, but the CO may specify other periods of time if circumstances warrant), the "Cure Notice" should not be issued. The "Cure Notice" may follow this format:

CURE NOTICE

You are notified that BPA considers your .....(specify the contractor's failure or failures) a condition that is endangering performance of the contract. Therefore, unless you provide a plan within ____ (CO specify an appropriate period of time) calendar days after receipt of this notice to cure this condition, BPA may terminate for default under the terms and conditions of the ..... (insert clause title) clause of this contract.

(End of notice)

20.5.5 Show Cause and Stop Work Notices.
PROCEDURE:

(a) If the time remaining in the contract delivery schedule is not sufficient to permit a realistic cure period (see 20.5.4), or the CO is considering a default termination, and the CO wishes to allow the contractor an opportunity to show why the contract should not be terminated, the following show cause notice may be used. (See 14.12 regarding suspension and stop work orders.)

SHOW CAUSE NOTICE

Since you have failed to .....(insert "perform Contract No. ..... within the time required by its terms", or "cure the conditions endangering performance under Contract No. ..... as described to you in BPA's letter of .....(date)"), BPA is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to determine whether your failure to perform arose from unforeseeable causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to ..... (insert complete address, including symbol, of activity where CO is located), with a copy to the Contracting Officer for information, within __ (CO insert the appropriate period of time) calendar days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and BPA under the terms and conditions of the Termination for Default clause and the liabilities that may be invoked if a decision is made to terminate for default.

Any assistance given to you on this contract or any acceptance by BPA of delinquent goods or services will be solely for the purpose of mitigating damages. It is not the intention of BPA to condone any delinquency or to waive any rights BPA has under the contract.

(End of notice)

(b) Stop work instructions. Stop work instructions may be used when it is definitely known that there are no further requirements for the items or services, but an investigation must be conducted to determine whether an actionable default exists in lieu of termination for convenience. In this situation, the following may be inserted as the final paragraph of the Show Cause Notice

"Pending decision, you are instructed to stop all work immediately and to make no further commitments under this contract. Advise all subcontractors and suppliers to do the same."

20.5.6 CO's Decision.
PROCEDURE:

(a) When a contract is terminated for default, the CO shall prepare a written decision explaining the reasons for the action taken. The decision shall demonstrate that the matter has been carefully considered. A thorough analysis of the matter by the CO should provide an opportunity to objectively review all facts surrounding a dispute. The CO shall make the same distribution of the CO decision as was made of the contract. The CO may include a copy of the Administrative Dispute Resolution Act of 1996 and DOE Board of Contract Appeals rules with the decision.

(b) The CO's decision should generally be formatted as follows:

(1) Description of contract
- (A) Item(s) or purpose
- (B) Date
- (C) Amount
- (D) Applicable modifications, if any

(2) A description of the acts or omissions constituting the default, including where applicable:
- (A) A brief statement of the claim or problem requiring decision
- (B) A statement of all relevant facts and incidents leading up to claim
- (C) A recital of, or reference to, all applicable contract and specification provisions
- (D) A discussion of facts of performance or nonperformance as related to contract provisions

(3) A statement that the contractor's right to proceed further with performance of the contract (or a specified portion of the contract) is terminated.

(4) If the CO has not determined whether the failure to perform is excusable, a statement that the supplies or services terminated may be repurchased and that the contractor may be held liable for any excess costs. (Firm fixed-price contracts only)

(5) If the CO has determined that the failure to perform is not excusable, a statement that the notice of termination constitutes such decision, a statement that the contractor will be held liable for any excess costs, and a statement that the contractor has the right to appeal this decision under the Disputes clause:

> "**This is the final decision of the Contracting Officer. You may submit the decision to the dispute resolution processes made available by the Administrative Dispute Resolution Act of 1996 (ADRA) at 5 U.S.C. 571-584 (1996) within the timeframes specified by statute. Should you choose to submit this decision to such processes, a copy of that request must simultaneously be sent to the Contracting Officer that issued the decision."**

(6) A statement that BPA reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs.

20.5.7 Repurchases Charged to the Contractor (Firm Fixed-Price Only).
PROCEDURES:

(a) When the supplies or services specified in the contract are still required after termination, the CO shall repurchase the same or similar supplies or services and charge them to the contractor as soon as practicable. BPA is under a legal obligation to mitigate the resulting costs when repurchasing goods or services which will be charged to the contractor. However, the mitigation is not required if it will impair BPA's program operations. The CO shall repurchase at as reasonable a price as practicable, considering the quality and delivery requirements.

(b) If repurchase is made at a price over the price of the supplies or services terminated, the CO shall, after completion and final payment of the repurchase contract, make a written demand on the contractor for the total amount of the excess, giving consideration to any increase or decrease in other costs such as transportation, discounts, etc.

(c) However, an exception to this policy is permitted if it appears that a defaulting contractor may become, or already is, insolvent rendering it financially unable to pay. In these instances, at the CO's discretion, excess re-procurement costs may be assessed at the time the repurchase contract is executed, thus protecting BPA's position as a general creditor. If adjustments are subsequently required, they shall be made when the re-procurement contract is closed.

20.5.8 Other Damages.
PROCEDURE:

(a) If a contract is terminated for default or if a course of action in lieu of termination for default is followed, the CO shall promptly ascertain and make demand for any liquidated damages to which BPA is entitled under the contract. If the contract includes provisions for liquidated damages (clause 24-2, see 24.5.1), these damages are in addition to any excess repurchase costs.

(b) If BPA has suffered any other damages as a result of the contractor's default, the CO shall, on the basis of legal advice, take appropriate action to assert BPA's claim for the damages.

20.5.9 Termination of Cost-Reimbursement Contracts for Default.
PROCEDURE:

(a) Settlement of a cost-reimbursement contract terminated for default is subject to the principles in Subpart 20.1, in the same manner in which a contract is terminated for convenience, except that the costs of preparing the contractor's settlement proposal are not allowable; and the contractor is reimbursed the allowable costs, and an appropriate reduction is made in the total fee, if any.

(b) However a cost-reimbursement contract does not contain any provision for recovery of excess repurchase costs after termination for default.

20.5.10 Surety-Takeover Agreements.
PROCEDURE:

(a) The procedures in this section apply primarily, but not solely, to fixed-price construction contracts which require performance bonding terminated for default.
(b) Because of the surety's liability for damages resulting from the contractor's default, the surety has certain rights and interests in the completion of the contract work and application of any undisbursed funds. Accordingly, the CO shall carefully consider proposals by the surety concerning completion of the work. The CO shall take action on the basis of BPA's best interests, including the possible effect of the action upon BPA's rights against the surety.

(c) If the surety does not complete the contract, the CO normally will arrange for completion of the work by awarding a new contract based on the same plans and specifications. The CO shall exercise reasonable diligence to obtain the lowest price available for completion.

20.50 TEXT OF CLAUSES
The following clauses are referred to in Part 20:

Clause 20-1 TERMINATION FOR CONVENIENCE BY EITHER PARTY 19
Clause 20-2 TERMINATION FOR THE CONVENIENCE OF BPA..... 19
Clause 20-3 TERMINATION FOR DEFAULT 20

Clause 20-1 TERMINATION FOR CONVENIENCE BY EITHER PARTY (Jul 13)(BPI 20.3.1)
Either party may terminate all or any part of this contract at any time upon 30 days written notice to the other party. Termination costs will be negotiated between the parties. Notwithstanding the Disputes clause of this contract, if the parties are unable to agree upon the termination costs, the parties may use Alternative Dispute Resolution processes (5 U.S.C. 571-584 {1996} or the Administrative Dispute Resolution Act of 1996) or Civilian Board of Contract Appeals if agreement cannot be reached.

(End of Clause)

Clause 20-2 TERMINATION FOR THE CONVENIENCE OF BPA. (Jul 13)(BPI 20.4.1)
(a) BPA may terminate all or any part of this contract, at any time, upon written notice to the contractor. Upon receipt of the termination notice, the contractor shall stop work on the terminated portion of the contract.

(b) The contract amount shall be revised as a result of termination under this clause. On fixed-price contracts the revised amount shall not exceed the pre-termination contract price, excluding payments already received, plus reasonable termination expenses. On cost-reimbursement contracts it will not exceed the total of allowable and allocable costs of performance prior to termination, excluding payments already received, plus reasonable termination expenses, plus an adjustment of the fee on the terminated portion of the contract. No payment will be made for anticipated profits on the terminated portion, or consequential damages, of the contract. The contractor shall submit a settlement proposal within 30 days of the notice of termination.

(c) The Contracting Officer may direct the disposition of material produced or acquired for the work terminated, or any completed or partially completed items.

(End of clause)

Clause 20-3 TERMINATION FOR DEFAULT. (Jul 13)(BPI 20.5.1)
(a) BPA reserves the right to terminate any or all of any undelivered or unexecuted portion of this contract for cause if the contractor fails to make any delivery, fails to prosecute the work, or to perform as scheduled, or if any of the contract terms are breached. However, the contractor shall not be terminated for default if the failure to perform arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, provided that the Contractor provides notice to the Contracting Officer that a force majeure event has occurred within a reasonable period of time after occurrence. Examples of those events are: (1) acts of God or of the public enemy, (2) acts of the Government in its sovereign or BPA in its contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather.

(b) The Contracting Officer may direct the disposition of material produced or acquired for the work terminated, and the disposition of any completed or partially completed items.

(End of clause)

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(c) BPA may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to BPA for any excess costs for those supplies or services, including administrative costs.

(End of Alternate I)

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 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 laws of the United States.

21.1.2.1 Clause Usage Prescription.
PROCEDURE: The CO shall include Clause 21-5, Applicable Law in all solicitations and contracts, including Intergovernmental Contracts (IGCs). For commercial acquisitions, Clause 21-5 shall not be included in the solicitation or contract; the requirement is addressed in the Clause 28-22.

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. § 3708 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.

(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 official 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.

(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 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.,. 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 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, asa 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 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. § 7101-7109), 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 official 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.

(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.

21.3.10.1 Clause Usage Prescription.
PROCEDURE: The CO shall include Clause 21-4 Release of Claims in solicitations and contracts unless the conditions in 21.3.4 apply. For commercial acquisitions, Clause 21-4 shall not be included in the solicitation or contract; the requirement is addressed in the payment clauses in Part 28, Clauses 4.2.

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; The basis for an amount of any accrued interest or penalty;
(B) For debts resulting from specific contract terms (*e.g.*, debts resulting from incentive clause provisions, Cost Accounting Standards, price reduction for 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).
(C) 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.

(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 §, 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.
(a) ***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;
(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.

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

(c) ***PROCEDURE:*** 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.

(d) ***PROCEDURE:*** 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.

(e) ***PROCEDURE:*** 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.

(f) ***PROCEDURE:*** 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:

(a) 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.

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

(c) 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. For commercial acquisitions, Clause 21-2 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-13 Disputes.

21.50 TEXT OF CLAUSES.

Clause 21-1 PROTESTS AGAINST AWARD 12
Clause 21-2 DISPUTES 12
Clause 21-3 RESERVED 14
Clause 21-4 RELEASE OF CLAIMS 14
Clause 21-5 APPLICABLE LAW 14

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 (Jul 13)(BPI 21.3.15.1; 25.4.1)

(a) This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. § 7101-7109).

(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 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 (Jul 13)(BPI 21.3.10.1)

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)

Clause 21-5 APPLICABLE LAW (Jul 13)(BPI 21.1.2.1; 25.4.1)

United States law will apply to resolve any claim of breach of this contract.

(End of clause)

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22.1 BASIS OF PAYMENT.

(a) ***POLICY:*** Payment provisions shall be drawn with an eye to balancing the equities of the protection of BPA's interests against adequately compensating the contractor for supplies delivered or services performed.

(b) ***PROCEDURE:*** COs shall consider the following order of preference when establishing a basis for payment in award documents:

(1) Single Payments (Lump Sum) - one payment made after completion and acceptance of all work.
(2) Partial Payments - full payment for completed separately priced items in the contract. Multiple payments are anticipated.
(3) Progress Payments - multiple payments made during performance based on a percentage or stage of completion.
(4) Advance Payments - advances of money in anticipation of performance.

22.1.1 Single Payments and Partial Payments.

(a) ***INFORMATION:*** Single payments are one (lump sum) payment made after completion and acceptance of all work.

(b) ***INFORMATION:*** Partial payments are payments authorized under a contract, made upon completion of the delivery of one or more complete units (or one or more distinct items of service), called for, delivered, and accepted by BPA under the contract. Although partial payments are generally treated as a method of payment and not as a method of contract financing, the use of partial payments can assist contractors to participate in BPA contracts.

(c) ***PROCEDURE:*** There are certain circumstances that could indicate that partial payments are inappropriate, and should be prohibited. Those circumstances include:

(1) When the additional administrative time required to issue two or more payments may not be cost effective.
(2) When partial delivery of individual components does not constitute a usable item on its own.

22.1.2 Progress Payments.

(a) ***POLICY:***

(1) Where progress payments are authorized, BPA will make progress payments on the basis of percentage or stage of completion. Typical progress payment provisions call for payment of part of the contract price only when a completed stage of work (milestone) or a completed component can be said to be of value to BPA in the event the contract were to be terminated at that point. However, progress payment schedules can be negotiated that will allow payment based on an estimated percentage of completion.
(2) Progress payments shall not be used for the acquisition of commercial items and services.

(b) ***PROCEDURE:***

(1) The CO may provide for progress payments if the contractor:
(A) Will not be able to bill for the first delivery of products, or other performance milestones, for a substantial time after work is scheduled to begin, and

(B) Will make expenditures for contract performance during the pre-delivery period that have a significant impact on the contractor's working capital.

(2) When there is reason to doubt the amount of a progress payment request, only the doubtful amount should be withheld, subject to later adjustment after review or audit; any clearly proper and due amounts should be paid without awaiting resolution of the differences.

(3) Post-payment reviews may be made when considered desirable by the CO to determine the validity of progress payments already made and those expected to be made. The post-payment review should include a review of whether or not the unpaid balance of the contract price will be adequate to cover the anticipated cost of completion.

22.1.3 Clause Usage Prescriptions.
PROCEDURE:

(a) The CO shall include Clause 22-2, Basis of Payment -- Progress Payments (Construction Contracts), in all fixed-price construction solicitations and contracts when progress payments are anticipated. The CO may modify the percentage specified in paragraph (a) for payment of material delivered on site but not yet installed. The CO may include the clause in solicitations and contracts when a fixed price service contract for dismantling, demolition or removal of improvements is expected. Clause 22-2 shall not be included in solicitations and contracts for commercial acquisitions.

(b) The CO may include a clause similar to 22-3, Basis of Payment - Progress Payments, in fixed-price solicitations and contracts for other than construction when progress payments are anticipated. . Clause 22-3 shall not be included in solicitations and contracts for commercial acquisitions.

(c) The CO shall include Clause 22-4, Basis of Payment -- Time-and-Materials Contracts, in solicitations and contracts when a time-and-materials basis for payment is contemplated. For commercial acquisitions, Clause 22-4 shall not be included in the solitication or contract; the requirement is addressed in Clause 28-4.2.

(d) The CO shall include Clause 22-5, Basis of Payment -- Cost Reimbursement, in all cost reimbursement contracts. Clause 22-5 shall not be included in solicitations and contracts for commercial acquisitions.

(e) The CO shall include Clause 22-6, Predetermined Final Indirect Cost Rates, in Intergovernmental Contract's (IGCs) and other solicitations and contracts when a cost-reimbursement contract with an educational institution is contemplated and predetermined final indirect cost rates are to be used. Clause 22-6 shall not be included in solicitations and contracts for commercial acquisitions.

(f) The CO shall include Clause 22-7, Contract Ceiling Limitation, in intergovernmental contracts and other solicitations and contracts if a cost-reimbursement or time-and-materials contract is contemplated. For commercial acquisitions, Clause 22-7 shall not be included in the solitication or contract; the requirement is addressed in Clause 28-4.2.

(g) The CO shall include Clause 22-19, Fixed Indirect Cost Rates with Carry-forward, in Intergovernmental Contracts (IGCs) and other contracts when a cost-reimbursement contract is contemplated, and fixed indirect cost rates with carry-forward are to be used. Clause 22-19 shall not be included in solicitations and contracts for commercial acquisitions.

22.1.4 Advance Payments.
POLICY:

(a) “Contract financing,” as defined in 22.2(c), shall be provided by BPA only to the extent actually needed for prompt and efficient performance, considering the availability of private financing. Any undue risk of monetary loss to BPA through the financing shall be avoided. Advance payment is a form of contract financing.

(b) Contract financing methods are intended to be self-liquidating through contract performance. BPA may use the methods only for financing of contractor working capital, not for the expansion of contractor-owned facilities or the acquisition of fixed assets.

(c) Advance payments shall be authorized sparingly. They should be authorized only if partial payments or progress payments are not feasible and private financing is not reasonably available.

(d) Subject to BPI 22.1.4.1, advance payments shall not be used for the acquisition of commercial items and services.

22.1.4.1 Authorized Advance Payments.
PROCEDURE: The items authorized for advance pay below do not require additional review and approval by the HCA. All others not identified below require submittal to the HCA (see 22.1.4.2) for approval. Payments under time-and-material or cost-reimbursement contracts made to small businesses in advance of their payment to their suppliers or subcontractors (see BPI Clauses 22-4 and 22-5) are not considered advance payments under this subpart.

(a) Rent (leases, and rental agreements, including meeting and lodging room rentals);

(b) Tuition and conference registration fees;

(c) Insurance premiums;

(d) Extension or connection of public utilities for BPA buildings or installations;

(e) Subscriptions to publications - interpreted to include electronic methods of data recording. Software subscription services are therefore authorized;

(f) Purchases of supplies or services in foreign countries, if the purchase price does not exceed $10,000 and the advance payment is required by the laws or regulations of the foreign country concerned;

(g) Advance payments to Federal agencies; and

(h) Advance payments to Intergovernmental Contract (IGC) organizations other than Federal agencies, as defined in 25.1(a), require prior approval by the CO's purchasing Performance Manager. Requirements for approval shall be similar to the HCA approval procedure in 22.1.4.2.

22.1.4.2 Requirements for Approval of Other Advance Payments.
PROCEDURE: The CO shall transmit the following together with a recommendation of approval of a contractor's request for advance payment to the HCA:

(a) A summary of the solicitation or contract requirements;

(b) Comments on (1) the contractor's need for advance payments and (2) potential benefits to BPA from providing advance payments;

(c) CO's proposed actions to minimize BPA's risk of loss from providing advanced payment;

(d) Proposed advance payment contract terms; and

(e) Justification of any proposal for waiver of interest charges (see 22.1.4.3).

22.1.4.3 Interest on Advance Payments.
POLICY:

(a) BPA will charge interest daily on the amount of advance payments received by the Contractor in excess of the Contractor's current needs. Federally recognized Indian Tribes, Federal agencies, State governments or instrumentalities thereof, as defined in 25.1(a), will not be required to repay interest earned on advanced payments. The CO may, however, require Contractor-agencies, other than Federal agencies as defined in 25.1(a) and (c), to pay interest on unliquidated amount of advances that the CO determines unreasonably exceeds that Contractor-agency's current needs. The interest will be charged at the higher of Department of Treasury current value of funds rate or the BPA cost of borrowing rate.

(b) The HCA may authorize advance payments without requiring repayment of interest if advantageous to BPA.

22.1.4.4 Payment of Advances.

(a) ***POLICY:*** Advance payments shall be processed in the following manner. Letters of Credit are not authorized at BPA. Payments will be made by electronic funds transfer. Payment will only be made by direct Treasury check when electronic funds transfer is not possible.

(1) 30-Day Advance: The contractor is authorized to request, in writing, BPA funds in amounts needed to cover its own disbursements of cash in the next 30 calendar days for contract performance. The contractor's request typically requires 5 working days for processing. The 30-day advance is the preferred method of providing advance funds to a contractor.

(2) Less than 30-Day Advance: In lieu of a Letter of Credit, the contractor is authorized to request BPA funds in amounts needed to cover its own disbursements of cash for periods of less than 30 calendar days for contract performance. When this payment method is selected, BPA will deposit funds in the contractor's designated account within 5 working days after BPA receipt of the request. The request shall be made to BPA's Disbursement Operations as required by its procedures. This method of providing advance funds to a contractor is the least preferred method and shall be used sparingly.

(b) ***INFORMATION:*** BPA may terminate advance payments if the contractor is unwilling or unable to minimize the elapsed time between receipt of the advance and disbursement of the funds. In lieu of termination, the CO may require the contractor to not request BPA funds until the contractor's checks are ready to be forwarded to the payees.

22.1.4.5 Clause Usage Prescriptions.
PROCEDURE:

(a) Where the CO wants advances to cover the next 30 days and accumulated interest to be repaid to BPA: The CO shall include Clause 22-8, Advance Payments, in all solicitations and contracts when advance payments, other than those authorized under subpart 22.1.4.1, are contemplated. If the CO wants to limit the total value of advance payments, add a paragraph to the clause stating the limits of advance funding.

(b) Where the CO wants advances to cover the contractor's immediate (less than 30-day) needs and accumulated interest to be repaid to BPA: The CO shall substitute paragraph (a) shown in Alternate I.

(c) Where the CO wants advances to cover the contractor's immediate (less than 30-day) needs and payment of accumulated interest to BPA has been waived in accordance with subpart 22.1.4.3: The CO shall substitute paragraphs (a) and (k) shown in Alternate II and delete paragraph (l)

(d) Where the CO wants advances to cover the next 30 days and payment of accumulated interest to BPA has been waived in accordance with 22.1.4.3, the CO shall substitute paragraph (k) shown in Alternate III and delete paragraph (l).

(e) See BPI 25.3 for Advance Payment clauses applicable to Intergovernmental contracts.

(f) Clause 22-8 shall not be included in solicitations and contracts for commercial acquisitions.

22.1.5 Withholding.
(a) ***POLICY:*** The CO shall not routinely withhold funds from contractor payments. The CO shall consider a withholding only when a contractor has not achieved satisfactory progress during any period for which a payment is to be made or when the CO expects difficulty in the timely and complete receipt of information required by the contract or when BPA has no verifiable record of past performance.

(b) ***INFORMATION:*** Withholding should not be used as a substitute for good contract management, and COs should not withhold funds without cause. Decisions to withhold and the specific amount to be withheld shall be made by the CO on a case-by-case basis. Such decisions will be based on the CO's assessment of past performance and the likelihood that such performance will continue.

(c) ***PROCEDURE:***
(1) Generally, the CO shall not withhold an amount greater than 10% of the total contract amount, and shall withhold only in those specific instances where the CO has determined, in writing, that it is necessary to protect the interests of BPA.
(2) Upon completion of all contract requirements, withheld amounts shall be promptly released for payment.

22.1.5.1 Clause Usage Prescriptions.
PROCEDURE: The CO may include Clause 22-9, Withholding, in all solicitations and contracts. The CO may add a paragraph similar to paragraph (c) shown in Alternate 1 when equipment warranties, specified written warranties, owner's manuals, operating instructions or other documentation is required by the contract. The CO shall specify the maximum percentage of the contract amount to be withheld. Clause 22-9 shall not be used in solicitations and contracts issued on a cost reimbursement basis. Clause 22-9 shall not be included in solicitations and contracts for commercial acquisitions.

22.2 PROMPT PAYMENT.
(a) ***POLICY:*** Payments shall be made in accordance with the Prompt Payment regulations at 5 CFR Part 1315. All written contracts shall specify payment due dates and proper invoice requirements.

(b) ***PROCEDURE***:

(1) Payment will be based on receipt of a proper invoice (as defined in 22.2(c), satisfactory contract performance, and receipt of the recipient's Taxpayer Identification Number (TIN) and other banking information required to process payment (see 4.1.2 and 22.6).
(2) (Reserved.)
(3) When specifying the frequency of billing, full consideration should be given to the time and resources required by BPA to process multiple payments. Generally, contractors may bill no more often than monthly, unless the CO approves a more frequent period. Billings under cost reimbursement contracts are usually not accepted more frequently than every two weeks.
(4) Except as provided by 22.6(d), disagreements shall be referred to the CO for final decision after consulting with such other BPA offices as determined necessary by the CO.
(5) Questions concerning delinquent payments should be directed to the designated billing office.

(c) ***INFORMATION***: Definitions: As used in this part –

"Certified Invoice" means, as used within this subpart, written evidence which indicates BPA acceptance of services performed by the contractor.

"Contract financing payments" means authorized disbursement of monies prior to acceptance of supplies or services including advance payments, progress payments based on cost, progress payments (other than under construction contracts or architect-engineer contracts) based on a percentage or stage of completion where payment is not based upon acceptance of work delivered or rendered for which a price is separately stated, and interim payments on cost-type contracts.

"Designated billing office" means the BPA office or person designated in the contract to receive the contractor's invoices.

"Due date" means the date on which payment should be made according to the terms of the contract.

"Payment date" means the date on which a check for payment is dated or the date electronic funds transfer is made.

"Proper invoice" means a bill or written request for payment (invoice) containing all necessary information required by BPA's Disbursement Operations for payment, as described in the billing instructions within the contract payment clause and other terms and conditions for invoice submission contained in the contract.

"Receiving report" means written documentation or data entered into the BPA ERP system that is indicates BPA acceptance of supplies delivered.

22.2.1 Prompt Payment Discounts.
(a) ***POLICY:*** COs are encouraged to negotiate meaningful discounts for prompt payment whenever possible.

(b) ***INFORMATION:***
(1) Decisions to accept or not accept a prompt payment discount are made by BPA Cash Manager based on the value of the discount offered compared to BPA cost of money. There is no minimum time period for which discounts will be taken; any discount will be taken if determined cost effective by the BPA Cash Manager. When BPA cost of money exceeds the value of the discount, the discount will not be taken.
(2) Information on this policy can be obtained from the BPA Cash Manager.

22.2.2 Payment Due Dates.
(a) ***POLICY:*** For the sole purpose of computing an interest penalty that might be due the contractor, COs shall establish a period for acceptance that reflects the minimum time necessary for inspection or

testing. The period shall be no shorter than 7 days nor longer than 30 days after the contractor has delivered supplies or performed services in accordance with the terms and conditions of the contract.

(b) ***INFORMATION***:

(1) The due date for most transactions, (e.g. lump sum payments, partial payments, etc.) shall be not later than the 30th day after BPA receives a proper invoice in the designated billing office, or not later than the 30th day after BPA acceptance of supplies delivered or services rendered, whichever is later.

(2) For all progress payments except construction, the due date shall be not later than the 30th day after BPA approval of contractor estimates of work or of services accomplished. For the sole purpose of computing an interest penalty that might be due the contractor, BPA approval shall be deemed to have occurred constructively on the 7th day after the contractor estimates are received by BPA.

(3) Progress payments under construction contracts shall be due not later than the 14th day after receipt of a proper invoice by the designated billing office. The CO has the discretion to specify a longer period, not to exceed 30 days, if more time is required to afford BPA a reasonable opportunity to adequately inspect the work and to determine the adequacy of the contractor's performance under the contract.

(4) For payment of any amounts retained by the CO, the due date shall be not later than the 30th day after approval by the CO for release to the contractor.

(5) Final Payments shall be due not later than the 30th day after BPA receives a proper invoice in the designated billing office, or not later than the 30th day after BPA acceptance of the work or services, whichever is later. On final payments where the amount is subject to contract settlement actions, acceptance shall be deemed to have occurred on the effective date of the contract settlement.

22.2.3 Interest Penalties.

INFORMATION:

(a) An interest penalty shall be paid automatically without request from the contractor, when all of the following conditions, if applicable, have been met:

(1) A proper invoice has been received.

(2) Contractor has provided its taxpayer identification number (TIN) and other banking information necessary to process payment, as per 31 U.S.C. 3332 (see 22.6).

(3) There is no disagreement over quantity, quality, or contractor compliance with any contract requirement.

(4) In the case of a final invoice, the payment amount is not subject to dispute or to further contract settlement negotiations between BPA and the contractor.

(5) BPA paid the contractor after the due date.

(6) Interest owed is over $1.00 in value.

(b) The interest penalty shall be at the rate established by the Secretary of the Treasury under Section 611 of the Contract Disputes Act of 1978 (PL 95-563, 41 U.S.C. § 7109) that is in effect on the day after the due date.

(c) Interest penalties under the Prompt Payment Act will not continue to accrue (1) after the filing of a claim for such penalties under the disputes clause of the contract, if included, or (2) for more than 1 year.

(d) Interest penalties are not required on payment delays due to defective invoices, disagreement between BPA and contractor over the payment amount, or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the disputes clause.

(e) No interest penalty shall be paid to the contractor as a result of delayed contract financing payments (see 22.2(c) for definition of “contract financing payments”).

22.2.4 Documentation of Acceptance.
PROCEDURE:

(a) For payment purposes, BPA acceptance will be documented on either a receiving report or by a contractor invoice certified by the COTR. The invoice may be transmitted electronically, provided that the Contracting Officer or designated billing office can verify the invoice is a legitimate submission from the contractor. The receiver or approving party shall enter the receipt or invoice information into the BPA ERP system within 3 business days of receipt or acceptance of the goods or services to ensure timely payment processing. Contractors are required to submit all original invoices and supporting documentation to the address indicated within the contract. The receiving report or invoice shall, as a minimum, include the following:

(1) Contract number or other authorization for supplies delivered or services performed;
(2) Description of supplies delivered or services performed;
(3) Quantities of supplies received and accepted, if applicable; and
(4) Date supplies delivered or services performed.

The following information is on the receiving report, or added by the COTR to the invoice:

(1) Date supplies or services were accepted by the designated BPA official (or progress payment request was approved); and
(2) Signature, printed name, and title of the designated BPA official responsible for acceptance or approval.

(b) The designated billing office, as indicated in the contract, shall mark each invoice with the date the invoice is received.

22.2.5 Clause Usage Prescriptions.
PROCEDURE:

(a) The CO may include Clause 22-10, Discounts for Prompt Payment, in fixed price solicitations and contracts. For commercial acquisitions, Clause 22-10 shall not be included in the solicitation or contract; the requirement is addressed in Clauses 28-4.1 and 28-4.2.

(b) The CO shall include Clause 22-11, Payment -- Construction Contracts, in solicitations and contracts for construction when progress payments are anticipated and Clause 22-2, Basis of Payment -- Progress Payments (Construction Contracts), is used. Paragraph (b)(1), Payment Due Dates, may be modified to establish a due date longer than 14 days if the CO justifies the need in writing. The face page of the award form shall indicate the address to which invoices are to be sent for processing. Clause 22-11 shall not be included in solicitations and contracts for commercial acquisitions.

(c) The CO shall include Clause 22-12, Payment, in all solicitations and contracts for service and supply, including Intergovernmental Contracts with Indian Tribes and all non-Federal governmental entities paid in arrears (see 25.3). Do not use this clause when contract financing will be used (see definition at 22.2(c)). It shall also be included in construction solicitations and contracts when progress payments are not anticipated (i.e., payment will be made only on a single payment or a partial payment basis.) The CO may modify the clause to change the frequency of payments (see BPI 22.2). The face page of the award form shall indicate the address to which invoices are to be sent for processing. For commercial acquisitions, Clause 22-12 shall not be included in the solicitation or contract; the requirement is addressed in Clauses 28-4.1 and 28-4.2.

22.3 INTEREST ON AMOUNTS DUE BPA.
POLICY:

(a) BPA shall apply interest charges to any contract debt unpaid after 30 days from the issuance of a demand, unless:

(1) The contract specifies another due date or procedure for charging or collecting interest; or

(2) The contract is a kind excluded under 22.3.1; or
(3) The contract or debt has been exempted from interest charges under BPA Financial Operations procedures.

(b) If not already applicable under the contract terms, interest on contract debt shall be made an element of any agreement entered into on deferment of collection.

22.3.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include Clause 22-13, Interest on Amounts Due BPA, in solicitations and contracts in excess of $100,000 for non-commercial goods or services. For commercial acquisitions, Clause 22-13 shall not be included in the solicitation or contract; the requirement is addressed in Clauses 28-4.1 and 28-4.2.

22.4 ASSIGNMENT.
(a) ***POLICY:*** Normally BPA will permit assignments in order to aid contractors in obtaining independent financing. As assignments are common practice in the commercial marketplace, BPA will accept assignment documents prepared by a financial institution and signed by an officer of the financial institution. However***,*** when the contract provides for advance payments, assignment of contract payments will not be permitted.

(b) ***INFORMATION:***
(1) "Assignment of contract payments" means the transfer or making over by the contractor to a bank, trust company, or other financing institution, as security for a loan to the contractor, of its right to be paid by BPA for contract performance.
(2) An assignment of contract payments extinguishes the right of the transferor (assignor, contractor) to all future payments due under the contract, and establishes that right in the transferee (assignee, financial institution). Requests from contractors or financial institutions regarding assignments are processed by the CO. Generally a contractor will advise the CO that an assignment is contemplated. The assignment becomes effective upon written acknowledgment by the CO.
(3) Extent of assignee's protection. BPA may not recover payments made to the assignee. This immunity of the assignee is effective whether the contractor's liability arises from or independently of the assigned contract.
(4) A contractor may assign payments due or to become due under a contract if all the following conditions are met:
(A) The assignment is made to a bank, trust company, or other financing institution, including any Federal lending agency;
(B) The assignment covers all unpaid amounts payable under the contract; and
(C) The contract terms do not expressly prohibit the assignment.

(c) ***PROCEDURE:***
(1) Upon notification of a desire for an assignment, the CO shall:
(A) Notify the disbursing officer of the pending assignment.
(B) Use BPA form 4220.09 Instrument of Assignment to complete the action, or the bank generated forms if they contain the same content as the BPA form.
(C) Immediately notify the disbursing officer when assignment is accepted and ensure delivery of the instrument to the disbursing officer. This is especially important to ensure that the payment is made to the assignee (see 22.6.1).
(2) A release of assignment is required whenever the contractor wishes to reestablish its right to receive further payments after the contractor's obligations to the assignee have been satisfied and a balance remains due under the contract.
(3) See BPI 28.4.13 for assignment of contracts for commercial acquisitions.

22.5 TAXES.
POLICY:

(a) COs shall consult BPA's Office of General Counsel before determining whether or not a tax is valid or applicable or before obtaining exemption from, or refund of, a tax.

(b) While state governments are prohibited from directly taxing the Federal Government, BPA shall pay all applicable state taxes imposed on contractors as part of the award price. Contract modifications will be issued to reimburse the contractor for any Federal excise taxes or duties which are passed by Congress after award or as to which exemptions are removed after award. The contractor shall be responsible for any state or local taxes which are passed or increased or as to which exemptions are removed or reduced after award; and there shall be no additional compensation from BPA for any such taxes.

(c) When the constitutional immunity of BPA from state or local taxation may reasonably be at issue, contractors should be discouraged from negotiating independently with taxing authorities if the contract contains a tax escalation clause.

(d) COs will refer prospective offerors to their own legal counsel for a determination as to the applicability of taxes to contractors doing business with BPA.

(e) COs should solicit prices on a tax-exclusive basis when it is known that BPA is exempt from these taxes and the exemption is at least $250.

(f) BPA shall take maximum advantage of available Federal excise tax and duty exemptions.

(g) The contract price of supplies shall not include the manufacturers' excise tax on parts or accessories purchased by BPA for use in the manufacture of any article.

22.5.1 General.
INFORMATION:

(a) Federal excise taxes are levied on the sale or use of particular supplies or services. An excise tax is similar to a sales tax. The most common excise taxes are --

(1) Manufacturers' excise taxes imposed on certain motor-vehicle articles, gasoline, lubricating oils, coal, fishing equipment, firearms, shells, and cartridges sold by manufacturers, producers, or importers; and

(2) Special-fuels excise taxes imposed at the retail level on diesel fuel and special motor fuels.

(b) Federal excise taxes are usually paid by the seller and included in the sales price. Sometimes the law exempts the Federal Government from these taxes. COs should solicit prices on a tax-inclusive basis when no exemption exists and on a tax-exclusive basis when it is known that BPA is exempt from these taxes.

22.5.2 General Exemptions.
INFORMATION:

(a) No Federal manufacturers' or special-fuels excise taxes are imposed in many contracting situations as, for example, when the supplies are for any of the following:

(1) The exclusive use of any state or political subdivision,

(2) Further manufacture, or resale for further manufacture (this exemption does not include tires and inner tubes),

(3) A nonprofit educational organization, or

(4) Emergency vehicles.

(b) The Secretary of the Treasury has exempted the United States from the communications excise tax imposed in 26 U.S.C. 4251, when the supplies and services are for the exclusive use of the United Sates.

(c) The Secretary of the Treasury has exempted the United States from the federal highway vehicle users tax imposed in 26 U.S.C. 4481. The exemption applies whether the vehicle is owned or leased by the United States.

22.5.3 Applicability of State and Local Taxation.

(a) ***POLICY:***

(1) Generally, purchases and leases made by and for BPA's use are exempt from state and local taxation. For specific advice and assistance, COs shall contact BPA's Office of General Counsel.

(2) BPA shall pay all applicable state and local taxes imposed on contractors as part of the award price. For specific advice and assistance, COs shall contact BPA's Office of General Counsel.

(3) BPA shall take maximum advantage of all available exemptions in excess of $250 from state and local taxation.

(4) The applicability of state and local taxes to purchases by BPA may depend on the place and terms of delivery. When the contract price will be substantial, alternative places and terms of delivery should be considered in light of possible tax consequences.

(5) Prime contractors and subcontractors shall not normally be designated as agents of BPA for the purpose of claiming immunity from state or local sales or use taxes. Before any designation is made, the matter shall be referred to the HCA for review.

(6) When purchases are not made by BPA itself, but by a prime contractor or by a subcontractor under a prime contract, the right to an exemption shall be determined by the legal counsel of the contractor or subcontractor.

(7) Frequently, property (including property acquired under the progress payments clause or under the BPA property clause of cost-reimbursement contracts) owned by BPA is in the possession of a contractor or subcontractor. Situations may arise in which states or localities assert the right to tax BPA property directly or to tax the contractor's or subcontractor's possession of, interest in, or use of

that property. BPA's Office of General Counsel shall review such cases and advise the CO on the appropriate course of action.

(b) ***INFORMATION:*** The imposition of state and local taxes may result in special contract considerations including the following:

(1) With coordination of BPA's Office of General Counsel, a contract may state that the contract price includes or excludes a specified tax or require that the contractor take certain actions with regard to payment, nonpayment, refund, protest, or other treatment of a specified tax. Such special treatment may be appropriate when there is doubt as to the applicability or allocability of the tax, or when the applicability of the tax is being litigated.

(2) Indefinite-delivery contracts (including those for leased equipment) may require the contractor to furnish equipment in more than one state. As states and local governments impose a wide variety of sales, property, use, or other taxes, the CO shall consider the risk to BPA of having contractors include taxes in the contract price when the place of delivery is not known at the time of contract award.

22.5.3.1 State and Local Tax Exemptions.

(a) ***INFORMATION:*** Evidence of exemptions. Evidence needed to establish exemption or immunity from state or local taxes depends on the grounds for the exemption or immunity claimed, the parties to the transaction, and the requirements of the taxing jurisdiction. Such evidence may include the following:

(1) A copy of the contract or relevant portion.

(2) Copies of purchase orders, shipping documents, credit-card-imprinted sales slips, paid or acknowledged invoices, or similar documents that identify BPA as the buyer.

(3) A State or local form indicating that the supplies or services are for the exclusive use of BPA.

(4) Any other State or locally required document for establishing general or specific exemption.

(5) Shipping documents indicating that shipments are in interstate or foreign commerce.

(b) ***PROCEDURE:*** Furnishing proof of exemption. If a reasonable basis to sustain a claimed exemption exists, the seller will be furnished evidence of exemptions, as follows:

(1) Under a cost-reimbursement contract: At the discretion of the CO.

(2) Under a fixed price contract: If requested by the contractor and the contractor either certifies that the contract price does not include the tax or, if the transaction is for property which is tax exempt, consents to a reduction in the contract price.

22.5.3.2 State of Washington Sales and Use Taxes.

INFORMATION:

(a) The State of Washington has enacted legislation subjecting materials to be incorporated into construction projects and BPA-owned property, materials and equipment used by contractors in constructing projects in the State of Washington to sales and use taxes.

(b) Washington State gasoline tax. The Revised Code of Washington (RCW) at Chapter 82.36 imposes a tax on gasoline sold, used, or distributed in the state. The tax is imposed on the distributor, and is passed on as a cost to the purchaser. On such a tax, BPA has no basis to claim immunity, and must pay costs.

(c) Washington State diesel fuel tax. The Revised Code of Washington (RCW) at Chapter 82.38 imposes a tax on the users of diesel fuel within the state. This tax may not be imposed on BPA, and the State specifically recognizes the federal exemption at RCW 82.38.80.

22.5.3.3 State of Idaho Use Tax.

INFORMATION: The State of Idaho has enacted legislation subjecting BPA-owned property, materials and equipment used by contractors in constructing projects for BPA to a use tax. Examples include tower steel, conductor, hardware and accessories, and substation equipment and materials installed by contractors. Also included are materials purchased by contractors in constructing a facility and which

form a part of that facility. Not included are materials consumed, partially or entirely in performing the construction.

22.5.4 Contracts for Expert/Consultant Services.
(a) ***INFORMATION:*** Prior to entering into a contract for expert/consultant services, BPA, or an independent party, shall determine if the expert/consultant qualifies as an independent contractor.

(b) ***POLICY:*** If the analysis by BPA or an independent party determines a proposed expert/consultant is an independent contractor, BPA may contract directly with that expert/consultant and will issue an IRS form 1099 to the expert/consultant that is an independent contractor.

If the analysis determines a proposed expert/consultant is not an independent contractor, BPA will contract for the services of that expert/consultant through one of its third party supplemental labor contractors who will issue an IRS tax form W-2 to that employee.

22.5.5 Contracts for Supplemental Labor Services.
(a) ***INFORMATION:*** Supplemental Labor is non-government employee labor contracted and billed on an hourly or daily basis performing tasks for BPA. The labor is used to augment existing BPA staff levels or to fill gaps in the Federal workforce.

(b) ***POLICY:*** BPA shall acquire all supplemental labor services through a third party supplemental labor contractor. BPA shall not enter into direct contracts with any individuals for supplemental labor services. Third party supplemental labor contractors shall issue their employees assigned to BPA an IRS tax form W-2.

22.5.6 Clause Usage Prescriptions.
PROCEDURE:

(a) The CO shall include Clause 22-14, Taxes -- Indefinite Delivery Contracts, in solicitations and contracts for equipment (including leased equipment) and services, when a fixed price indefinite delivery contract is contemplated and the place or places of delivery could be in more than one state and are not specifically known at the time of contracting.

(b) The CO shall include Clause 22-15, Federal, State and Local Taxes, in solicitations and contracts over $100,000 if a fixed price or time and materials contract is contemplated. For commercial acquisitions, Clause 22-15 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-17.

(c) Reserved.

(d) The CO shall include Clause 22-17, Washington State Sales and Use Taxes, in all solicitations and contracts requiring construction to be performed wholly or partly in the State of Washington.

(e) The CO shall include Clause 22-18, State of Idaho Use Tax, in all solicitations and contracts requiring construction in the State of Idaho.

(f) The CO shall include Clause 22-22, Contracts for Expert/Consultant Services with Independent Contractors, in all solicitations and contracts for Expert and Consultant Services with Independent Contractors.

(g) The CO shall include Clause 22-23, Contracts for Supplemental Labor, in all solicitations and contracts for Supplemental Labor services.

22.6 ELECTRONIC FUNDS TRANSFER.
POLICY:

(a) Electronic funds transfer (EFT) shall be used as the primary payment method for contract invoice and contract financing payments as required by 31 U.S.C. 3332(e), with only limited exceptions. Government purchase card transactions are not subject to the requirements of this subpart.

(b) Exempted from the EFT payment method are:
(1) A contract or agreement which uses a government purchase card as the exclusive means of payment; and
(2) Contracting conditions that limit the use of EFT payment, as described in 31 CFR 208.3(c) (such as, emergency, security, or foreign payment considerations). The CO shall coordinate with the Vendor File Maintenance Team and Disbursement Operations on alternatives to EFT payment, and document the official file with a record of such discussions and the selected payment alternative.

(c) EFT payment processing requires that the Contractor provide its taxpayer identification number (TIN) and other banking information necessary for EFT payment processing. This information is required by 31 U.S.C. 3332 and 7701 as a condition of payment (see 4.1). BPA will protect against improper disclosure of a Contractor's EFT banking information.

(d) ***PROCEDURE:*** The Contractor shall submit banking information to the BPA Vendor File Maintenance Team, as per Clause 22-20, Electronic Funds Transfer Payment. BPA will not require a Contractor to resubmit its TIN and other banking information for each contract, provided this information is current and on file with BPA. If the Contractor's banking information has changed, the Contractor shall be responsible to verify and resubmit changed information directly to the Vendor File Maintenance Team.

22.6.1 Assignment of Claims.
INFORMATION: Disbursement Operations will utilize the most current banking information that the Contractor has submitted to the Vendor File Maintenance Team to process EFT payment, unless otherwise notified by the Contractor. A timely and properly executed assignment of claims (see 22.4) is critical for ensuring payment to the assignee, and not to the Contractor's account. EFT information which shows the ultimate recipient of the transfer to be other than the Contractor, in the absence of a proper assignment of claims, is considered to be incorrect EFT information within the meaning of the "Suspension of Payment" paragraph of Clause 22-20, Electronic Funds Transfer Payment.

22.6.2 Clause Usage Prescriptions.
PROCEDURE:

(a) The CO shall include Clause 22-20, Electronic Funds Transfer Payment, in all solicitations and contracts not otherwise exempt by 22.6(b). For commercial acquisitions, Clause 22-20 shall not be included in the solicitation or contract; the requirement is addressed in the payment clauses, Clauses 28-4.1 Payment - Firm Fixed Price and 28-4.2 Payment - Time and Materials/Labor Rate.

(b) Oral solicitations (see 11.10.1) or oral solicitations and resultant oral contracts for commercial acquisitions must be paid by EFT, unless otherwise exempt by BPI 22.6(b). When conducting an oral solicitation, the CO shall advise the contractor that payment will be made by EFT, except as noted in BPI 22.6(b). For commercial acquisitions, the CO shall inform the contractor that the resultant purchase order or contract will contain EFT provisions in the commercial payment clauses. For noncommercial acquisitions, the CO shall include Clause 22-20, Electronic Funds Transfer Payment, in any written contract resulting from oral solicitation procedures. If not already on file, the CO shall notify the Contractor of procedures for submission of the required banking information to the Vendor Maintenance Team.

22.7 RESERVED.

22.50 TEXT OF CLAUSES.
The following clauses are referenced in Part 22:

Clause 22-1 RESERVED. 17
Clause 22-2 BASIS OF PAYMENT -- PROGRESS PAYMENTS (CONSTRUCTION CONTRACTS) 17
Clause 22-3 BASIS OF PAYMENT -- PROGRESS PAYMENTS 17
Clause 22-4 BASIS OF PAYMENT -- TIME-AND-MATERIALS CONTRACTS 18
Clause 22-5 BASIS OF PAYMENT -- COST REIMBURSEMENT 19
Clause 22-6 PREDETERMINED FINAL INDIRECT COST RATES 22
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Clause 22-12 PAYMENT 27
Clause 22-13 INTEREST ON AMOUNTS DUE BPA 27
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Clause 22-16 RESERVED. 29
Clause 22-17 WASHINGTON STATE SALES AND USE TAXES 29
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Clause 22-1 RESERVED.

Clause 22-2 BASIS OF PAYMENT -- PROGRESS PAYMENTS (CONSTRUCTION CONTRACTS) (Jul 13)(BPI 22.1.3)

(a) Progress payments. BPA shall make progress payments as the work proceeds based on its assessment of the stage or percentage of work accomplished. BPA may include in the calculation of progress, 75 percent of the cost of material delivered to the site but not yet installed. The Contractor shall submit supplier invoices to verify such cost of material. The Contractor shall furnish a breakdown of the work as a percentage of total contract price, in such detail as required by the CO. (See Clause 24-10, Price Data Sheet).

(b) Interest on unearned amounts. After making a request for progress payment, if all or a portion of the request constitutes a payment for performance by the Contractor (or any subcontractors or suppliers) that fails to conform to the requirements of the contract, the Contractor shall (1) notify the CO of the performance deficiency and (2) pay BPA an amount equal to interest on the unearned amount from the date of receipt of the unearned amount until the date that the performance deficiency has been corrected or until the contractor reduces the amount of any subsequent request for progress payments by the unearned amount.

(c) Title to all material and work covered by progress payments made shall pass to BPA at the time of payment. This shall not be construed as--

(1) Relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work; or

(2) Waiving the right of BPA to require the fulfillment of all of the terms of the contract.

(d) Performance and payment bond premiums paid by the Contractor will be reimbursed by BPA after the Contractor has furnished evidence of full payment to the surety.

(e) Partial Payments. Unless otherwise specified, payment shall be made after acceptance of any portion of the work delivered or rendered for which a price is separately stated in the contract.

(f) Final Payment. BPA shall pay the amount due the Contractor under this contract after completion and acceptance of all work and after presentation of a release of all claims against BPA arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release. A release may also be required of any assignee if the Contractor's claim to amounts payable under this contract has been assigned. The release forms will be provided by BPA.

(End of clause)

Clause 22-3 BASIS OF PAYMENT -- PROGRESS PAYMENTS (Jul 13)(BPI 22.1.3)

(a) Progress payments. BPA shall make progress payments as the work proceeds based on the stage or percentage of work accomplished. The Contractor shall furnish a breakdown of the work as a percentage of the total contract price, in such detail as required by the CO.

(b) Title to all material and work covered by progress payments shall pass to BPA at the time of payment. This shall not be construed as--

(1) Relieving the Contractor from the sole responsibility for all work upon which payments have been made or the restoration of any damaged work; or

(2) Waiving the right of BPA to require the fulfillment of all of the terms of the contract.

(c) Partial Payments. Unless otherwise specified, payment shall be made after acceptance of any portion of the work delivered or rendered for which a price is separately stated in the contract.

(d) Final Payment. BPA shall pay the amount due the Contractor under this contract after completion and acceptance of all work and after presentation of a release of all claims against BPA arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release. A release may also be required of any assignee if the Contractor's claim to amounts payable under this contract has been assigned.

(End of clause)

Clause 22-4 BASIS OF PAYMENT -- TIME-AND-MATERIALS CONTRACTS (Jul 13)(BPI 22.1.3)

BPA shall pay the Contractor as follows after submission of invoices approved by the CO. The Contractor shall be reimbursed for items and services purchased directly for the contract only when cash, checks, or other forms of actual payment have been made for such purchased items or services.

(a) Hourly Rate.
(1) The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the Schedule by the number of direct labor hours performed. The rates shall include wages, indirect costs, general and administrative expense, and profit. Fractional parts of an hour shall be payable on a prorated basis. The Contractor shall substantiate invoices by evidence of actual payment and by individual daily job timecards, or other substantiation approved by the CO.
(2) Overtime. The hourly rates shall not be varied by virtue of the Contractor having performed work on an overtime basis unless the CO has specifically authorized overtime and the contract includes overtime rates.

(b) Materials. Allowable costs of direct materials shall be determined by the CO in accordance with Part 13 of the BPI in effect on the date of this contract. Reasonable and allocable material handling costs may be included in the charge for material to the extent they are clearly excluded from the hourly rate. Material handling costs are comprised of indirect costs, including, when appropriate, general and administrative expense allocated to direct materials in accordance with the Contractor's usual accounting practices, consistent with Part 13 of the BPI. Direct materials are those materials which enter directly into the end product, or which are used or consumed directly in connection with the furnishing of the end product.

(c) Travel Costs. Costs incurred for lodging, meals, and incidental expenses shall be reimbursed on an actual cost basis to the extent that they do not exceed on a daily basis the per diem rates in effect at the time of travel as set forth in the Federal Travel Regulations, prescribed by the General Services Administration, for travel in the conterminous 48 United States. Airline costs will be reimbursed on an actual cost basis to the extent determined reasonable and allocable under Part 13 of the BPI. The CO must approve any variation from these requirements. Contractors may request a letter from the Contracting Officer authorizing access to lodging, or other rates negotiated for government travel to the extent such authorization is honored by the service providers.

(d) Subcontracts. The cost of subcontracts that are authorized under the subcontracts clause of this contract shall be reimbursable costs under this clause, if such costs are consistent with Part 13 of the BPI. Reimbursable costs in connection with subcontracts shall be limited to the amounts paid to the subcontractor. Reimbursable costs shall not include any costs arising from the letting, administration or supervision of performance of the subcontract, if the costs are included in the hourly rates in the Schedule.

(e) Responsibility to obtain best overall price. To the extent able, the Contractor shall--
(1) Obtain materials, subcontracts, and travel at the most advantageous prices available with due regard to securing prompt delivery of satisfactory products and services; and
(2) Take all cash and trade discounts, rebates, allowances, credits, salvage, commissions, and other benefits and additionally, give credit to BPA for any amounts that have accrued to the

benefit of the Contractor or would have accrued except for the fault or neglect of the contractor. When unable to take advantage of the benefits, the Contractor shall promptly notify the CO and give the reasons.

(f) Material the Contractor regularly sells to the public. If the nature of the work to be performed requires the Contractor to furnish material which is regularly sold to the general public in the normal course of business by the Contractor, the price to be paid for such material, notwithstanding (e)(1) above, shall be on the basis of an established catalog or list price, in effect when the material is furnished, less all applicable discounts to BPA; provided, that in no event shall such price be in excess of the Contractor's sales price to its most favored customer for the same item in like quantity, or the current market price, whichever is lower.

(g) Audit. At any time before final payment under this contract the CO may audit the invoices and substantiating material. Each payment previously made shall be subject to reduction to the extent of amounts, on preceding invoices, that are found by the CO not to have been properly payable and shall also be subject to reduction for overpayments or to increase for underpayments. Upon receipt and approval of the invoice designated by the Contractor as the "final invoice" and substantiating material, and upon compliance by the Contractor with all terms of this contract, BPA shall promptly pay any balance due the Contractor.

(h) Refunds. The Contractor agrees that any refunds, rebates, or credits (including any related interest) accruing to or received by the Contractor or any assignee, that arise under the materials portion of this contract and for which the Contractor has received reimbursement, shall be paid by the Contractor to BPA. The Contractor and each assignee shall assign to BPA all such refunds, rebates, or credits (including any interest) in form and substance satisfactory to the CO.

(End of clause)

Clause 22-5 BASIS OF PAYMENT -- COST REIMBURSEMENT (Jul 13)(BPI 22.1.3)

(a) Invoicing.

BPA shall make payments to the Contractor when requested as work progresses in amounts determined to be allowable by the CO. The Contractor shall substantiate invoices by evidence of actual payment and in such form and reasonable detail as required by the CO.

(b) Reimbursing costs.

(1) Costs under this contract will be reimbursed in accordance with BPI Part 13. For the purpose of reimbursing allowable costs (except with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term "costs" includes only -

(A) Those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(B) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for -

(i) Materials issued from the Contractor's inventory and placed in the production process for use on the contract;

(ii) Direct labor;

(iii) Direct travel. Costs incurred for lodging, meals, and incidental expenses shall be considered reasonable to the extent that they do not exceed on a daily basis the per diem rates in effect at the time of travel as set forth in the Federal Travel Regulations, prescribed by the General Services Administration, for travel in the conterminous 48 United States. Airline costs will be reimbursed on an actual cost basis to the extent determined reasonable and allocable under Part 13 of the BPI. Any variation from these requirements must be approved by the CO. Contractors may request a letter from the CO authorizing access to

airline, lodging, or other rates negotiated for government travel to the extent such authorization is honored by the service providers;

(iv) Other direct in-house costs; and

(v) Properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts.

(C) The amount of progress payments that have been paid to the Contractor's subcontractors under similar cost standards.

(2) Contractor contributions to any pension, profit-sharing, or employee stock ownership plan funds that are paid quarterly or more often may be included in indirect costs for payment purposes; provided, that the Contractor pays contributions to the fund within 30 days after the close of the period covered. Payments made 30 days or more after the close of the period shall not be included until the contractor actually makes the payment. Accrued costs for such contributions that are paid less often than quarterly shall be excluded from indirect costs for payment purposes until the Contractor actually makes the payment.

(3) Any statements in specifications or other documents incorporated in this contract by reference designating performance of services or furnishing of materials at the Contractor's expense or at no cost to BPA shall be disregarded for purposes of cost reimbursement under this clause.

(c) Final indirect cost rates.

(1) Final annual indirect cost rates and the appropriate bases shall be established in accordance with BPI Part 13 in effect for the period covered by the indirect cost rate proposal.

(2) The Contractor shall, within 90 days after the expiration of each of its fiscal years, or by a later date approved by the CO, submit to the audit activity responsible for negotiating its final indirect cost rates, proposed final indirect cost rates for that period and supporting cost data specifying the contract and/or subcontract to which the rates apply. The proposed rates shall be based on the Contractor's actual cost experience for that period. The appropriate BPA representative and Contractor shall establish the final indirect cost rates as promptly as practical after receipt of the Contractor's proposal.

(3) The Contractor and the appropriate BPA representative shall execute a written agreement setting forth the final indirect cost rates. The agreement shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract. The agreement is incorporated into this contract upon execution.

(4) Failure by the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of the Disputes clause.

(d) Billing rates.

Until final annual indirect cost rates are established for any period, BPA shall reimburse the Contractor at billing rates established by the CO or by an authorized representative (the cognizant auditor), subject to adjustment when the final rates are established. These billing rates:

(1) Shall be the anticipated final rates; and

(2) May be prospectively or retroactively revised by mutual agreement, at either party's request, to prevent substantial overpayment or underpayment.

(e) Quick-close-out procedures.

When the Contractor and CO agree, the quick-close-out procedures of BPI subpart 14.17.5 shall be used.

(f) Audit.

At any time or times before final payment, the CO may have the Contractor's invoices or statements of cost audited. Any payment may be (1) reduced by amounts found by the CO not to constitute allowable costs or (2) adjusted for prior overpayments or underpayments.

(g) Final payment.

(1) The Contractor shall submit an invoice marked "Final Invoice", promptly upon completion of the work. Upon approval of that invoice, and upon the Contractor's compliance with all terms of this contract, the BPA shall promptly pay any balance of allowable costs and that part of the fee (if any) not previously paid.

(2) The Contractor shall pay to BPA any refunds, rebates, credits, or other amounts (including interest, if any) accruing to or received by the Contractor or any assignee under this contract, to the extent that those amounts are properly allocable to costs for which the Contractor has been reimbursed by BPA. Reasonable expenses incurred by the Contractor for securing refunds, rebates, credits, or other amounts shall be allowable costs if approved by the CO. Before final payment under this contract, the Contractor and each assignee whose assignment is in effect at the time of final payment shall execute and deliver an assignment to BPA of refunds, rebates, credits, or other amounts (including interest, if any) properly allocable to costs for which the Contractor has been reimbursed by BPA under this contract.

(End of clause)

Clause 22-6 PREDETERMINED FINAL INDIRECT COST RATES (Jul 13)(BPI 22.1.3)

(a) Notwithstanding the Basis of Payment -- Cost Reimbursement clause of this contract, the allowable indirect costs under this contract shall be obtained by applying predetermined final indirect cost rates to bases agreed upon by the parties, as specified below.

(b) Not later than 90 days after the expiration of the Contractor's fiscal year, the Contractor shall submit to the cognizant CO and to the cognizant Federal agency, proposed predetermined final indirect cost rates and supporting cost data. The proposed rate shall be based on the Contractor's actual cost experience during that fiscal year. Negotiations of predetermined final indirect cost rates shall begin as soon as practical after receipt of the Contractor's proposal.

(c) Allowability of costs and acceptability of cost allocation methods shall be determined in accordance with the BPI Part 13 in effect on the date of this contract.

(d) Predetermined rate agreements in effect on the date of this contract shall be incorporated into the contract. The CO and Contractor shall negotiate rates for subsequent periods and execute a written indirect cost rate agreement setting forth the results. The indirect cost rate agreement shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract. The agreement is incorporated into this contract upon execution.

(e) Pending establishment of predetermined final indirect cost rates for any fiscal year (or other period agreed to by the parties), the Contractor shall be reimbursed either at the rates fixed for the previous fiscal year (or other period) or at billing rates acceptable to the CO, subject to appropriate adjustment when the final rates for that period are established.

(f) If for any fiscal year the parties fail to agree to predetermined final indirect cost rates, the allowable indirect costs shall be obtained by applying final indirect cost rates established in accordance with the Basis of Payment -- Cost Reimbursement clause.

(g) Allowable indirect costs for the period from the beginning of performance until the end of the Contractor's fiscal year shall be obtained using the predetermined final indirect cost rates and the bases shown in the Schedule.

(End of clause)

Clause 22-7 CONTRACT CEILING LIMITATION (Jul 13)(BPI 22.1.3)

(a) The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the contract ceiling. The contract ceiling includes all estimated costs (both direct and indirect) and any fee allowance. If this is a cost-sharing contract, the contract ceiling includes both BPA's and the Contractor's share of the cost.

(b) Notification of CO. The Contractor shall notify the CO in writing at the first indication that the total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.

(c) Revised Estimate. As part of the notification, the Contractor shall provide the CO a revised estimate of the total cost of performing this contract.

(d) Contract Ceiling.
(1) BPA is not obligated to reimburse the Contractor for costs incurred in excess of the contract ceiling specified in the Schedule or, if this is a cost-sharing contract, the estimated cost to BPA specified in the Schedule; and
(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of the contract ceiling specified in the Schedule, until the CO notifies the Contractor in writing that the contract ceiling has been increased.

(e) No notice, communication, or representation, or from any person other than the CO, shall affect this contract's contract ceiling.

(f) If this contract is terminated or the contract ceiling is not increased, BPA and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

(End of clause)

Clause 22-8 ADVANCE PAYMENTS (Jul 13)(BPI 22.1.4.5)

(a) Requirements for payment. Advance payments will be made under this contract by electronic funds transfer upon submission of invoices by the Contractor, and approval by the CO. The contractor is authorized to request BPA funds for contract performance in amounts needed to cover its own disbursements of cash in the next 30 days. The Contractor shall apply terms similar to this clause to any advance payments to subcontractors.

(b) Use of funds. Advances may only be used to pay for properly allocable, allowable, and reasonable costs for direct materials, direct labor, and indirect costs. Advances for other items require approval in writing by the CO.

(c) Repayment to BPA. Whenever requested by the CO, the Contractor shall repay to BPA any part of unspent advance payments considered to exceed the Contractor's current requirements.

(d) Maximum payment. When the sum of all unspent advance payments, unpaid interest charges, and other payments exceed _____ (insert percentage) percent of the contract price,
BPA shall withhold further payments to the Contractor. On completion or termination of the contract, BPA shall deduct from the amount due to the Contractor all unliquidated advance payments and any interest charges payable. If previous payments to the Contractor exceed the amount due, the excess amount shall be immediately repaid to BPA.

(e) Lien on property under contract.
(1) The Contractor will file a security interest in favor of BPA, paramount to all other liens, upon purchase or acquisition of property and/or materials for the performance of this contract and will immediately deliver copies of the filings to the CO.
(2) The Contractor will identify, by marking or segregation, all property that is subject to a lien in favor of BPA. If, for any reason, the supplies, materials, or other property are not identified by marking or segregating, BPA shall be considered to have a lien to the extent of BPA's interest under this contract on any mass of property with which the supplies, materials, or other property are commingled.

(f) Insurance - Supply Contracts. The Contractor shall demonstrate that it maintains with responsible insurance carriers adequate insurance on plant and equipment against fire and other hazards. Contractor agrees that, until work under this contract has been completed and all advance payments made under the contract have been liquidated, it will maintain this insurance. Contractor shall maintain adequate insurance on any materials, parts, assemblies, subassemblies, supplies, equipment, and other property acquired for or allocable to this contract and subject to BPA lien under paragraph (i) of this clause.

(g) Termination of advance payments. The CO may, by written notice to the contractor, withhold further advance payments on this contract at any time the CO determines the Contractor is not adequately performing.

(h) Access to records. The Contractor shall provide the authorized BPA representatives proper facilities for inspection of the Contractor's books, records, and accounts.

(i) Restrictions on Novation. While any advance payments made under this contract remain outstanding, the Contractor shall not substantially change the management, ownership, or control of the corporation without the prior written consent of the CO.

(j) Prohibition against assignment. The Contractor shall not assign this contract, any interest therein, or any claim under the contract to any party.

(k) Interest Required. The Contractor shall pay interest to BPA on advance payments received by the Contractor in excess of the Contractor's current needs. The interest will be paid at the higher of Department of Treasury's current value of funds rate or the BPA cost of money rate. Interest charges shall be deducted from payments, other than advance payments, due the Contractor.

(l) Interest Charged to Subcontractors. The Contractor shall charge interest on advance payments to subcontractors and credit the interest to BPA. Interest need not be charged on advance payments to nonprofit educational or research subcontractors for experimental, developmental or research work.

(End of clause)

ALTERNATE I (Sep 98)

(a) Requirements for payment. Advance payments will be made under this contract by electronic funds transfer within 5 working days after BPA receipt of a request. The contractor is authorized to request BPA funds for contract performance in amounts needed to cover its own disbursements of cash for periods of less than 30 calendar days. The Contractor shall report cash disbursements and balances as required by the BPA billing office. The Contractor shall apply terms similar to this clause to any advance payments to subcontractors.

(End of Alternate I)

ALTERNATE II: (Sep 98)

(a) Requirements for payment. Advance payments will be made under this contract by electronic funds transfer within 5 working days after BPA receipt of a request. The contractor is authorized to request BPA funds for contract performance in amounts needed to cover its own disbursements of cash for periods of less than 30 calendar days. The Contractor shall report cash disbursements and balances as required by the BPA billing office. The Contractor shall apply terms similar to this clause to any advance payments to subcontractors.

(k) No interest shall be charged to the Contractor for advance payments except for interest charged during a period of default.

(End of Alternate II)

ALTERNATE III: (Oct 93)

(k) No interest shall be charged to the Contractor for advance payments except for interest charged during a period of default.

(End of Alternate III)

Clause 22-9 WITHHOLDING (Jul13)(BPI 22.1.5.1)

(a) The CO reserves the right to withhold an amount not to exceed ____ percent of the contract price if determined necessary to protect BPA's interests.

(b) Upon completion and acceptance of each severable item of work for which the price is stated separately in the contract, payment shall be made for the completed work, less liquidated damages (if any), without withholding of a percentage.

(End of clause)

Alternate I (Mar 95)

(c) In the event this contract requires a specific written warranty, equipment operating instructions, owners manual, or other documentation the CO may process an interim payment for completed work, retaining a maximum of _____ percent of the contract amount until such documentation that is in compliance with the contract is received by the CO. If a manufacturers' inspection is required, the interim payment shall not be made until the manufacturer certifies that the work was accomplished to their satisfaction and in accordance with contract requirements. Upon determination of acceptability of all required documentation, payment of the amount withheld will be made without further invoicing from the contractor.

(End of Alternate I)

Clause 22-10 DISCOUNTS FOR PROMPT PAYMENT (Jul 13)(BPI 22.2.5)

In connection with any discount offered for prompt payment, time shall be computed from the date shown on the invoice or if no date is shown then from the date BPA receives the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the date on which an electronic funds transfer was made.

(End of clause)

Clause 22-11 PAYMENT -- CONSTRUCTION CONTRACTS (Jul 13)(BPI 22.2.5)

(a) Prompt Payment Act. This contract is subject to the provisions of the Prompt Payment Act (31 U.S.C. 3901 et seq.) and the regulations at 5 CFR Part 1315. All payments will be made in accordance with the regulations at 5 CFR Part 13154.

(b) Payment Due Dates: For purposes of determining interest penalty only, work will be deemed accepted not later than 30 calendar days after the contractor has completed the work or services. According to the Prompt Payment Act, a proper invoice to a Federal Agency must include bank account information requisite to enable Electronic Funds Transfer (EFT) as the method of payment.

(1) Progress payments shall be due not later than fourteen (14) calendar days after receipt of the payment request by the BPA designated billing office. BPA shall make progress payments monthly as the work proceeds, or at more frequent intervals as may be agreed to by the CO, on estimates of work accomplished which meets the standards of quality established under the contract.
(2) Payment of any withholding shall be due not later than 30 days after approval for release to the Contractor by the CO.
(3) Partial payments and final payments shall be due not later than thirty (30) calendar days after the later of the date on which BPA actually receives a proper invoice or the date of BPA acceptance of the work or services completed by the Contractor.

(c) Billing Instructions.
(1) Invoices must include the contractor's name and address, invoice date, contract number, task order number (if applicable), contract line item number, description of products delivered or work performed, price and quantity of item(s) actually delivered or rendered (amounts billed for work performed under a task order must be separately identified by task order number), and the name and address of the person to whom payment will be made, and name (where practicable), title, phone number, mailing address of person to be notified in event of a defective invoice and bank account information requisite to enable Electronic Funds Transfer (EFT) as method of payment (Invoices will not require banking information if the contractor has that information on file at BPA). Failure to submit a proper invoice may result in a delay in payment including a rejection of invoice pending receipt of a properly amended invoice.

(2) Contractors may bill monthly, or at more frequent intervals as may be agreed to by the CO. The contractor may submit invoices electronically (e-mail, fax, etc.).

(d) Payment Method. Payments under this contract will be made by electronic funds transfer whenever possible, or by check in very limited circumstances, at the option of BPA.

(e) Interest Penalty Payments. If interest penalty payments are determined due under the provisions of the Prompt Payment Act, payment shall be made at the rates determined by the U.S. Treasury Section 611 of the Contract Disputes Act of 1978 (PL 95-563, 41 U.S.C. § 7109).

(f) Subcontract Requirements.
(1) The Contractor shall include in each subcontract:
(A) A payment clause which obligates the Contractor to pay the subcontractor for satisfactory performance under its subcontract not later than 7 days from receipt of payment by BPA under this contract.
(B) An interest penalty clause which obligates the Contractor to pay to the subcontractor an interest penalty for each payment not made in accordance with the payment clause.
(C) A clause requiring each subcontractor to include a payment clause and an interest penalty clause in each of its subcontracts, and to require each of its subcontractors to include such clauses in their subcontracts with each lower-tier subcontractor or supplier.
(2) If a Contractor, after making a request for payment to BPA, discovers that all or a portion of the payment otherwise due a subcontractor is subject to withholding from the subcontractor in accordance with the subcontract agreement, then the Contractor shall--
(A) Furnish a notice to the subcontractor specifying (1) the amount to be withheld; (2) the specific cause for the withholding; and (3) the remedial actions to be taken by the subcontractor in order to receive payment of the amount withheld;
(B) Give the CO a copy of the notice furnished to the subcontractor;
(C) Notify the CO of the beginning and end dates of any withholding of subcontractor payments; and
(D) Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency.
(E) Pay interest to BPA from the 8th day funds are held by the Contractor to the date the funds are either paid to the subcontractor or are returned to BPA.

(3) The Contractor may not request payment from BPA of any amount withheld or retained from a subcontractor until such time as the Contractor has determined the subcontractor is entitled to the payment of such amount.

(End of clause)

Clause 22-12 PAYMENT (Jul 13)(BPI 22.2.5)

(a) Payment Due Date. Payment (including partial payments or progress payments, if authorized, shall be due not later than thirty (30) calendar days after the later of the date on which BPA actually receives a proper invoice in the designated billing office or the date when the items delivered or completed services are accepted by BPA. According to the Prompt Payment Act, a proper invoice to a Federal Agency is to include bank account information requisite to enable Electronic Funds Transfer (EFT) as method of payment. For purposes of payment only, items will be deemed accepted not later than seven (7) calendar days after proper delivery. If delivered items or completed services are found defective, the provisions of this paragraph will be reapplied upon receipt of a corrected item or service.

(b) Billing Instructions.
(1) Invoices must include the contractor's name and address, invoice date, contract number, task order number (if applicable), contract line item number, description of products delivered or work performed, price and quantity of item(s) actually delivered or rendered (amounts billed for work performed under a task order must be separately identified by task order number), and the name and address of the person to whom payment will be made, and name (where practicable), title, phone number, mailing address of person to be notified in event of a defective invoice and bank account information required to enable Electronic Funds Transfer (EFT) as method of payment (Invoices will not require banking information if the contractor has that information on file at BPA). Failure to submit a proper invoice may result in a delay in payment including a rejection of invoice pending receipt of a properly amended invoice.
(2) Contractors may bill monthly, or at more frequent intervals as may be agreed to by the CO. The contractor may submit invoices electronically (e-mail, fax, etc.).

(c) Payment Method. Payments under this contract will be made by electronic funds transfer whenever possible, or by check in very limited circumstances, at the option of BPA.

(d) Prompt Payment Act. This contract is subject to the provisions of the Prompt Payment Act (31 U.S.C. 3901 et seq.), and regulations at 5 CFR Part 1315.

(e) Interest Penalty Payments. If interest penalty payments are determined due under the provisions of the Prompt Payment Act, payment shall be made at the rates determined by the U.S. Treasury Section 611 of the Contract Disputes Act of 1978 (PL 95-56341 U.S.C. § 7109).

(End of clause)

Clause 22-13 INTEREST ON AMOUNTS DUE BPA (Jul 13)(BPI 22.3.1)

(a) Notwithstanding any other clause of this contract, all amounts that become payable by the Contractor to BPA under this contract (net of any applicable tax credit under the Internal Revenue Code (26 U.S.C. l48l)) shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate shall be the interest rate established by the Secretary of the Treasury as provided in Section l2 of the Contract Disputes Act of l978 (Pub. L. 95-563), which is applicable to the period in which the amount becomes due, as provided in paragraph (b) of this clause, and then at the rate applicable for each six-month period as fixed by the Secretary until the amount is paid.

(b) Amounts shall be due at the earliest of the following dates:
(1) The date fixed under this contract;

(2) The date of the first written demand for payment consistent with this contract, including any demand resulting from a default termination;
(3) The date BPA transmits to the Contractor a proposed supplemental agreement to confirm completed negotiations establishing the amount of debt; and
(4) If this contract provides for revision of prices, the date of written notice to the Contractor stating the amount of refund payable in connection with a pricing proposal or a negotiated pricing agreement not confirmed by contract modification;

(c) Payment will be due within 30 days of the date of the invoice. The collection actions available under the Debt Collection Act of 1982 (Pub. L. 97-365), as amended, and the revised Federal Claims Collections Standards (4 CFR 102), will be utilized. Administrative charges and penalties will be charged in accordance with 31 U.S.C. 3717, except where prohibited or explicitly provided for by statute or regulation required by statute.

(End of clause)

Clause 22-14 TAXES -- INDEFINITE DELIVERY CONTRACTS (Sep 98)(BPI 22.5.6)

The contract price excludes all State and local taxes levied on or measured by the contract or sales price of the services or completed supplies furnished under this contract. The Contractor shall state separately on its invoices taxes excluded from the contract price, and BPA agrees either to pay the amount of the taxes to the Contractor or provide evidence necessary to sustain an exemption.

(End of clause)

Clause 22-15 FEDERAL, STATE AND LOCAL TAXES (Jul 13)(BPI 22.5.6)

(a) The contract price shall include all applicable Federal, State, and local taxes and duties.

(b) The contract price shall be increased by the amount of any after-imposed Federal excise tax or duty, provided the Contractor warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price.

(c) The contract price shall be decreased by the amount of any after-relieved Federal excise tax or duty.

(d) The contract price shall be decreased by the amount of any Federal excise tax or duty, except social security or other employment taxes, that the Contractor is required to pay or bear, or does not obtain a refund of, through the Contractor's fault, negligence, or failure to follow instructions of the Contracting Officer.

(e) No adjustment shall be made in the contract price under this clause unless the amount of the adjustment exceeds $250.

(f) Notwithstanding any of the above provisions for adjustment of the contract price in the event of a change in a Federal excise tax or duty after the contract date, no increase in the contract price shall be made for any duty imposed under the Tariff Act of 1930, as amended, (19 U.S.C. 1303) or the Anti-dumping Act of 1921, as amended (19 U.S.C. 160-171).

(End of clause)

Clause 22-16 RESERVED.

Clause 22-17 WASHINGTON STATE SALES AND USE TAXES (Sep 98)(BPI 22.5.6)

(a) The Supreme Court has ruled that the Washington State Sales and Use Taxes apply to Federal contracts. Therefore, it is the responsibility of the offerors to take Washington State Tax Statutes into account when preparing their offers.

(b) Offerors should not take into account or include a factor for the State of Washington Sales or Use Tax which may be levied on Government-furnished materials or equipment in connection with performance of this contract. Any assessment by the State of Washington against the contractor shall be reported immediately to the CO. The contractor shall be reimbursed by BPA for payment of any tax authorized to be paid by the CO by an appropriate contract modification. The reimbursement shall be limited to the actual tax amount assessed by the State of Washington. The contractor hereby authorizes BPA to enter into such negotiations and arrangements with the State of Washington as it may deem appropriate in resolving the amount of applicable tax(es).

(End of clause)

Clause 22-18 STATE OF IDAHO USE TAX (Sep 98)(BPI 22.5.6)

The State of Idaho may endeavor to impose a use tax on the value of Government-furnished materials on this contract. Offerors should not include in their offers any factor for this tax. In the event the State of Idaho purports to assess or levy such a tax, the Contractor shall immediately submit copies of any documents reflecting such assessment or levy to the CO. Any inquiries from the State of Idaho relating to the value of equipment or materials furnished by BPA shall be referred to the CO. The Contractor shall not make any payments to the State of Idaho on account of such taxes unless authorized by the CO.

(End of clause)

Clause 22-19 INDIRECT COST RATES WITH CARRY-FORWARD (Jul 13)(BPI 22.1.3)

Notwithstanding 2 CFR Part 225, Cost Principles for State, Local, and Indian Tribal Governments (OMB Circular A-87), the indirect cost rate for this contract will be established based on the estimate of a future period's cost and is not subject to revision. However, differences between the estimated costs and actual costs when they become known are carried forward and are considered in the negotiation of rates for subsequent periods. If actual indirect costs are more than estimated, the amount of the increase is added to the estimate for the next period to determine the fixed rate for the next period. Conversely, if actual indirect costs are less than estimated, the difference between the fixed rate and the actual cost is subtracted from the estimate of the next period to determine the fixed rate for the next period.

(End of clause)

Clause 22-20 ELECTRONIC FUNDS TRANSFER PAYMENT (Jul 13)(BPI 22.6.2)

(a) Payment Method. Payments under this contract, including invoice and contract financing payments, will be made by electronic funds transfer (EFT). Contractors are required to provide its taxpayer

identification number (TIN) and other necessary banking information as per paragraph (c) of this clause to receive EFT payment.

(b) Contractor EFT arrangement with a financial institution or authorized payment agent. The Contractor shall designate to BPA, as per paragraph (c) of this clause, and maintain at its own expense, a single financial institution or authorized payment agent capable of receiving and processing EFT using the Automated Clearing House (ACH) transfer method. The most current designation and EFT information will be used for all payments under all BPA contracts, unless the BPA Vendor File Maintenance Team is notified of a change as per paragraph (d) of this clause. An initial designation should be submitted after award, but no later than three weeks before an invoice or contract financing request is submitted for payment.

(c) Submission of EFT banking information to BPA. The Contractor shall submit EFT enrollment banking information directly to BPA Vendor File Maintenance Team, using Substitute IRS Form w9e, Request for Taxpayer Identification Number and Certification. This form is available either from the Contracting Officer (CO) or from the Vendor File Maintenance Team. Submit completed enrollment form to the Vendor Team. Contact and mailing information:

Bonneville Power Administration
PO Box 491
ATTN: NSTS - MODW Vendor Maint.
Vancouver, WA 98666-0491

E-mail Address: VendorMaintenance@BPA.gov
Phone: (360) 418-2800
Fax: (360) 418-8904

(d) Change in EFT information. In the event that EFT information changes or the Contractor elects to designate a different financial institution for the receipt of any payment made using EFT procedures, the Contractor shall be responsible for providing the changed information to the BPA Vendor File Maintenance Team office. The Vendor File Maintenance Team must be notified 30 days prior to the date such change is to become effective.

(e) Suspension of Payment. BPA is not required to make any payment under this contract until receipt of the correct EFT payment information from the Contractor.

(f) EFT and prompt payment. BPA shall pay no penalty on delay of payment resulting from defective EFT information. BPA will notify the Contractor within 7 days of its receipt of EFT information which it determines to be defective.

(g) EFT and assignment of claims. If the Contractor assigns the proceeds of this contract as provided for in the Assignment of Claims clause of this contract, the assignee shall provide the assignee's EFT information required by paragraph (c) of this clause.

(End of clause)

Clause 22-21 RESERVED.

Clause 22-22 CONTRACTS FOR EXPERT/CONSULTANT SERVICES WITH INDEPENDENT CONTRACTORS (Dec 10)(BPI 22.5.6)

(a) Contractor is associated with BPA only for purposes and to the extent specified in this contract, and in respect to performance of the contracted services pursuant to this contract, contractor is and shall be an independent contractor and, subject only to the terms of this contract, shall have the sole right to supervise, manage, operate, control, and direct performance of the details incident to its duties under this contract.

(b) Contractor shall be solely responsible for, and the BPA shall have no obligation with respect to (1) withholding of income taxes, FICA or any other taxes or fees; (2) industrial insurance coverage; (3) participation in any group insurance plans available to contractor employees; (4) participation or contributions to contractor retirement systems; (5) accumulation of vacation leave or sick leave provided through contractor leave programs; or (6) unemployment compensation coverage provided by contractor.
(c) Contractor acknowledges that neither contractor, its employees, agents, or representatives shall be considered employees, agents, or representatives of the BPA.

(End of clause)

Clause 22-23 CONTRACTS FOR SUPPLEMENTAL LABOR (Dec 10)(BPI 22.5.6)

(a) Contractor is associated with BPA only for purposes and to the extent specified in this contract, and in respect to performance of the contracted services pursuant to this contract, contractor is and shall be subject only to the terms of this contract, and shall have the sole right and responsibility to supervise, manage, operate, control, and direct performance of the details incident to its duties under this contract.

(b) Contractor shall be solely responsible for, and the BPA shall have no obligation with respect to (1) withholding of income taxes, FICA or any other taxes or fees; (2) industrial insurance coverage; (3) participation in any group insurance plans available to contractor employees; (4) participation or contributions to contractor retirement systems; (5) accumulation of vacation leave or sick leave provided through contractor leave programs; or (6) unemployment compensation coverage provided by contractor.

(c) Contractor acknowledges that neither contractor, its employees, agents, or representatives shall be considered employees, agents, or representatives of the BPA.

(End of clause)

PART 23 SERVICE CONTRACTS

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23.1 SERVICE CONTRACTS.

INFORMATION: A service contract requires a contractor to furnish time and effort to perform an identifiable task, rather than to supply a product. A service contract may cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis.

POLICY: BPA may enter into a service contract, so long as the contract is not a personal services contract which is defined at 23.1.4.

POLICY: BPA shall not award personal services contracts unless specifically authorized by statute (e.g. 5 U.S.C. 3109) to do so.

POLICY: For service contracts, the period of performance for Supplemental Labor and other outsourced services contracts, for recompetition purposes, shall generally be limited to three years, including options. The period of performance for an Expert/Consultant Services contracts, for recompetition purposes, shall generally be limited to two years.

23.1.1 Definitions

"Independent Contractor" means a person who does work for BPA by contract, and BPA has the right to control or direct only the result of the work and not the means and methods of accomplishing the result. BPA has adopted the Internal Revenue Service's general and common law rules to define an Independent Contractor.

"Expert/Consulting Services" means contractors working on project-related work that are hired for specific expertise, or to provide advisory assistance, or for implementation of a project or objective.

"Service Contract" means a contract that directly engages the time and effort of a contractor whose primary purpose is to perform a task rather than furnish a product.

"Supplemental Labor" means non-federal employee labor contracted and billed on an hourly or daily basis performing tasks for BPA.

23.1.2 Expert/Consultant Services

(a) ***INFORMATION*:** Expert/Consultant services provide information, advice, recommendations, options, alternatives, analysis and training to support or improve BPA's operations, projects, program, policy development, decision-making, management and administrative activities, and may be used to augment or supplement BPA's knowledge and expertise to enhance BPA's understanding of complex issues, to provide new insights into alternate solutions, make recommendations on business or decision-making functions or to serve as an expert in any court litigation, administrative hearing or other dispute resolution forum involving BPA, whether or not the expert is expected to testify. Experts/Consultants possess extensive knowledge in a particular field or subject; are independently responsible for the management of work products, quality, and deliverables; may perform their services onsite or offsite.

(b) ***POLICY:*** Expert/Consultant Services may be used at all organizational levels to help managers achieve maximum effectiveness or economy in their operations.

(c) ***POLICY*:** Expert/Consultant services shall not be:

(1) Used in performing work of a policy, decision-making, or managerial nature which is the direct responsibility of agency officials;
(2) Used to bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures;
(3) Contracted for on a preferential basis to former employees of the Federal Government; or
(4) Used under any circumstances specifically to aid in influencing or enacting legislation.

(d) ***POLICY*:**

(1) BPA, or an independent third party hired by BPA, shall analyze the facts and determine whether the expert/consultant qualifies as an independent contractor prior to entering into a contract for expert/consultant services.
(2) If the analysis indicates that a proposed expert/consultant is an independent contractor, BPA may contract directly with that expert/consultant.
(3) If the analysis indicates a proposed expert/consultant is not an independent contractor, BPA will contract for the services of that expert/consultant through one of its third party supplemental labor contractors. See BPI 22.5.4 for tax policy for Expert/Consultant Services.

(e) ***POLICY***: Experts/Consultants services directly related to an investigation or legal proceeding, including any administrative, civil or criminal proceeding to which BPA is a party, may be acquired without regard to section (d) upon a written request from the Executive Vice President, General Counsel, and approved by the Head of Contracting Activity.

(f) ***PROCEDURE:*** All individuals approved under BPI 23.1.2(e) are required by IRS statutes and regulations to be treated, for income tax withholding purposes, as an employee. COs shall notify Disbursements upon receipt of HCA approval to assure proper setup of withholdings from BPA payments to that individual.

(g) ***PROCEDURE:*** BPA shall annually review the contracts defined in (e) to insure they do not become personal services contracts. The review will be initiated and documented by Supply Chain Services, with input from the benefitting organization. The HCA shall provide a final decision to resolve any disagreement between the Supply Chain Services and benefitting organization relating to the review results for these contracts.

23.1.3 Supplemental Labor

(a) ***INFORMATION:*** Supplemental Labor is non-federal employee labor contracted and billed on an hourly or daily basis performing tasks for BPA. The labor is used to augment existing BPA staff levels or to fill gaps in the Federal Government workforce.

(b) ***POLICY:*** BPA shall acquire all supplemental labor services through a third party supplemental labor contractor. BPA shall not enter into direct contracts with any individuals for supplemental labor services.

23.1.4 Personal Services Contracts

(a) ***INFORMATION:***

(1) A personal services contract is characterized by the employer-employee relationship it creates between BPA and the contractor's personnel. BPA normally obtains its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.

(2) An employer-employee relationship under a service contract occurs when, as a result of the contract's terms or the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a BPA officer or employee. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts a contractor employee into a BPA employee.

(3) Each contract arrangement must be judged in the light of its own facts and circumstances, and the key question is whether BPA will exercise relatively continuous supervision and control over the contractor personnel performing the contract. The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Federal Government supervision of a substantial number of contractor employees would have to be taken strongly into account.

(b) ***POLICY*:** Contracts which create personal services relationships are not permitted.
See BPI 22.5.5 for tax policy for Supplemental Labor Services.

23.1.5 Inherently Governmental Functions.

***INFORMATION*:**

(a) An inherently governmental function is a function that is so intimately related to the public interest as to mandate performance by employees of the Federal Government. These functions include those activities that require either the exercise of discretion in applying Federal Government authority, or the application of value judgments in making decisions for the Federal Government.

(b) Federal Government functions normally fall into two categories: the act of governing, i.e., the discretionary exercise of Federal Government authority, and monetary transactions and entitlements. Inherently governmental functions do not normally include gathering information for, or providing advice, opinions, recommendations, or ideas to, federal officials, nor do they include functions that are primarily ministerial and internal in nature.

(c) The following are examples of inherently governmental functions, which may not be contracted. These examples are not intended to be an exhaustive list of inherently governmental functions.

(1) The determination of BPA policy, such as determining the content and application of regulations.
(2) The determination of BPA program priorities and budget requests.
(3) The direction and control of employees of the Federal Government
(4) The approval of position descriptions and performance standards for employees of the Federal Government.
(5) The determination of what BPA property is to be disposed of and on what terms.
(6) The determining what supplies or services are to be acquired by BPA.
(7) The approval of any contractual documents such as those documents defining requirements, incentive plans and evaluation criteria.
(8) The awarding, administering, and terminating contracts.
(9) The determining whether contract costs are reasonable, allocable and allowable.
(10) The determination of budget policy, guidance and strategy.

(d) ***POLICY:*** BPA shall not contract for inherently governmental functions. BPA follows the principles outlined in OMB Circular A-76, Performance of Commercial Activities, to determine whether an activity is an inherently governmental function.

23.1.6 Safety Requirements.
POLICY: While a contractor, including subcontractors, is to be held responsible for its actions with respect to safety, BPA has adopted a safety policy which requires additional safety measures for working on and around transmission lines, substations, rights-of-way and other projects that may place workers in close proximity to energized transmission facilities and other potentially hazardous conditions. BPA safety policy and procedures are found in the BPA's Accident Prevention Manual and in BPI Part 15. (Also, see BPI Parts 11.5, 14.12, and 24.4 for additional purchasing requirements regarding safety).

23.1.6.1 Clause Usage Prescriptions.
PROCEDURES:

(a) The CO may include a clause similar to 23-1, Continuity of Services, in service solicitations and contracts when BPA anticipates the need to facilitate the transition from one contractor to another, or to BPA.

(b) The CO shall include a clause similar to 23-2, Key Personnel, in any solicitations and contracts when specific personnel are essential to the conduct of a project.

23.1.7 Nondisplacement of Qualified Workers Under Service Contract Act.
***INFORMATION*:** Executive Order 13495 (EO 13495) states that the Federal Government's procurement interests in economy and efficiency are served when the successor contractor hires the predecessor's employees. A carryover workforce minimizes disruption in the delivery of services during a period of transition between contractors and provides the Federal Government the benefit of an experienced and trained workforce that is familiar with the Federal Government's personnel, facilities, and requirements. EO 13495, therefore, generally requires that successor service contractors performing on Federal contracts offer a right of first refusal to suitable employment (*i.e.,* a job for which the employee is qualified) under the contract to those employees under the predecessor contract whose employment will be terminated as a result of the award of the successor contract.

POLICY:

(a) When a service contract succeeds a contract for performance of the same or similar services, as defined at 29 CFR 9.2, at the same location, the successor contractor and its subcontractors are required to offer those service employees that are employed under the predecessor contract, and whose employment will be terminated as a result of the award of the successor contract, a right of first refusal of employment under the contract in positions for which they are qualified. EO 13495 generally prohibits employment openings under the successor contract until such right of first refusal has been provided, when consistent with applicable law. Nothing in EO 13495 shall be construed to permit a contractor or subcontractor to fail to comply with any provision of any other Executive order or law.

(b) Definitions:

(1) "Service contract" or "contract" means any contract or subcontract for services entered into by BPA or its contractors that is covered by the Service Contract Act of 1965, as amended, 41 U.S.C. 351 et seq., and its implementing regulations.

(2) "Employee" means a service employee as defined in the Service Contract Act of 1965, 41 U.S.C. 357(b).

(c) Exemptions:

(1) This requirement does not apply to:

(a) Contracts and subcontracts under $150,000;

(b) Contracts or subcontracts awarded pursuant to 41 U.S.C. chapter 85, Committee for Purchase from People Who Are Blind or Severely Disabled;

(c) Guard, elevator operator, messenger, or custodial services provided to the Government under contracts or subcontracts with sheltered workshops employing the "severely handicapped" as described in 40 U.S.C. 593;

(d) Agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph Sheppard Act, 20 U.S.C. 107; or

(e) Service employees who were hired to work under a Federal service contract and one or more nonfederal service contracts as part of a single job, provided that the service employees were not deployed in a manner that was designed to avoid the purposes of this subpart.

(2) The exemptions in paragraphs (c)(1)(b) through (c)(1)(d) of this subsection apply when either the predecessor or successor contract has been awarded for services produced or provided by the "severely handicapped."

(d) Authority to Exempt Contracts: If the HCA finds that the application of the requirements of EO 13495 would not serve the purposes of the Order, or would impair the ability of BPA to procure services on an economical and efficient basis, the HCA may exempt the agency from the requirements of any or all of the provisions of the Order with respect to a particular contract, subcontract, or purchase order, or any class of contract, subcontract or purchase order.

23.1.7.1 Clause Usage Prescription.
PROCEDURE: The CO shall include Clause 23-5 Nondisplacement of Qualified Workers in solicitations and contracts for:

(1) service contracts, as defined at BPI 23.1.7(b)(1)
(2) that succeed contracts for performance of the same or similar work at the same location; and
(3) that are not exempted by BPI 23.1.7(c) or waived in accordance with BPI 23.1.7(d).

For commercial acquisitions, Clause 23-5 shall not be included in the solicitation or contract; the requirement is addressed in Clause 28-20.

23.2 UNAUTHORIZED USE OF COMPUTER SOFTWARE BY CONTRACTORS.
POLICY: BPA shall caution contractors concerning the proper use of copyrighted software licensed to BPA.

23.2.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include a clause similar to 23-3, Unauthorized Reproduction or Use of Computer Software, in solicitations and contracts where the contractor employees are expected to have access to copyrighted or proprietary software.

23.3 SCREENING CONTRACTOR PERSONNEL.
POLICY: It is BPA policy to protect the agency workforce, facilities, and information by taking steps to ensure that the contractor workforce is properly screened prior to gaining access to BPA facilities and/or computer resources.

23.3.1 Background Screenings.
(a) ***INFORMATION:*** BPA policy and procedures regarding security management are found in BPAM Chapter 1070 Security and Emergency Management, and those for identification badges are in BPAM 1077 Personnel Security Program. Federal law establishes the screening procedures which apply to contractors providing child care services as defined in Section 231 of the Crime Control Act of 1990 (42 U.S.C § 13041). Screening procedures for all non-child care contractors are prescribed in Clause 23-4, Screening Requirements for Personnel Having Access to BPA Facilities.

(b) ***INFORMATION*:** BPA follows the procedures and guidance prescribed in Homeland Security Presidential Directive (HSPD) 12, Policy for a Common Identification Standard for Federal Employees and Contractors, and Federal Information Processing Standards (FIPS) Publication 201: Personal Identity Verification (PIV) of Federal Employees and Contractors, issued by the National Institute of Standards and Technology (NIST).

(c) ***PROCEDURE:*** Contractor personnel that require access to BPA facilities, and/or sensitive unclassified information and computer systems, must be screened in order to protect BPA property, information, and child day care attendees. The contractor must comply with the procedures established at BPA for screening of new hires, and current staff, as prescribed in HSPD-12 and FIPS 201, as implemented at BPA. The contractor will initiate the screening process by ensuring that its employees present the required forms of personal identification, and complete SF85 - Questionnaire for Non-Sensitive Positions, and submit to the BPA sponsor for processing. The BPA Sponsor may be the COTR or some other person designated to facilitate the contractor employees' entry into BPA facilities and computer systems.

23.3.2 Pre-Registration of Foreign Nationals.
(a) ***INFORMATION:*** In compliance with DOE Order 142.3A, Unclassified Foreign Visits and Assignments Program, a contract employee who is a non-US citizen (foreign national) must be pre-registered and approved prior to visits or work assignments at BPA facilities. This process is in addition to the screening process described above. BPA program offices determine the need for, and appropriate work duration, of all contract employees, including non-US Citizens.

(b) ***PROCEDURE:*** The contract employee must complete BPA form 5632.08e – Foreign Nationals Registration (Short Form) or BPA form 5632.08a – Foreign Nationals Registration (Long Form) and submit it to the BPA Security office for processing.

23.3.2.1 Clause Usage Prescription.
PROCEDURE: The CO shall include Clause 23-4, Screening Requirements for Personnel Having Access to BPA Facilities, in all solicitations and contracts that require contractor personnel to have access to BPA information resources and/or facilities, including child day care centers, either on a continuing basis or during frequent visits.

23.50 TEXT OF CLAUSES.
The following clauses are referred to in BPI Part 23:

Clause 23-1 CONTINUITY OF SERVICES 7
Clause 23-2 KEY PERSONNEL 8
Clause 23-3 UNAUTHORIZED REPRODUCTION OR USE OF COMPUTER SOFTWARE 8
Clause 23-4 SCREENING REQUIREMENTS FOR PERSONNEL HAVING ACCESS TO BPA FACILITIES 8
Clause 23-5 NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACT ACT 9

Clause 23-1 CONTINUITY OF SERVICES (Sep 98)(BPI 23.1.6.1)

(a) The Contractor recognizes that the services under this contract are vital to BPA and must be continued without interruption and that, upon contract expiration, a successor, either BPA or another contractor, may continue them. The Contractor agrees to (1) furnish phase-in training and (2) exercise its best efforts and cooperation to effect an orderly and efficient transition to a successor.

(b) The Contractor shall, upon the Contracting Officer's written notice, (1) furnish phase-in, phase-out services for up to 60 days after this contract expires and (2) negotiate in good faith a plan with a successor to determine the nature and extent of phase-in, phase-out services required. The plan shall be subject to the Contracting Officer's approval. The Contractor shall provide sufficient experienced personnel during the phase-in, phase-out period to ensure that the services called for by this contract are maintained at a high level of proficiency.

(c) The Contractor shall also disclose necessary personnel records and allow the successor to conduct on-site interviews. If selected employees are agreeable to the change, the Contractor shall release them at a mutually agreeable date and negotiate transfer of their earned fringe benefits to the successor.

(d) The Contractor shall be reimbursed for all reasonable phase-in, phase-out costs (i.e., costs incurred within the agreed period after contract expiration that result from phase-in, phase-out operations) and a fee (profit) not to exceed a pro rata portion of the fee (profit) under this contract.

(End of clause)

Clause 23-2 KEY PERSONNEL (Sep 98)(BPI 23.1.6.1)

The personnel listed below are considered to be essential to the work being performed hereunder. No diversion shall be made by the Contractor without the written consent of the Contracting Officer. (List key personnel below)

(End of clause)

Clause 23-3 UNAUTHORIZED REPRODUCTION OR USE OF COMPUTER SOFTWARE (Sep 98)(BPI 23.2)(BPI 17.4.1.1)

The contractor shall hold BPA harmless for unauthorized reproduction or use of copyrighted or proprietary computer software and/or manuals or other documentation by the contractor's employees or subcontractors in the performance of the contract.

(End of clause)

Clause 23-4 SCREENING REQUIREMENTS FOR PERSONNEL HAVING ACCESS TO BPA FACILITIES (Dec 10)(BPI 23.3.2.1)

(a) The following definitions shall apply to this contract:
(1) "Access" means the ability to enter BPA facilities as a direct or indirect result of the work required under this contract.
(2) "Sensitive unclassified information" means information requiring a degree of protection due to the risk and magnitude of loss or harm that could result from inadvertent or deliberate disclosures, alteration, or restriction. Sensitive unclassifed information may include, but is not limited to: personnel data maintained in systems or records subject to the Privacy Act of 1974, Pub. L. 93-579 (5 U.S.C. 552a); proprietary business data (18 U.S.C. 1905) and the Freedom of Information Act (5 U.S.C. 552); unclassified controlled information (42 U.S.C. 2168, DOE Order 471.3), and critical infrastructure information, energy supply data; economic forecasts; and financial data.

(b) BPA personnel screening activities are based on the Homeland Security Presidential Directive 12 (HSPD-12), and DOE rules and guidance as implemented at BPA. The background screening process to be conducted by the Office of Personnel Management is called a National Agency Check with Inquiries (NACI). The results of the NACI process will provide BPA with information to determine an individual's initial eligibility or continued eligibility for access to BPA facilities including IT access. Such a determination shall not be construed as a substitute for determining whether an individual is technically suitable for employment.

(c) The contractor is responsible for protecting BPA property during contract performance, including sensitive unclassified data. Effective October 27, 2005, all new-hire contract employees expected to work at federal facilities for six or more consecutive months must be screened according to HSPD-12. To initiate the federal screening process discussed in paragraph (b) above, the contractor shall ensure that all prospective contract employees present the required forms of personal identification and complete SF85 - Questionnaire for Non Sensitive Positions and submit it to BPA for processing. All contract employees on board prior to that date will be screened in phases according to length of service. Rescreenings of longer term contract employees will occur at periodic intervals, generally of five years.

(d) As part of the NACI, the government's determination of approval for an individual's access shall be at least based upon criteria listed below. However, the contractor also has a responsibility to affirm that permitting the individual access to BPA facilities and/or computer systems is an acceptable risk which will not lead to improper use, manipulation, alteration, or destruction of BPA property or data, including unauthorized disclosure. Positive findings in any of these areas shall be sufficient grounds to deny access.

(1) Any behavior, activities, or associations which may show the individual is not reliable or trustworthy;
(2) Any deliberate misrepresentations, falsifications, or omissions of material facts;
(3) Any criminal, dishonest or immoral conduct (as defined by local Law), or substance abuse; or
(4) Any illness, including any mental condition, of a nature which, in the opinion of competent medical authority, may cause significant defect in the judgment or reliability of the employee, with due regard to the transient or continuing effect of the illness and the medical findings in such case.

(e) If the NACI screening process described above prompts a determination to disapprove access, BPA shall notify the contractor, who will then inform the individual of the determination and the reasons therefor. The contractor shall afford the individual an opportunity to refute or rebut the information that has formed the basis for the initial determination, according to the appeal process prescribed by HSPD-12 and supplemental implementing guidance.

(f) If the individual is granted access, the individual's employment records or personnel file shall contain a copy of the final determination as described in paragraph (e) above and the basis for the determination. The contractor shall conduct periodic reviews of the individual's employment records or personnel file to reaffirm the individual's continued suitability for access. The reviews should occur annually, or more often as appropriate or necessary. If the contractor becomes aware of any new information that could alter the individuals' continued eligibility for approved access, the contractor shall notify the COTR immediately.

(g) If a security clearance is required, then the applicant's job qualifications and suitability must be established prior to the submission of a security clearance request to DOE. In the event that an applicant is specifically hired for a position that requires a security clearance, then the applicant shall not be placed in that position until a security clearance is granted by DOE.

(h) In addition to the requirements described elsewhere in this clause, all contractor employees who may be accessing any of BPA's information resources must participate annually in a BPA-furnished information resources security training course.

(i) The contractor is responsible for obtaining from its employees any BPA-issued identification and/or access cards immediately upon termination of an employee's employment with the contractor, and for returning it to the COTR, who will forward it to Security Management.

(j) The substance of this clause shall be included in any subcontracts in which the subcontractor employees will have access to BPA facilities and/ or computer systems.

(End of Clause)

Clause 23-5 NONDISPLACEMENT OF QUALIFIED WORKERS UNDER SERVICE CONTRACT ACT (Jul 13)(BPI 23.1.7.1)

(a) "Service employee", as used in this clause, means any person engaged in the performance of a service contract other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR part 541. The term "service employee" includes all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor.
(b) The Contractor and its subcontractors shall, except as otherwise provided herein, in good faith offer those service employees employed under the predecessor contract whose employment will be terminated as a result of award of this contract or the expiration of the contract under which the service employees were hired, a right of first refusal of employment under this contract in positions for which the service employees are qualified.

(1) The Contractor and its subcontractors shall determine the number of service employees necessary for efficient performance of this contract and may elect to employ fewer employees than the predecessor Contractor employed in connection with performance of the work.

(2) Except as provided in paragraph (c) of this clause, there shall be no employment opening under this contract, and the Contractor and any subcontractors shall not offer employment under this contract, to any person prior to having complied fully with this obligation.

(i) The successor Contractor and its subcontractors shall make a bona fide express offer of employment to each service employee as provided herein and shall state the time within which the service employee must accept such offer, but in no case shall the period within which the service employee must accept the offer of employment be less than 10 days.

(ii) The successor Contractor and its subcontractors shall decide any question concerning a service employee's qualifications based upon the individual's education and employment history, with particular emphasis on the employee's experience on the predecessor contract, and the Contractor may utilize employment screening processes only when such processes are provided for by the contracting agency, are conditions of the service contract, and are consistent with Executive Order 13495.

(iii) Where the successor Contractor does not initially offer employment to all the predecessor contract service employees, the obligation to offer employment shall continue for 90 days after the successor contractor's first date of performance on the contract.

(iv) An offer of employment will be presumed to be bona fide even if it is not for a position similar to the one the employee previously held, but is one for which the employee is qualified, and even if it is subject to different employment terms and conditions, including changes to pay or benefits. (See 29 CFR 9.12 for a detailed description of a bonafide offer of employment).

(c) Notwithstanding the obligation under paragraph (b) of this clause, the successor Contractor and any subcontractors (i) may employ under this contract any service employee who has worked for the contractor or subcontractor for at least three months immediately preceding the commencement of this contract and who would otherwise face lay-off or discharge, (ii) are not required to offer a right of first refusal to any service employee(s) of the predecessor contractor who are not service employees within the meaning of the Service Contract Act, 41 U.S.C. 6701(3), and (iii) are not required to offer a right of first refusal to any service employee(s) of the predecessor contractor whom the Contractor or any of its subcontractors reasonably believes, based on the particular service employee's past performance, has failed to perform suitably on the job (see 29 CFR 9.12 (c)(4) for additional information). The successor Contractor bears the responsibility of demonstrating the appropriateness of claiming any of these exceptions.

(d) The Contractor shall, not less than 30 days before completion of the Contractor's performance of services on the contract, furnish the Contracting Officer with a certified list of the names of all service employees working under this contract and its subcontracts at the time the list is submitted. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts with either the current or predecessor contractors or their subcontractors. Where changes to the workforce are made after the submission of the certified list described in this paragraph, the Contractor shall, in accordance with paragraph (e) of this clause, not less than 10 days before completion of the services on this contract, furnish the Contracting Officer with an updated certified list of the names of all service employees employed within the last month of contract performance. The updated list shall also contain anniversary dates of employment, and, where applicable, dates of separation of each service employee under the contract and its predecessor contracts with either the current or predecessor Contractors or their subcontractors.

(1) Immediately upon receipt of the certified service employee list but not before contract award, the contracting officer shall provide the certified service employee list to the successor contractor, and, if requested, to employees of the predecessor contractor or subcontractors or their authorized representatives.

(2) The Contracting Officer will direct the predecessor Contractor to provide written notice to service employees of their possible right to an offer of employment with the successor contractor. Where a significant portion of the predecessor Contractor's workforce is not fluent in English, the notice shall be provided in English and the language(s) with which service employees are more familiar. The written notice shall be—

(i) Posted in a conspicuous place at the worksite; or

(ii) Delivered to the service employees individually. If such delivery is via e-mail, the notification must result in an electronic delivery receipt or some other reliable confirmation that the intended recipient received the notice.

(e)

(1) If a contract is being performed at a Federal facility where service employees may be retained in the performance of the succeeding contract and are subject to a wage determination which contains vacation or other benefit provisions based upon the length of service with a contractor (predecessor or successor (29 CFR 4.173), the predecessor Contractor shall, not less than 10 days before completion of this contract, furnish the Contracting Officer a certified list of the names of all service employees working under this contract and its subcontracts during the last month of contract performance. The list shall also contain anniversary dates of employment of each service employee under this contract and its predecessor contracts either with the current or predecessor Contractors or their subcontractors. If there are no changes to the workforce before the predecessor contract is completed, then the predecessor Contractor is not required to submit a revised list 10 days prior to completion of performance. When there are changes to the workforce after submission of the 30-day list, the predecessor Contractor shall submit a revised certified list not less than 10 days prior to performance completion.

(2) Immediately upon receipt of the certified service employee list but not before contract award, the contracting officer shall provide the certified service employee list to the successor contractor, and, if requested, to employees of the predecessor contractor or subcontractors or their authorized representatives.

(f) The Contractor and subcontractor shall maintain the following records (regardless of format, *e.g.*, paper or electronic) of its compliance with this clause for not less than a period of three years from the date the records were created.

(1) Copies of any written offers of employment or a contemporaneous written record of any oral offers of employment, including the date, location, and attendance roster of any service employee meeting(s) at which the offers were extended, a summary of each meeting, a copy of any written notice that may have been distributed, and the names of the service employees from the predecessor contract to whom an offer was made.

(2) A copy of any record that forms the basis for any exemption claimed under this part.

(3) A copy of the service employee list provided to or received from the contracting agency.

(4) An entry on the pay records of the amount of any retroactive payment of wages or compensation under the supervision of the Administrator of the Wage and Hour Division to each service employee, the period covered by such payment, and the date of payment, and a copy of any receipt form provided by or authorized by the Wage and Hour Division. The Contractor shall also deliver a copy of the receipt to the service employee and file the original, as evidence of payment by the Contractor and receipt by the service employee, with the Administrator or an authorized representative within 10 days after payment is made.

(g) Disputes concerning the requirements of this clause shall not be subject to the disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 9. Disputes within the meaning of this clause include disputes between or among any of the following: The Contractor, the contracting agency, the U.S. Department of Labor, and the service employees under the contract or its predecessor contract. The Contracting Officer will refer any service employee who wishes to file a complaint, or ask questions concerning this contract clause, to the: Branch of Government Contracts Enforcement, Wage and Hour Division, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210. Contact e-mail: displaced@dol.gov.

(h) The Contractor shall cooperate in any review or investigation by the Department of Labor into possible violations of the provisions of this clause and shall make such records requested by such official(s) available for inspection, copying, or transcription upon request.

(i) If it is determined, pursuant to regulations issued by the Secretary of Labor (Secretary), that the Contractor or its subcontractors are not in compliance with the requirements of this clause or any regulation or order of the Secretary, appropriate sanctions may be imposed and remedies invoked against the Contractor or its subcontractors, as provided in Executive Order 13495, the regulations, and relevant orders of the Secretary, or as otherwise provided by law.

(j) The Contractor shall take such action with respect to any such subcontract as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for noncompliance. However, if the Contractor, as a result of such direction, becomes involved in litigation with a subcontractor, or is threatened with such involvement, the Contractor may request that the United States, through the Secretary, enter into such litigation to protect the interests of the United States.

(k) The Contracting Officer will withhold, or cause to be withheld, from the prime Contractor under this or any other Government contract with the same prime Contractor, such sums as an authorized official of the Department of Labor requests, upon a determination by the Administrator, the Administrative Law Judge, or the Administrative Review Board, that there has been a failure to comply with the terms of this clause and that wages lost as a result of the violations are due to service employees or that other monetary relief is appropriate. If the Contracting Officer or the Administrator, upon final order of the Secretary, finds that the Contractor has failed to provide a list of the names of service employees working under the contract, the Contracting Officer may, in his or her discretion, or upon request by the Administrator, take such action as may be necessary to cause the suspension of the payment of contract funds until such time as the list is provided to the Contracting Officer.

(l) *Subcontracts.* In every subcontract over the simplified acquisition threshold entered into in order to perform services under this contract, the Contractor shall include a provision that ensures—

(1) That each subcontractor will honor the requirements of paragraphs (b) through (c) of this clause with respect to the service employees of a predecessor subcontractor or subcontractors working under this contract, as well as of a predecessor Contractor and its subcontractors;

(2) That the subcontractor will provide the Contractor with the information about the service employees of the subcontractor needed by the Contractor to comply with paragraphs (d) and (e) of this clause; and

(3) The recordkeeping requirements of paragraph (f) of this clause.

(End of clause)

PART 24 CONSTRUCTION AND DEMOLITION CONTRACTS

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24.1 APPLICABILITY.

(a) ***INFORMATION:*** This Part prescribes additional purchase policies and procedures for construction and dismantling, demolition, or removal of improvements. Guidance for the administration of construction contracts is provided in Appendix 14-A.

(b) ***POLICY:*** This Part applies to all contracts for construction and to the construction portion of contracts for supplies or services. In the event that the portions of multipurpose contracts are so commingled that priced deliverables for construction, service, or supply cannot be segregated, the BPI Part applicable to the predominant purpose shall be followed. However, whenever portions of multipurpose contracts are segregable and deliverables can be separately priced, the CO shall clearly identify those construction, service, or supply items in the pricing schedule and identify which contract clauses apply to the construction, service, or supply items of work. Segregation need not be attempted under contracts of less than $100,000.

24.2 DEFINITIONS.

INFORMATION: As used in this part –

"As-built drawings" means drawings submitted by a contractor or subcontractor at any tier to show the construction of a particular structure or work as actually completed under the contract.

"Construction" means construction, alteration, or repair (including dredging, excavating, and painting) of buildings, structures, or other real property. For purposes of this definition, the terms "buildings, structures, or other real property" include but are not limited to improvements of all types, such as electrical substations, maintenance facilities, fish hatcheries, office facilities, bridges, dams, roads, sewers, water mains, power lines, pumping stations, railways, airport facilities, and terminals. Construction does not include exploratory drilling or other investigative work which is intended to obtain preliminary data for engineering studies and which is not a part of commencing or continuing the construction process; nor does it include the manufacture, production, furnishing, construction, alteration, repair, processing, or assembling of personal property, or demolition without construction.

“Construction Contract” means a contract which places responsibility on the construction contractor to perform as per the design developed by BPA design staff and/or by an independent architectural/engineering firm under a separate contract.

“Construction-Management-Contract” means a service-type contract which places construction project oversight responsibility on the construction management contractor for all or a portion of each separate construction or other contract(s) awarded by BPA. A key responsibility of the construction management contractor is to work with the architect/engineer during design to ensure that “constructability” issues are adequately considered.

"Design-Build-Construction Contract" means a contract which places the responsibility for the complete design and construction of the project on the design-build contractor to meet the general specifications and specific performance requirements of the contract. This type of contract is sometimes referred to as the "turnkey" method or the "Engineer/Procure/Construct" EPC method.

"Design-Supply-Construction Contract" means a contract which places the responsibility for total system performance on the equipment manufacturer as per the general specifications and specific performance requirements of the contract.

"Plans and specifications" means drawings, specifications, and other data for and preliminary to the construction of a particular building, structure, or other real property.

"Shop drawings" means drawings by the construction contractor or a subcontractor at any tier submitted or required under a construction contract, showing in detail (1) the proposed fabrication and assembly of structural elements, (2) the installation (i.e., form, fit, and attachment details) of materials or equipment, or (3) both.

24.3 DISMANTLING, DEMOLITION OR REMOVAL OF IMPROVEMENTS.
(a) ***INFORMATION:*** Contracts for dismantling, demolition, or removal of improvements are subject to either the Service Contract Act (41 U.S.C. § 6701-6707) or the Davis-Bacon Act (40 U.S.C. § 3141-3148). If the contract is solely for dismantling, demolition, or removal of improvements, the Service Contract Act applies, unless further work involving construction, alteration, or repair of a public building or public work at that location is contemplated. If such further construction work is intended, regardless of whether or not it falls under the same contract or is to be performed by BPA forces, then the Davis-Bacon Act applies to the contract for dismantling, demolition, or removal.

(b) ***POLICY:*** The CO shall consider the usefulness to BPA of all salvageable property. Any of the property whose usefulness to BPA exceeds its value as salvage to the Contractor should be expressly designated in the contract for retention by BPA. The contract may provide that the (1) BPA pay the Contractor for the dismantling or demolition of structures, (2) the Contractor pay BPA for the right to salvage and remove the materials resulting from the dismantling or demolition operation, or (3) a combination of both. Care should be taken to ensure compliance with environmental laws and regulations.

(c) ***PROCEDURE:*** The CO shall determine the fair market value of any property not to be retained by BPA, since the Contractor will receive title to this property. Its value will therefore be important in determining what payment, if any, shall be made to the Contractor, and whether additional compensation will be made if the contract is terminated. Asset Center Representatives must approve the disposition of BPA property to be transferred to Contractors under dismantling, demolition or removal of improvements contracts. See Part 19 and Appendix 19-A for further information.

24.3.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall insert a clause similar to clause 24-1, Dismantling and Demolition of Property, in solicitations and contracts involving the dismantling, demolition, or removal of improvements when the Contractor is given title to BPA property under the contract.

24.4 GENERAL CONSTRUCTION PURCHASE GUIDANCE.

24.4.1 State Regulation of Federal Construction Projects.

(a) ***INFORMATION:*** BPA contractors have occasionally encountered requests from state and local governments for the contractors to obtain building permits, zoning approval, sanitation approval, etc. Based on the "supremacy" clause of Article 6 of the United States Constitution, construction contractors are not required to obtain permits or approvals for work done under government contracts on BPA property. The States have enforcement authority for safety (OSHA) and environmental protection (CERCLA and RCRA).

(b) ***PROCEDURE:*** Contractors which encounter attempts by State or local government entities to assess various types of fees should be advised of BPA's position as noted above. The Contractor should be advised to inform the CO immediately if the assessing entity attempts in any way to prevent or hinder the Contractor at the job site. Legal advice should be sought from the Office of General Counsel.

24.4.2 Local Employment in Construction Projects.

POLICY: Occasionally, efforts are made by state or local governments to have BPA limit employment on construction projects to local residents or firms. Such a restriction has been held to be improper, and shall not be used in BPA contracts. (Reference Washington State Supreme Court case Laborers Local Union No. 374 v. Felton Construction Co., Nov. 24, 1982, and 42 Comp. Gen. 1, B-198952, 81-1 CPD 467). BPA recognizes that Tribal Employment Rights Ordinances (TERO) that effect projects on or near certain Indian reservations may have effect on contractor labor. BPA shall inform offerors of the existence of a TERO in the solicitation.

24.4.3 Disclosure Construction Project Size.

POLICY: When the estimated price of the proposed construction project is $100,000 or more, solicitations should state the size of the requirements in terms of physical characteristics and estimated price range. In no event shall the statement of size disclose BPA's estimate. Therefore, the estimated price should be described in terms of one of the following price ranges:

(a) Less the $100,000.
(b) Between $100,000 and $250,000.
(c) Between $250,000 and $500,000.
(d) Between $500,000 and $1,000,000.
(e) Between $1,000,000 and $5,000,000.
(f) Between $5,000,000 and $10,000,000.
(g) More than $10,000,000.

24.4.4 Safety Requirements.

POLICY: While a contractor, including subcontractors, is to be held responsible for its actions with respect to safety, BPA has adopted a safety policy which requires additional measures for working safely on and around transmission lines, substations, rights-of-way and other projects that may place workers in close proximity to energized transmission facilities. BPA safety policy and procedures are found in BPA's Accident Prevention Manual and in BPI 15.2. (Also, see BPI 11.5, 11.8, 14.16(a), 15.2.1(a), 23.1.5 for additional purchasing requirements regarding safety.)

24.5 SPECIFIC CONSTRUCTION PURCHASE GUIDANCE.

24.5.1 Liquidated Damages.

(a) ***POLICY:*** Liquidated damages clauses should be used only when (1) the time of completion or performance is such an important factor in the award of the contract that BPA may reasonably expect to suffer damage if the completion or performance is delinquent, and (2) the extent or amount of such damage would be difficult or impossible to ascertain or prove. In deciding whether to include a liquidated damages provision in a contract, the CO should consider the probable effect on such matters as pricing, competition, and the costs and difficulties of contract administration.

(b) ***INFORMATION:*** When administering contracts which include liquidated damages the CO shall take all reasonable steps to adequately warn Contractors of the pending assessment when concern of late completion develops. If a basis for termination for default exists, the CO should advise the Contractor that the liquidated damages which may continue to be assessed, would be damages that may be collected in addition to any reprocurement costs (see Subpart 20.5.7). If completion or performance is desired after termination for default, efforts must be made to obtain the completion or performance elsewhere within a reasonable time.

(c) ***INFORMATION:*** The rate of liquidated damages used must be reasonable, and must be considered on a case-by-case basis, since liquidated damages fixed without any reference to probable actual damages may be held to be a penalty, and therefore unenforceable. The rate should, at a minimum, cover the estimated cost of contract administration, including inspection, for each day of delay in completion. In addition, other specific losses anticipated to be incurred as a direct result of the failure of the Contractor to complete the work on time should be included. Examples of specific losses are:

(1) Additional inspection costs;
(2) The cost of substitute facilities;
(3) The rental of buildings; or
(4) The cost of BPA crews, or hourly paid contract employees, forced on standby.

24.5.1.1 Clause Usage Prescriptions.
PROCEDURE: The CO may include Clause 24-2, Liquidated Damages, in solicitations and contracts when a firm-fixed-price completion type contract for construction demolition with a value greater than $100,000 is contemplated and its use meets the requirements of 24.5.1(a) above. If different completion dates are specified in the contract for separate parts or stages of the work, the CO may revise paragraph (a) of the clause to state the amount of liquidated damages for late completion of each part or stage of the work. Separate calculation and documentation of the estimated damages (24.5.1(c) above) must be developed for each amount specified with a differing basis.

24.5.2 Inspection of Site and Examination of Data.
(a) ***INFORMATION:*** If the contract site does not have free access, the CO should make appropriate arrangements for prospective offerors to inspect the work site. The CO should also afford them the opportunity to examine data in the possession of BPA, which may provide information concerning the performance of the work such as boring samples, original boring logs, geology reports, and record and plans of previous construction. The solicitation should notify offerors of the time(s) and place(s) for the site inspection and data examination. If it is not feasible for offerors to inspect the site or examine the data on their own, the solicitation should also designate an individual who will show the site or data to the offerors. A record shall be kept of the identity and affiliation of all offerors' representatives who inspect the site or examine BPA site information.

(b) ***POLICY:*** Significant site information should be made available to all offerors, including information regarding known safety or hazardous conditions, as well as, any utilities to be furnished during construction. During BPA guided site tours, care must be taken not to provide information contradictory to the solicitation. All potential offerors are to be advised of any substantive clarification or correction of the solicitation package.

24.5.2.1 Clause Usage Prescriptions.
PROCEDURE: The CO shall include Clause 24-3, Site Investigation and Conditions Affecting the Work,in solicitations and contracts when a firm fixed price construction or demolition contract is contemplated, and the contract amount is expected to be greater than $100,000.

24.5.3 Clause Usage Prescriptions.
***PROCEDURE*:** Add the following clauses as required for the specific requirements of the contract.

24.5.3.1 Physical Data.
PROCEDURE: The CO shall include clause 24-4, Physical Data, in solicitations and contracts when a firm fixed price construction contract is contemplated and physical data (e.g., test borings, hydrographic, weather conditions data) will be furnished or made available to offerors. All information to be furnished or made available to offerors before award that pertains to the performance of the work shall be identified in the clause. When subparagraphs are not applicable, they may be deleted.

24.5.3.2 Preconstruction Conference.
***PROCEDURE*:** The CO may include a clause similar to 24-5, Preconstruction Conference, in solicitations and contracts when a construction, or demolition contract is contemplated, and the CO deems a preconstruction conference with the Contractor is advisable.

24.5.3.3 Schedule for Construction Contracts.
PROCEDURE: The CO shall include a clause similar to 24-6, Schedules for Construction Contracts, in solicitations and contracts when a firm fixed price construction contract is contemplated, the contract amount is expected to be greater than $100,000, and the period of actual work performance exceeds 60 days. The clause is not applicable to term type (level of effort) contracts.

24.5.3.4 Differing Site Conditions.
(a) ***INFORMATION:*** The purpose of the Differing Site Conditions clause is to encourage offerors to limit inclusion of contingency costs in their offers for conditions which are not reasonably foreseeable. The clause will also assist BPA and the Contractor with compliance with the Archaeological Resources Protection Act of 1979 (36 CFR 1214).

(b) ***PROCEDURE:*** The CO shall include clause 24-7, Differing Site Conditions, in solicitations and contracts when a firm fixed price construction, or a firm fixed price demolition contract is completed, and the contract amount is expected to be greater than $100,000. The clause is not applicable to term type (level of effort) contracts.

24.5.3.5 Layout of Work.
PROCEDURE: The CO may include a clause similar to 24-8, Layout of Work, in solicitations and contracts when a firm fixed price construction contract is contemplated and there is a need for accurate work layout and siting verification during work performance.

24.5.3.6 Specifications, Drawings and Material Submittals.
PROCEDURE: The CO shall include a clause similar to 24-9, Specifications, Drawings and Material Submittals, in all solicitations and contracts for construction expected to be greater than $100,000. When shop drawings are required, the CO may add text similar to Alternate I or II to paragraph (i) of the clause.

24.5.3.7 Price Data Sheet.
PROCEDURE: The CO shall include a clause similar to 24-10, Price Data Sheet, in solicitations and contracts involving construction when a firm fixed price contract with lump sum pricing is in use, and the contract amount is expected to be greater than $100,000. This clause will aid in the calculation of progress payments.

24.5.3.8 Working Hours.
PROCEDURE: The CO shall include a clause similar to 24-11, Working Hours, in solicitations and contracts for construction when a firm fixed price contract is contemplated and the contract amount is expected to be greater than $100,000.

24.5.3.9 Radio Information.
PROCEDURE: The CO may include a clause similar to 24-12, Radio Information, in contracts involving construction. It is useful where the work requirements are not confined to one specific work area and contract inspection would be aided by access to the Contractor's radio communications.

24.5.3.10 Material and Workmanship.
PROCEDURE: The CO shall include clause 24-13, Material and Workmanship, in solicitations and contracts for construction.

24.5.3.11 Superintendence by the Contractor.
PROCEDURE: The CO shall include a clause similar to 24-14, Superintendence by the Contractor, in solicitations and contracts when a construction or demolition contract is contemplated and the contract amount is expected to be greater than $100,000. This clause may be used in similar contracts less than $100,000.

24.5.3.12 Permits and Responsibilities.
PROCEDURE: The CO shall include clause 24-15, Permits and Responsibilities, in solicitations and contracts when a construction or demolition contract is contemplated and the contract amount is expected to be greater than $100,000. The CO should consider inserting the clause, appropriately modified, in other than firm fixed price contracts.

24.5.3.13 Other Contracts.
PROCEDURE: The CO shall include clause 24-16, Other Contracts, in solicitations and contracts when a firm fixed price construction or demolition contract is contemplated, the contract amount is expected to be greater than $100,000, and there is a reasonable expectation of other work activities at the work site during the term of the contract.

24.5.3.14 Operations and Storage Areas.
PROCEDURE: The CO may include a clause similar to 24-17, Operations and Storage Areas, in solicitations and contracts when a firm fixed price construction or demolition contract is contemplated and the contract amount is expected to be greater than $100,000.

24.5.3.15 Use and Possession Prior to Completion.
PROCEDURE: The CO shall include clause 24-18, Use and Possession Prior To Completion, in solicitations and contracts when a firm fixed price construction contract is contemplated, the contract amount is expected to be greater than $100,000, and there is a reasonable probability for early possession.

24.5.3.16 Cleaning Up.
PROCEDURE: The CO shall include a clause similar to 24-19, Cleaning Up, in solicitations and contracts when a firm fixed price construction or demolition contract is contemplated and the contract amount is expected to be greater than $100,000.

24.5.3.17 Availability and Use of Utility Services.
PROCEDURE: The CO may include a clause similar to 24-20, Availability and Use of Utilities Services, in solicitations and contracts when a construction or demolition contract is contemplated. The clause is useful when the contract is to be performed on BPA sites, and the CO determines (a) that the existing utility system is adequate for the needs of both BPA and the Contractor, and (b) furnishing it is in BPA's interest. When this clause is used, the CO shall list the available utilities in the contract and the cost (if any) to be charged to the Contractor for each unit.

24.5.3.18 Road Maintenance.
PROCEDURE: The CO shall include a clause similar to 24-21, Road Maintenance, in solicitations and contracts when a firm fixed price construction or demolition contract is contemplated, the contract work may damage site, or adjacent roads, and the contract amount is expected to be greater than $100,000.

24.5.3.19 Use of Land for Storage and Offices.
PROCEDURE: The CO may include a clause similar to 24-22, Use of Land for Storage and Offices, in solicitations and contracts for line construction.

24.5.3.20 Use of Explosives.
PROCEDURE: The CO shall include a clause similar to 24-23, Use of Explosives, in all solicitations and contracts for construction and demolition when the contract may include the use of explosives.

24.5.3.21 Contractor's Daily Report.
PROCEDURE: The CO shall include a clause similar to 24-24, Contractor's Daily Report, in all solicitations and contracts for construction. The reports are useful for resolving contract disputes and for gathering data for management purposes. Any modification to the contents of this clause must consider that tracking of man-hours from these reports is to be used for calculation of accident rates under BPA contracts.

24.5.3.22 Field Contract Modifications.
PROCEDURE: The CO may include clause 24-25, Field Contract Modifications, in solicitations and contracts for construction when individuals to be delegated the authority of the clause are adequately trained. The CO may not modify the contents of this clause except when the contract type is other than firm fixed price or for title changes of BPA representatives assigned under the contract. The CO shall provide Field Modification forms, appropriately tailored to the contract, to those given the authority to issue them. The amount specified in the clause shall be inserted by the CO. This clause is not appropriate for use under term type (level of effort) contracts.

24.5.3.23 Oral Modifications.
PROCEDURE: The CO may include clause 24-26, Oral Modification, in solicitations and contracts for construction. The CO may not modify the contents of this clause.

24.5.3.24 Equipment Cost Allowances.
PROCEDURE: The CO may include a clause similar to 24-27, Equipment Cost Allowances, in solicitations and contracts for construction when a firm fixed price contract expected to be greater than $100,000 is contemplated. This clause is useful in negotiation of equipment costs when equitable adjustments for contract changes are necessary.

24.5.4 Payment for Mobilization and Bonding Costs.
PROCEDURE: A separate item(s) may be included in the schedule of each construction solicitation and resultant contract to reimburse Contractors for the costs of mobilization where deemed appropriate by the CO. This will help to provide "front-end money" for small business contractors. COs should take care during negotiation to ensure the amount set for mobilization is reasonable, and not advance funding of the work. Front-end recovery of bonding costs is also appropriate and already covered in clause 22-2, Basis of Payment - Progress Payments (Construction Contracts).

24.50 TEXT OF CLAUSES.
The following clauses are referred to in BPI Part 24:

Clause 24-1 DISMANTLING AND DEMOLITION OF PROPERTY 9
Clause 24-2 LIQUIDATED DAMAGES 9
Clause 24-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK 10
Clause 24-4 PHYSICAL DATA..... 10
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Clause 24-24 CONTRACTOR'S DAILY REPORT..... 18
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Clause 24-26 ORAL MODIFICATION..... 19
Clause 24-27 EQUIPMENT COST ALLOWANCES 19

Clause 24-1 DISMANTLING AND DEMOLITION OF PROPERTY (Sep 98)(BPI 24.3.1)

The Contractor shall receive title to all property to be dismantled or demolished that is not specifically designated in the contract as being retained by BPA. The title shall vest in the Contractor immediately upon BPA's issuing the notice of award, or if a performance bond is to be furnished after award, upon BPA's issuance of a notice to proceed with the work. BPA shall not be responsible for the condition of, or any loss or damage to, the property.

(End of clause)

Clause 24-2 LIQUIDATED DAMAGES (Jul 13)(BPI 24.5.1.1)

(a) If the Contractor fails to complete the work within the time specified in the contract, or any extension, the Contractor shall pay to BPA as liquidated damages, the sum of $_____ for each day of delay.

(b) If BPA terminates the Contractor's right to proceed, the resulting damage will consist of liquidated damages until such reasonable time as may be required for final completion of the work, together with any increased costs to BPA in completing the work.

(c) If BPA does not terminate the Contractor's right to proceed, the resulting damage will consist of liquidated damages until the work is completed or accepted.

(End of Clause)

Clause 24-3 SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (Sep 98)(BPI 24.5.2.1)

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (l) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by BPA, information available to the public from local government agencies, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for properly estimating the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to BPA.

(b) BPA assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by BPA. Nor does BPA assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

(End of clause)

Clause 24-4 PHYSICAL DATA (Sep 98)(BPI 24.5.3.1)

Data and information furnished or referred to below is for the Contractor's information. BPA shall not be responsible for any interpretation of or conclusion drawn from the data or information made available to the Contractor. Further, BPA specifically does not warrant construction methodology which may be included in such documents.

(a) The indications of physical conditions on the drawings and in the specifications are the result of site investigations by _____ (insert a description of investigational methods used, such as surveys, auger borings, core borings, test pits, probings, test tunnels).

(b) _____ (insert other pertinent information).

(End of clause)

Clause 24-5 PRECONSTRUCTION CONFERENCE (Sep 98)(BPI 24.5.3.2)

The successful offeror will be required to attend a pre-construction conference at a site designated by the Contracting Officer prior to commencement of the work.

(End of Clause)

Clause 24-6 SCHEDULES FOR CONSTRUCTION CONTRACTS (Sep 98)(BPI 24.5.3.3)

(a) The Contractor shall, within five days after the work commences on the contract or another period of time determined by the Contracting Officer (CO), prepare and submit to the CO three copies of a practicable schedule showing the order in which the Contractor proposes to perform the work, and the dates on which the Contractor contemplates starting and completing the several salient features of the work (including acquiring materials, plant, and equipment). The schedule shall be in the form of a progress chart of suitable scale to indicate appropriately the percentage of work scheduled for completion each week during the contract period. If the Contractor fails to submit a schedule within the time prescribed, BPA may withhold approval of progress payments until the Contractor submits the required schedule. Should the Contractor fall behind its schedule, a revised schedule shall be forwarded with the next Contractor's request for progress payment. Additional schedules shall be furnished to BPA as soon as practicable if requested by the CO.

(b) With each payment request the Contractor shall submit a copy of the last submitted schedule annotated to indicate actual progress made to date. If at any time, in the opinion of the CO, the Contractor has fallen behind the schedule to an extent which would jeopardize timely completion, the Contractor shall take the steps necessary to improve its progress, including those that may be required by the CO, to enable timely completion without additional cost to BPA. The CO may require the Contractor to implement such things as increasing the number of shifts, the amount of overtime, days of work per week, and/or the amount of construction plant being utilized. The Contractor shall submit any supplementary schedules the CO deems necessary to demonstrate how the rate of progress necessary for timely completion will be regained.

(c) Failure of the Contractor to comply with the requirements of the CO under this clause shall be grounds for a determination by the CO that the Contractor is not prosecuting the work with sufficient diligence to ensure completion within the time specified in the contract. Upon making this determination, the Contracting Officer may terminate the Contractor's right to proceed with the work, or any separable part of it, in accordance with the default terms of this contract.

(End of clause)

Clause 24-7 DIFFERING SITE CONDITIONS (Sep 98)(BPI 24.5.3.4)

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inherent to the type of work provided for in the contract. Unless specifically identified in the contract, discoveries of archaeological or historical remains such as graves, fossils, skeletal materials and artifacts protected by the Archaeological Resources Protection Act (36 CFR 1214) are considered type 2 conditions.

(b) BPA shall investigate the site conditions promptly after receiving the notice. If the Contracting Officer determines that the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

(End of clause)

Clause 24-8 LAYOUT OF WORK (Sep 98)(BPI 24.5.3.5)

The Contractor shall lay out its work from BPA-established base lines and bench marks indicated on the drawings, and shall be responsible for all measurements in connection with the layout. The Contractor shall furnish, at its own expense, all stakes, templates, platforms, equipment, tools, materials, and labor required to lay out any part of the work. The Contractor shall be responsible for the execution of the work to the lines and grades that may be established or indicated by the Contracting Officer. The Contractor shall also be responsible for maintaining and preserving all stakes and other marks established by the Contracting Officer until authorized to remove them. If such marks are destroyed by the Contractor or through its negligence before their removal is authorized, the Contracting Officer may replace them and deduct the expense of the replacement from any amounts due or to become due to the Contractor.

(End of clause)

Clause 24-9 SPECIFICATIONS, DRAWINGS AND MATERIAL SUBMITTALS (Sep 98)(BPI 24.5.3.6)

(a) Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at its own risk and expense. The Contracting Officer shall furnish from time to time such detailed drawings and other information as considered necessary, unless otherwise provided.

(b) Wherever in the specifications or upon the drawings the words "directed", "required", "ordered", "designated", "prescribed", or words of like import are used, it shall be understood that the "direction", "requirement", "order", "designation", or "prescription", of the Contracting Officer is intended, and similarly the words "approved", "acceptable", "satisfactory", or words of like import shall mean "approved by", or "acceptable to", or "satisfactory to" the Contracting Officer, unless otherwise expressly stated.

(c) Where "as shown", "as indicated", "as detailed", or words of similar import are used, it shall be understood that the reference is made to the drawings accompanying this contract, unless stated otherwise. The word "provided" as used herein shall be understood to mean "provide complete in place", that is "furnished and installed".

(d) Omissions from the drawings and specifications or the misdescription of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work. They shall be performed as if fully and correctly set forth and described in the drawings and specifications.

(e) The Contractor shall check all drawings furnished by BPA prior to starting work and shall promptly notify the Contracting Officer of any discrepancies. Figures marked on drawings shall in general be followed in preference to scale measurements. Large scale drawings shall in general govern small scale drawings. The Contractor shall compare all drawings and verify the figures before laying out the work, and will be responsible for any errors which might have been avoided thereby.

(f) Shop drawings means drawings, submitted to BPA by the Contractor, Subcontractor, or any lower tier subcontractor pursuant to a construction contract, showing in detail (1) the proposed fabrication and assembly of structural elements and (2) the installation (i.e., form, fit, and attachment details) of materials or equipment. It includes drawings, diagrams, layouts, schematics, descriptive literature, illustrations, schedules, performance and test data, and similar materials furnished by the Contractor to explain in detail specific portions of the work required by the contract. BPA may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.

(g) If this contract requires material submittals (e.g., shop drawings, catalog cuts, certificates of conformance, etc.), the Contractor shall coordinate all such submittals, and review them for accuracy, completeness, and compliance with contract requirements and shall indicate its approval thereon as evidence of such coordination and review. Submittals sent to BPA without evidence of the Contractor's approval may be returned for resubmission. The Contracting Officer's representative (as set forth in Unit 3) will indicate an approval or disapproval of the submittal, and if not approved as submitted, shall indicate BPA's reasons therefor. Any work done before such approval shall be at the Contractor's risk. Approval by the Contracting Officer, by or his or her representative, shall not relieve the Contractor from responsibility for any errors or omissions in such submittals, nor from responsibility for complying with the requirements of this contract, except with respect to variations described and approved in accordance with (h) below.

(h) If submittals show variations from the contract requirements, the Contractor shall describe such variations in writing, separate from the submittal, at the time of submission. The variation description, a copy of the respective submittal and a proposal for its incorporation into the contract shall be sent directly to the Contracting Officer. If the Contracting Officer approves any such variation, the Contracting Officer shall issue an appropriate contract modification, except that, if the variation is minor or does not involve a change in price or in time of performance, a modification need not be issued.

(i) The Contractor shall submit to the Contracting Officer for approval 4 copies (unless otherwise indicated) of all submittals as called for under the various headings of these specifications. Three sets (unless otherwise indicated) of all submittals, will be retained by the Contracting Officer and one set will be returned to the Contractor.

(j) This clause shall be included in all subcontracts at any tier.

(End of clause)

Alternate I (Oct 93)
Upon completing the work under this contract, the Contractor shall furnish a complete reproducible set of all shop drawings as finally approved. These drawings shall show all changes and revisions made up to the time the work is completed and accepted.

(End of Alternate I)

Alternate II (Oct 93)
Upon completing the work under this contract, the Contractor shall furnish _____ sets of prints of all shop drawings as finally approved. These drawings shall show changes and revisions made up to the time the work is completed and accepted.

(End of Alternate II)

Clause 24-10 PRICE DATA SHEET (Sep 98)(BPI 24.5.3.7)

The Contractor shall provide, within 15 calendar days of receipt of a Notice of Award, a breakdown of elements of lump sum prices making up the accepted offer as set forth below. All blanks are to be filled in, and no editing of the provided format is authorized without prior authorization of the Contracting Officer or his or her official representative. Offerors are advised to inform potential subcontractors of this requirement in the event the required detail is greater than what would normally be provided. In the event a potential subcontractor refuses to provide the required detail through the prime Contractor, permission may be requested from the Contracting Officer, or his or her representative, to have data submitted directly to the Contracting Officer. If the Contractor, or subcontractor desires the information to be protected from public view, the data sheets should be clearly labeled as proprietary. Release of the data would be subject to the provisions of the Freedom of Information Act.

Item No. Description (Labor Material Equipment) Unit Qty Unit Cost Cost Total Amount
(CO FILL IN NON DOLLAR INFORMATION)

(End of Clause)

Clause 24-11 WORKING HOURS (Sep 98)(BPI 24.5.3.8)

(a) All sitework (except work during outages which may be required to be performed after normal working hours) shall be performed between 8 AM and 4:30 PM, Monday through Friday. No on-site work shall be permitted outside that workweek or on Federal Holiday observances, except as authorized in writing by the Contracting Officer.

(b) Application for varying working hours shall be submitted sufficiently in advance to enable the Contracting Officer to determine the desirability of allowing such performance, to determine if equitable adjustment to the contract must be made (to reimburse BPA for additional inspection or other costs) and to enable arrangements to be made for inspecting the work during those times.

(End of clause)

Clause 24-12 RADIO INFORMATION (Sep 98)(BPI 24.5.3.9)

(a) Radio/Transmitter Information: The Contractor shall furnish to the Contracting Officer within ten (10) days of contract award the following information in letter form;

(l) BPA contract number for this contract.
(2) Authorization as follows:
"The following information is our communications system authorization and supporting data. We give our permission to the Bonneville Power Administration for use of the frequencies stated below to operate (...FILL IN...) mobile radios/transmitters in conjunction with the communications systems we will have available for the project area."
(3) FCC license number.
(4) Frequency.
(5) Call sign.
(6) Transmitter power.
(7) States and Counties covered by this authorization for this project.
(8) Company name and address.
(9) Name and telephone number of the company communications representative.
(10) Signature and title of authorized company representative and date signed.
(11) Attach a copy of current FCC Frequency Authorization for the project area.

(b) Leased Communication Services: If the successful offeror does not currently have an authorized radio communications system for the project area, the requirements of this section shall be provided through leased services.

(End of Clause)

Clause 24-13 MATERIAL AND WORKMANSHIP (Sep 98)(BPI 24.5.3.10)

(a) All equipment, material, and articles incorporated into the work covered by this contract shall be new and of the most suitable grade for the purpose intended, unless otherwise specifically provided in this contract. Use of sustainable materials for the manufacture of such products is encouraged. Equipment, material, or articles specified by trade name, make, or catalog number, shall be provided. Equivalent items are not acceptable unless specifically authorized in the specification.

(b) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may require, in writing, that the Contractor remove from the work any employee the Contracting Officer deems incompetent, unsafe, or otherwise objectionable.

(End of clause)

Clause 24-14 SUPERINTENDENCE BY THE CONTRACTOR (Jul 13)(BPI 24.5.3.11)

(a) At all times during performance of this contract, and until the work is completed and accepted, the Contractor shall directly superintend the work or assign and have on the worksite a competent superintendent who is satisfactory to the Contracting Officer and has authority to act for the Contractor.

(b) If the Contractor's crew consists primarily of individuals whose primary language is other than English, the superintendent must be able to communicate effectively and efficiently in the English language and the language(s) of the crew. In addition, there shall be at least one other person on the crew who is fluent in both English and the primary language of the crew.

(End of clause)

Clause 24-15 PERMITS AND RESPONSIBILITIES (Sep 98)(BPI 24.5.3.12)

The Contractor shall, without additional expense to BPA, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, state, and municipal laws, codes, and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence, and shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. The Contractor shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

(End of clause)

Clause 24-16 OTHER CONTRACTS (Sep 98)(BPI 24.5.3.13)

BPA may undertake or award other contracts for additional work, or may utilize in-house construction forces, at or near the site of the work. The Contractor shall fully cooperate with such other contractors and BPA employees, and carefully adapt scheduling and performance of the work under this contract to accommodate simultaneous performance, heeding any direction that may be provided by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractors or by BPA employees.

(End of clause)

Clause 24-17 OPERATIONS AND STORAGE AREAS (Sep 98)(BPI 24.5.3.14)

(a) The Contractor shall confine all operations (including storage of materials) on BPA premises to areas authorized or approved by the Contracting Officer's Technical Representative or Field Inspector.

(b) Temporary buildings (e.g., storage sheds, shops, offices) and utilities may be erected by the Contractor only with the approval of the Contracting Officer, and shall be built with labor and materials furnished by the Contractor without expense to BPA. The temporary buildings and utilities shall remain the property of the Contractor and shall be removed by the Contractor at its expense upon completion of the work. With the written consent of the Contracting Officer, the buildings and utilities may be abandoned and need not be removed.

(End of clause)

Clause 24-18 USE AND POSSESSION PRIOR TO COMPLETION (Sep 98)(BPI 24.5.3.15)

(a) BPA shall have the right to take possession of or use any completed or partially completed part of the work. Before taking possession of or using any work, the Contracting Officer shall furnish the Contractor a list of items of work remaining to be performed or corrected on those portions of the work that BPA intends to take possession of or use. However, failure of the Contracting Officer to list any item of work shall not relieve the Contractor of responsibility for complying with the terms of the contract. BPA's possession or use shall not be deemed an acceptance of any work under the contract.

(b) While BPA has such possession or use, the Contractor shall be relieved of the responsibility for the loss or damage to the work resulting from BPA's possession or use, notwithstanding the terms of the clause in this contract entitled "Permits and Responsibilities". If prior possession or use by BPA delays the progress of the work or causes additional expense to the Contractor, an equitable adjustment will be made in the contract price or the time of completion and the contract will be modified in writing accordingly.

(End of clause)

Clause 24-19 CLEANING UP (Sep 98)(BPI 24.5.3.16)

(a) The Contractor shall at all times keep the work area, including storage areas, free from accumulations of waste materials. Before completing the work, the Contractor shall remove from the work and premises any rubbish, tools, scaffolding, equipment, and materials that are not the property of BPA. Upon completing the work, the Contractor shall leave the work area in a clean, neat, and orderly condition satisfactory to the Contracting Officer.

(b) Unless specifically set forth in the contract, the Contractor shall not burn any material on site, on the right-of-way or on the access roads to the sites. All material and debris shall be hauled to an appropriate disposal site.

(End of clause)

Clause 24-20 AVAILABILITY AND USE OF UTILITY SERVICES (Sep 98)(BPI 24.5.3.17)

(a) BPA shall make all reasonable required amounts of utilities available to the Contractor from existing outlets and supplies, as specified in the contract. Unless otherwise provided in the contract specifications, utilities will be furnished without charge. The Contractor shall carefully conserve any utilities furnished without charge.

(b) The Contractor, at its expense and in a workmanlike manner satisfactory to the BPA, shall install and maintain all necessary temporary connections and distribution lines, and all meters required to measure the amount of each utility used. Prior to final acceptance of the work by BPA, the Contractor shall remove all the temporary connections, distribution lines, meters, and associated paraphernalia.

(End of clause)

Clause 24-21 ROAD MAINTENANCE (Sep 98)(BPI 24.5.3.18)

The Contractor shall maintain all roads used by it, and upon completion of the job shall leave them in as good a condition as when first used. A road grading machine - not a bulldozer - shall be used for maintenance and final grading. In no event shall the Contractor interfere with the property owner's use of roads existing prior to the Contractor's entry.

(End of clause)

Clause 24-22 USE OF LAND FOR STORAGE AND OFFICES (Sep 98)(BPI 24.5.3.19)

(a) Right-of-Way:
(1) Use of land for storage and offices is restricted to the subject line right-of-way during the contract period, subject to the approval of the Contracting Officer. Campsites are prohibited.
(2) Adjacent right-of-way shall not be used except for access over and along existing roads and necessary extensions.

(b) Private Land:
(1) The Contractor shall not use private land for contract purposes without prior signed agreement from the landowner. The agreement shall include the following information:
(A) Name of landowner.
(B) Location of land.
(C) Purpose, terms and duration of agreement.
(D) Signatures of landowners and Contractor and dates signed.
(2) A signed copy of the agreement shall be furnished to the Contracting Officer prior to use of such land.
(3) The Contractor shall assume all liability for damages and interference with any part of the contract or other BPA work due to such use of private land.

(End of clause)

Clause 24-23 USE OF EXPLOSIVES (Sep 98)(BPI 24.5.3.20)

(a) Precautions:
(1) The Contractor shall use the utmost care to prevent danger to life and to prevent damage to property beyond the blast area. Failure to observe necessary precautions shall be grounds for suspending the work. The Contractor shall take necessary measures such as blasting mats to prevent rocks and debris from being thrown onto cultivated pasture lands, recreational areas, and other sensitive areas.
(2) The use of electric blasting caps is prohibited near energized power lines. Individual charges shall be detonated by means of approved detonating safety fuse cords.
(3) All exploders, fuses, and explosives shall be transported, stored, and used in compliance with applicable laws and regulations, including those prescribed by local agencies.

(b) Warning Lights: The Contractor shall furnish and use a flashing high intensity warning light at each blasting site. The light shall be placed where it will be visible from low flying aircraft in all directions. The light shall be turned on about 5 minutes before, and remain on during the blasting. Each light shall be enclosed in a red lens, produce one million candle power, be visible vertically and horizontally, and flash at about 80, but not more than 130 times a minute.

(c) Fire Danger: The following shall apply to blasting when a danger of fire is present:
(1) The use of fuse and caps is prohibited.
(2) The Contracting Officer may stop blasting during periods of high fire danger.
(3) When the relative humidity is below 50 percent, a watchman shall remain at each blasting site for at least one hour after blasting.

(End of clause)

Clause 24-24 CONTRACTOR'S DAILY REPORT (Sep 98)(BPI 24.5.3.21)

The Contractor is required to submit a "Daily Report to Inspector," BPA F6410.11. The forms shall be completed daily and delivered to the designated BPA Contracting Officer's Technical Representative or Field Inspector. Information to be reported on the forms includes, but is not limited to: workers by classification, the move-on and move-off of construction equipment, materials and equipment delivered to the site, inspections and tests performed, and total cumulative hours worked.

(End of clause)

Clause 24-25 FIELD CONTRACT MODIFICATIONS (Sep 98)(BPI 24.5.3.22)

(a) The purpose of this clause is to establish a procedure whereby one contract modification will be used both to direct field changes of the type specified in the changes clause herein and to settle any question of equitable adjustments that might arise. This procedure shall apply only to those changes having less than $ *___ impact to the contract price and 7 calendar days or less time extension. (* CO fill in amount)

(b) When either party desires a change which falls within the category of changes defined in paragraph (a), a field modification form shall be executed by both parties which shall constitute a full, complete, and final settlement for the change directed. The BPA individuals, besides the Contracting Officer, authorized to execute such modifications are: Contracting Officer Representative, Contracting Officer's Technical Representative and/or Field Inspector.

(c) The Contractor's job superintendent, or other specified representative, shall be authorized to execute said document on behalf of the Contractor thereby legally binding their company. This person shall be on the job site at all times during performance of the contract.

(End of clause)

Clause 24-26 ORAL MODIFICATION (Sep 98)(BPI 24.5.3.23)

Notwithstanding other provisions herein, only the Contracting Officer is authorized to orally modify or affect the terms of this contract. Contractor response to oral contract changes from any other source is at its own risk of liability.

(End of clause)

Clause 24-27 EQUIPMENT COST ALLOWANCES (SEP 02)(BPI 24.5.3.24)

When equipment costs are a factor in any determination of contract price adjustment pursuant to the Changes clause or any other provision of the contract, such adjustments shall be calculated in accordance with this clause. Chart No. 1, at the end of the clause, summarizes the allowable equipment costs.

(a) Contractor Owned Equipment:

(1) Operated equipment:

(A) For operated equipment, the Total Allowable Cost per hour actually worked will consist of the hourly ownership cost, hourly overhaul cost, and the hourly operating cost (field repair and fuel expense) listed in the Cost Reference Guide (CRG), published by PRIMEDIA Information Inc. current as of the date the piece(s) of equipment were operated. Adjustments to the CRG listed average figures will not be allowed.

(B) If, for any reason, the exact piece of equipment is not included in the CRG, costs for a similar item may be used, if reasonable. Determination of the appropriate "similar" item will be a joint determination of the Contractor and the Contracting Officer and will be based first on the work application of the piece of equipment and then on the equipment specifications as contained in the CRG.

(C) Costs for specialized equipment not included in the CRG (such as tensioners and pullers used in stringing conductor) will be negotiated with the Contracting Officer. The cost components included in such negotiated costs will be the same as those contained in the CRG rates.

(D) If the equipment is used in excess of forty (40) hours per week, the ownership and overhaul costs will be allowed at fifty percent (50%) of the listed costs for those excess hours. Operating costs will be allowed at the full rate.

(2) Standby Equipment:

(A) For equipment on standby, the Total Allowable Cost will consist of the total of one-half of the hourly ownership cost plus one-half of the hourly overhaul cost listed in the CRG, published by PRIMEDIA Information Inc. current as of the date the piece(s) of equipment were on standby. No operating costs will be allowed. Adjustments from the CRG listed average figures will not be allowed.

(B) If, for any reason, the exact piece of equipment is not included in the CRG, costs for a similar item may be used, if reasonable. Determination of the appropriate "similar" item will be a joint determination of the Contractor and the Contracting Officer, and will be based first on the work application of the piece of equipment and then on the equipment specifications as contained in the CRG.

(C) Standby costs for specialized equipment not included in the CRG (such as tensioners and pullers used in stringing conductor) will be negotiated with the Contracting Officer. The cost components included in such negotiated costs will be the same as those contained in the CRG ownership and overhaul rates.

(D) Payment for equipment placed on standby will be limited to forty (40) hours per week (combined operated and standby hours).

(b) Rented Equipment:

Operated Equipment:

(A) For operated rental equipment, the Total Allowable Cost will consist of the additional actual, reasonable, and allocable rental costs as evidenced by the rental agreement and invoices.

Rental costs will be converted to a “per hour” basis by dividing the rental (invoice) amount by the number of normal contractor working hours during the period of rental (i.e., If working five 8-hour days per week, divide weekly rentals by 40 hours and monthly rentals by 176 hours. If working six 10-hour days per week, divide weekly rentals by 60 hours and monthly rentals by 260 hours.) See attached Chart No. 1 for these examples.

(B) If no operating costs are included in the rental charge, the total operating cost per hour for that piece of equipment, as contained in the CRG, will be allowed. If some operating costs are included in the rental charge, duplicated charges will be deleted from the CRG-listed operating cost. In any case, the total operating cost shall not exceed the CRG amount.

(C) Unless additional actual, reasonable, and allocable rental costs are incurred, payment for hours in excess of the normal contractor working hours per day will be limited to operating costs only.

(2) Standby Equipment:
(A) For rented equipment on standby, the Total Allowable Cost will consist of the additional actual, reasonable, and allocable rental costs as evidenced by the rental agreement and invoices. No operating costs will be allowed unless they are included in the original rental agreement amount and actually incurred by the Contractor.
(B) Payment for rental equipment placed on standby will be limited to normal contractor working hours.

(c) Intra-Company Rentals:

Costs of equipment rented from any division, subsidiary, or organization under common control of the Contractor shall be allowable to the extent that they do not exceed the CRG hourly ownership and overhaul costs. Hourly operating costs will be allowed, subject to the same provisions as contained in paragraph (b)(1)(B) above.

(d) Equipment Identification:

Within two weeks after the issuance of the Notice to Proceed, the Contractor shall furnish the Contracting Officer with a master list of all contractor-owned and rented equipment initially assigned to the project. The list shall include the manufacturer, year of manufacture, equipment model, rating or capacity, and other information pertinent to proper identification. The manufacturer's identification plates will be used to determine ratings or capacities and model designations whenever possible. The list shall be updated periodically as new equipment is employed on the contract work.

(e) Elimination of Duplicate Charges:

The Contractor shall review all equipment costs that are included in the cost allowances provided by the CRG or are negotiated with the Contracting Officer and either (a) eliminate them from all other direct and indirect costs charged to the contract and/or the extra work or (b) reduce the allowable cost by that component of cost specified in the CRG or negotiated rate.

(f) Cost Reference Guide Updates

In the event CRG rates are updated during the period of extra work or standby, rates applicable to the days actually involved will be used. The CRG will be deemed to have been updated as of the first day of the month of the revision. For cost contracts, the costs allowed as of the first day the equipment is assigned to the project will be maintained throughout the term of the contract.

(g) Condition of Equipment:

Rates determined in accordance with this clause are for equipment of modern design, in sound workable condition, and used in the manner originally intended. Payment for equipment not meeting these criteria will be at rates negotiated with the Contracting Officer.

Chart No. 1 -- Summary of Allowable Costs

	Normal Working Hours	Excess Working Hours	Standby Hours
Owned Equipment	Ownership Cost plus Overhaul Cost plus Operating Costs	1/2 Ownership Cost plus 1/2 Overhaul Cost plus Operating Costs	1/2 Ownership Cost plus 1/2 Overhaul Cost, but No Operating Costs
Rented Equipment	Hourly Rental * plus Operating Costs	Operating Costs Only	Hourly Rental * Only

* Hourly Rental Cost = [Invoice Cost] / [Normal Contractor Working Hours in the Period]

Examples

	Working five 8-hour days	Working six 10-hour days
Weekly Rental	Divide by 40 hours	Divide by 60 hours
Monthly Rental	Divide by 176 hours	Divide by 260 hours

(End of clause)

PART 25 INTERGOVERNMENTAL CONTRACTS

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25.1 GENERAL.

(a) ***INFORMATION:*** As used in this part –

(1) "Intergovernmental contract" (IGC) means a contract between BPA and one of the following organizations: State or local governments, publicly-owned colleges or universities, federally-recognized Indian tribes, special districts (PUD's, water districts, school districts), or other federal agencies, both within the Department of Energy and other departments.

(2) "Memorandum of Understanding" (MOU) means a written agreement broadly stating basic understandings of tasks and describing a method for performing these tasks between BPA and another governmental entity. It is a mechanism for coordinating the activities between BPA and another organization. An MOU is not a binding contract. It cannot be used to obligate or commit funds, cannot obligate or require performance, nor is it used to transfer funds from one agency to another. BPA's affected program offices prepare MOUs.

(3) "Contractor-agency" means the entity or organization with which BPA is contracting utilizing an IGC.

(b) ***INFORMATON:***

(1) An IGC is distinguished from an MOU and a financial assistance agreement in that BPA is acquiring goods or services for its own use, rather than to document an understanding or to support a broad public purpose.

(2) The consideration and documentation of certain types of information makes sense when awarding IGCs. A period of performance along with any renewal permissions; and a statement of the goods or services being contracted for, along with a detailed schedule, reporting requirements and any project review/presentation requirements; and payment/billing requirements should be included if appropriate.

(c) ***POLICY:***

(1) Because public agencies are already accountable to the public and are subject to similar statutes and regulations, fewer contract clauses are necessary in IGCs than for most other types of contracts. Although the policies prescribed in other Parts of the BPI may be applicable to IGCs, the clauses prescribed for use by other Parts of the BPI are not required for use in IGCs unless specifically prescribed in this Part. (2) An IGC shall not be used to document MOUs or financial assistance agreements.

(d) ***PROCEDURE:*** IGCs will be documented using the BES system-generated form for Intergovernmental Contracts.

25.1.1 Clause Usage Prescriptions.

(a) The CO shall include the following clauses in all IGCs:

(1) Clause 3-2, Organizational Conflicts of Interest, in contracts with non-Federal Contractor-agencies exceeding $100,000. See BPI 3.4 for additional information;

(2) Clause 3-3, Certification, Disclosure and Limitation Regarding Payment to Influence Certain Federal Transactions, requests for proposals for IGCs with non Federal contractor-agencies over $150,000;

(3) Clause 14-2, Contract Administration Representatives;

(4) Clause 23-3, Unauthorized Reproduction or Use of Computer Software;

(5) Clause 25-7, Classified Information - Federal contractor-agencies only

(6) Termination Clauses – The CO shall choose an appropriate termination clause from the following:

(a) Clauses 25-12 Termination for Convenience by Either Party – Federal Agencies;

(b) Clause 25-13 Termination by Mutual Consent;

(c) Clause 20-1 Termination for the Convenience of Either Party;

(d) Clause 20-2 Termination for Convenience of BPA.

(e) Clause 20-3 Termination for Default, is not generally included in IGCs, but is not prohibited.

(7) Clause 3-4 Contractor Policy to Ban Text Messaging while Driving, except IGCs with other federal agencies.

(8) Clause 11-7 Subcontracting with Debarred or Suspended Entities, except IGCs with other federal agencies.

(9) Clause 10-18 Employment Eligibility Verification.

(b) The CO shall include the following clauses in IGCs, if applicable:

(1) Clause 5-1, Privacy Act, if the IGC is with a nonfederal contractor-agency and it involves the design, development, or operation of a system of records on individuals to accomplish a BPA function. (See BPI 5.1.)

(2) Clause 10-19 Equal Opportunity for Veterans, in IGCs with State or local government if the contract value is $100,000 or greater. Clause 10-19 shall not be included in IGCs with federal agencies, foreign entities, or Indian Tribal governments. (See BPI 10.8)

(3) Clause 16-3, Insurance, or a similar clause if the IGC is with a non-Federal contractor- agency and insurance may be necessary to protect BPA.

(4) Clause 17-2.1, or 17-2.2, Patent Rights, if patentable items are a possible outcome during the performance of the contract; (See BPI 17.4.1.1)

(5) Clause 17-5.1 or 17-5.2, Rights in Data, if copyright data or software may be developed or generated during the performance of the contract; (See BPI 17.5.4.1.1; 17.5.4.2)

(6) Clause 17-10, Commercial Software-Contractor License or 17-6 Commercial Software- No Contractor License, if proprietary computer software may be purchased; (See BPI 17.2.1.1)

(7) Clause 25-5, Audit - Intergovernmental Contracts Audit -- Non-Federal contractor if the contractor is subject to the Single Audit Act, as amended, (OMB Circular A-133) for receiving more than $500,000 in Federal funding; (See BFAI Part 4.10).

(8) Clause 25-6, Socio-Economic Requirements, or a similar clause if the IGC is with a non-Federal contractor-agency and it exceeds $100,000;
(9) Clause 25-9, Endangered Species Act Requirements, if the IGC supports the BPA Fish & Wildlife program.

25.2 PAYMENT.

(a) ***INFORMATION:***

(1) Payment types. IGC payment types may be either firm fixed price or cost reimbursement. The basis of payment for IGCs shall generally be made in accordance with the priority of BPI 22.1. Firm fixed price IGC payments to contractor-agencies, except Federal, are subject to the Prompt Payment requirements of 22.2, including interest penalty to be paid by BPA for late payment. Cost reimbursement type payment and other contract financing payment methods, as defined in 22.2(c) (such as advance payment), are not subject to the prompt payment requirements described in 22.2.
(2) Incurred costs necessary to the performance of the work by a contractor-agency are considered to be allowable for cost reimbursement purposes subject to the provisions of the applicable cost standards for that entity (codified at 2 CFR Parts 220, 225, etc.). Such costs include direct and indirect costs.
(3) Indirect costs are subject to the limitations of the rates negotiated by the cognizant audit office for the contractor-agency. If no such cognizant audit office has been designated for a specific contractor-agency, then BPA assumes cognizance and negotiates the needed indirect rate(s). See BPI 14.17.
(4) Interest on advance payments. Generally an IGC contractor-agency is required to pay BPA daily interest on the amount of advance payments the contractor-agency receives in excess of its current needs, unless waived by the HCA, as per 22.1.4.3. However, federally-recognized Indian tribes, Federal, and State government contractor-agencies and instrumentalities thereof are not required to repay interest earned on advance payments, as described in 22.1.4.3(a).

(b) ***POLICY:***

(1) Advance payment. As discussed in BPI 22.1.4.1, advance payment must be approved by the HCA, except advance payment to Federal contractor-agencies [see 22.1.4.1(g)]. Advance payment to IGC contractor-agencies, other than Federal, require the prior approval of the CO's purchasing performance manager [see 22.1.4.1(h)].
(2) Reimbursing payments. IGCs between BPA and other Federal agencies are not covered by specific cost principles. In order to establish a basis for equitably assigning costs to BPA projects, the established accounting standards of that agency will be used as the basis of reimbursing costs.

25.2.1 Clause Usage Prescriptions.

PROCEDURE:

(a) For payment in arrears:

(1) The CO shall include a clause similar to Clause 25-2 Payment in Arrears in fixed price IGCs - adding paragraphs (b) and (c) of Alternate I for cost reimbursement IGCs with non-Federal contractor-agencies. The CO shall substitute paragraph (c) of Alternate II for cost reimbursement IGCs with Federal contractor agencies. The CO shall consult with the program or project office to identify the need for additional specific provisions pertaining to invoice data, receipt, and processing.
(2) The CO shall include a clause similar to Clause 22-12 Payment in firm fixed price IGCs with non-Federal contractor-agencies (i.e., subject to the Prompt Payment requirements of 22.2).

(b) For payment in advance:

(1) The CO shall include Clause 25-3 Advance Payments and Financial Reports in IGCs with other than federally-recognized Indian tribes or Federal or State government contractor-agencies and instrumentalities thereof. This clause provides for advances, as per 22.1.4.1, to cover the contractor-agency's next 30 days contract performance expenses and requires accumulated interest on excess

advances to be repaid to BPA. The CO may modify the 30 day frequency of advances in paragraph (a) to provide for advances of less than 30 days (see 22.1.4.4). If the CO wants to limit the total value of advance payments, add a paragraph to the clause stating the limits of advance funding.
(2) The CO shall insert the base clause, but delete paragraphs (f) and (g) and substitute paragraph (f) from Alternative I in IGCs with federally-recognized Indian tribes or Federal or State government contractor-agencies and instrumentalities thereof. This provides for advances to cover the next 30 days and waives the repayment to BPA of interest accumulated on advances in excess of the contractor-agency's current needs. The CO may modify the 30 day frequency of advances in paragraph (a) to provide for advances of less than 30 days (see 22.1.4.4).

(c) In addition, the CO shall include the following payment clauses in IGCs, <u>if applicable</u>:
(1) Clause 22-6 Predetermined Final Indirect Cost Rates; (See BPI 22.1.3) if t
(2) Clause 22-7 Contract Ceiling Limitation Cost Limitations – if the IGC is being awarded on a cost reimbursement or time-and-materials basis, (See BPI 22.1.3)
(3) Clause 22-20 Electronic Funds Transfer Payment in IGCs if the contractor will receive EFT payments; (See BPI 22.6.2)

25.3 CONSTRUCTION AND QUALITY ASSURANCE.

POLICY:

(a) The contractor-agency is responsible for quality. BPA is not obligated to pay for the cost of correcting work (including work performed under cost reimbursement contracts) that does not meet the requirements of the contract.

(b) IGCs providing for the use of BPA funds for construction of public works are subject to the requirements of the Davis-Bacon Act and related regulations. Such IGCs shall contain the clauses required by BPI Part 10.

25.3.1 Clause Usage Prescriptions.

PROCEDURE:

(a) Specifications or statements of work shall clearly state the standards of acceptance by which the contractor-agency's work can be measured. The CO may include a clause similar to Clause 18-4, Inspection – Services and Construction, in IGCs. Withholding of payment for work not accepted by BPA shall be coordinated through and approved by the Contracting Officer.

(b) In addition, the CO shall include the following construction and quality assurance clauses in IGCs, <u>if applicable</u>:
(1) Clause 14-14, Stop Work Order; (See BPI 14.12.1), if suspension of work might be required.
(2) Clause 15-2 Safety and Health, or similar, if construction and/or other outdoor services are to be performed. (See BPI 15.2.1)

25.4 DISPUTES.

***POLICY*:** Any dispute between BPA and another federal agency, resulting from actions under an IGC awarded in accordance with BPI Part 25, that cannot be reasonably resolved through regular communications and negotiations shall be addressed using the disputes resolution process.

25.4.1 Clause Usage Prescriptions.

(a) The CO shall include the following disputes clauses in IGCs, <u>if applicable</u>:
(1) Clause 21-2 Disputes, in IGCs with non-federal entities if it may be useful to protect both parties' interests; (See BPI 21.3.12)

(2) Clause 21-4 Release of Claims, in IGCs if a release of claims may be necessary; (See BPI 21.3.10.1)
(3) Clause 21-5 Applicable Law; use Clause 25-10 Applicable Law-State of Idaho in IGCs with the State of Idaho; (See BPI 21.3.12)
(4) Clause 25-11 Disputes Resolution Process - Federal Agencies if this procedural clarification may be useful to protect both parties' interests;

(b) The CO shall also include clauses that address the following topics, if appropriate to the IGC subject matter:
(1) Changes - The CO shall include a clause similar to that at 25-4 Changes, in IGCs when provisions for changes to the work statement, and changes to the budget shall be defined.
(2) Property - The CO shall include a clause similar to Clause 19-1, BPA Furnished/Contractor-Acquired Property, in IGCs where property is furnished or purchased. Clause 19-2, BPA Property Furnished As-Is, where property is furnished in an "as is" condition; (See BPI 19.7.1). The CO shall also include a clause similar to that at 19-4, BPA Property to be transferred to the Contractor, when BPA property will be transferred to the contractor-agency;
(3) Key Personnel – The CO shall use a clause similar to Clause 23-2, Key Personnel, in IGCs where key personnel are named in the contract; (See BPI 23.1.6)
(4) Publications/Presentations – The CO shall use a clause similar to Clause 25-8, Publications/Presentations; in IGCs if publications or presentations are anticipated;

25.50 TEXT OF CLAUSES

Part 25 directs/suggests the use of clauses found in various parts of the BPI. The following clauses are specific to Intergovernmental Contracts and are found only in BPI Part 25.

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Clause 25-1 RESERVED.

Clause 25-2 PAYMENT IN ARREARS (Sep 04)(BPI 25.2.1)

(a) The contractor-agency shall submit invoices_____(specify frequency) for work performed, to:

Bonneville Power Administration
(CO Fill-in) Attention
(CO Fill-in) Street Address
(CO Fill-in) City, State, Zip

A proper invoice shall include the following information:

1. Contractor name
2. Contractor address
3. Invoice date
4. BPA contract number
5. Contractor invoice number
6. Invoice billing period (e.g., for work performed June 1 – June 30)
7. Shipping terms, if applicable
8. Payment terms (e.g., Net 30)
9. Contact name, title and telephone number
10. Remittance address (required only for contractors not using EFT payment procedures)
11. For Fixed price contracts: Description of item(s) or service(s), unit price, quantity, and extended price.

(End of clause)

Alternate I (Sep 02)

(b) The contractor-agency will supply an itemized listing of expenditures for each budgetary line item set forth in the approved budget, showing as a minimum:

(1) Salaries (including personnel and the total number of direct labor hours expended);
(2) Travel and transportation (including per diem);
(3) Non expendable equipment and materials (greater than $10,000 per item) – attach supporting documentation, including description, date of purchase, purchase cost, model number, and serial number;
(4) Expendable equipment and material (sensitive in nature);
(5) Operations and maintenance (including computer services and publications);
(6) Overhead;
(7) The currently approved budget; and
(8) Cumulative expenditures to date

(c) Non-itemized and/or incomplete billings will be retained for payment processing until correct information has been supplied by the contractor-agency. Allowable costs shall be determined in accordance with the cost principles of 2 CFR _____and are subject to the limitation of the award ceiling.

(End of Alternate I)

Alternate II (Sep 04)

(c) Non-itemized and/or incomplete billings will be detained for payment processing until correct information has been supplied by the contractor-agency. Costs under this cost reimbursement contract will be accumulated and charged to BPA in accordance with the established accounting standards of the contractor-agency and are limited to those deemed reasonable and allocable to this contract. Payments will not exceed the ceiling of the award.

(End of Alternate II)

Clause 25-3 ADVANCE PAYMENTS AND FINANCIAL REPORTS (Nov 08)(BPI 25.2.1)

(a) Requirements for payment. Advance payments will be made under this contract by electronic funds transfer upon submission by the Contractor-agency and approval by the CO of a written request containing:

1 Contract number,
2. Dollar amount of advance payment requested,
3. Period of time covered by advance payment request, and
4. Signature of Technical or Administrative contact person listed on the signature page of the award document.

Submit request for advance payment to:

Bonneville Power Administration
(CO Fill-in) Attention Line
(CO Fill-in) Street Address
(CO Fill-in) City, State, Zip

The contractor-agency is authorized to request BPA funds for contract performance in amounts needed to cover its own disbursements of cash in the next 30 days. The contractor-agency shall report cash disbursements and balances as required by the BPA billing office. The contractor-agency shall apply terms similar to this clause to any advance payments to subcontractors.

(b) Use of funds. Advances may only be used to pay for properly allocable, allowable, and reasonable costs for direct materials, direct labor, and indirect costs. Advances for other items require approval in writing by the CO. Allowable costs shall be determined in accordance with the cost principles of 2 CFR _____ (CO fill in for non-Federal IGCs, or delete this sentence from Federal IGCs.)

(c) Repayment to BPA. Whenever requested by the CO, the Contractor-agency shall repay to BPA any part of unspent advance payments considered to exceed the Contractor-agency's current requirements.

(d) Maximum payment. When the sum of all unspent advance payments, unpaid interest charges, and other payments exceed _____ (insert percentage) percent of the contract price, BPA shall withhold further payments to the Contractor-agency. On completion or termination of the contract, BPA shall deduct from the amount due to the Contractor-agency all unliquidated advance payments and any interest charges payable. If previous payments to the Contractor-agency exceed the amount due, the excess amount shall be immediately repaid to BPA.

(e) Termination of advance payments. The CO may, by written notice to the contractor-agency, withhold further advance payments on this contract at any time the CO determines the Contractor-agency is not adequately performing.

(f) Interest Required. The contractor-agency shall pay interest to BPA on advance payments received by the contractor-agency in excess of the contractor-agency's current needs. The interest will be paid at

the higher of either the Department of Treasury's current value of funds rate or the BPA cost of money. Interest charges shall be deducted from payments, other than advance payments, due the contractor-agency.

(g) Interest Charged to Subcontractors. The Contractor-agency shall charge interest on advance payments to subcontractors and credit the interest to BPA. Interest need not be charged on advance payments to nonprofit educational or research subcontractors for experimental, developmental or research work.

(h) Purchase of property. If this contract authorizes the purchase of property, the contractor-agency shall submit supporting documentation whenever non-expendable equipment (greater than $10,000 per item) equipment or materials are purchased. Include item description, model number, serial number, date of purchase, and purchase cost.

(i) The contractor-agency will supply, at least quarterly, an itemized listing of expenditures for each budgetary line item set forth in the approved budget, showing as a minimum:

(1) Salaries (including personnel and the total number of direct labor hours expended);
(2) Travel and transportation (including per diem);
(3) Non expendable equipment and materials (greater than $10,000 per item) – attach supporting documentation, including description, date of purchase, purchase cost, model number, and serial number;
(4) Expendable equipment and material (sensitive in nature);
(5) Operations and maintenance (including computer services and publications);
(6) Overhead;
(7) The currently approved budget; and
(8) Cumulative expenditures to date

(j) The contractor-agency may submit items 6-8 above on form SF-269A, Financial Status Report, if it is more convenient to do so.

(End of Clause)

Alternate I (Sep 98)

(f) Interest. No interest shall be charged to the contractor-agency for advance payments except for interest charged during a period of default.

(End of Alternate I)

Clause 25-4 CHANGES (Sep 98)(BPI 25.4.1)

Any changes in the project objectives, scope, or key personnel, including any proposed transfer of expenditures between all approved budget line items above 5% of the contract total must be approved by the Contracting Officer. All such changes must be submitted in writing through the Contracting Officer's Technical Representative prior to initiating the change.

(End of clause)

Clause 25-5 AUDIT – INTERGOVERNMENTAL CONTRACT (Nov 08)(BPI 25.1.1)

(a) The contractor-agency shall maintain accounting procedures and practices sufficient to reflect properly all costs claimed to have been incurred in performing this agreement. The Contracting Officer, or representatives of the Contracting Officer, shall have the right to examine books, records, documents and other evidence supporting such claimed costs at all reasonable times at the agency's facilities used in performing this agreement and other locations where records pertaining to this agreement are maintained. Such records shall be retained and made available for examination until 3 years after the budget year in which they were created.

(b) The contractor-agency shall comply with the provisions of OMB Circular A-133. The contractor-agency shall apply provisions of those circulars concerning program levels requiring audits, audit scope, and determinations of this agreement as if it was a Federal assistance program. If an audit is required, a copy of the audit report shall be sent to the BPA Internal Audit Staff, Mail Stop DN-7, Bonneville Power Administration, P.O. Box 3621, Portland, OR 97208, and other distribution of the report as required by the circular.

(End of clause)

Clause 25-6 SOCIO-ECONOMIC REQUIREMENTS (Mar 10)(BPI 25.1.1)

The contractor-agency agrees to comply with the following Federal Laws and Executive Orders:

(a) Laws and Regulations relating to Equal Employment Opportunity
(b) Drug Free Workplace Act of 1988, P.L. 100-690

(End of clause)

Clause 25-7 CLASSIFIED INFORMATION (Sep 98)(BPI 25.1.1)

The work or services to be performed under this contract does not use or generate classified information.

(End of Clause)

Clause 25-8 PUBLICATION/PRESENTATIONS (Sep 04)(BPI 25.4.1)

All news releases, presentations, publications, or signage and related materials shall acknowledge BPA support for project activities. BPA strongly endorses the publication of project results in scientific journals to facilitate public access and to preserve project data. Copies of news articles, publications, etc. shall be provided to the COTR. When appropriate, Project Managers shall prepare manuscripts for submission to journal editors, giving due credit for BPA's financial support. BPA reserves the right to publish all or part of the reports submitted pursuant to the terms of this contract.

(End of clause)

Clause 25-9 ENDANGERED SPECIES ACT REQUIREMENTS (Sep 98)(BPI 25.1.1)

(a) To the extent requested by BPA, the contractor-agency shall:
(1) Participate in consultations and conferences conducted under Section 7 of the Endangered Species Act (ESA), or work related to implementation of Section 7 BiOps, as directed;
(2) Obtain, or assist BPA in obtaining permits under Section 10 of the ESA, and
(3) Provide to BPA all information, materials, documents, records and other assistance requested by BPA for such consultations, conferences, BiOp implementation, or the acquisition of permits.

(b)The contractor-agency shall not proceed with action/activities in this agreement until completion of requisite consultations and conferences and the acquisition of necessary permits. To the extent requested by BPA, the contractor-agency shall comply with conditions identified during consultations and conferences and with the provisions of any requisite permit.

(End of clause)

Clause 25-10 APPLICABLE LAW – STATE OF IDAHO (Sep 09)(BPI 25.4.1)

Irrespective of the place of performance, this contract will be construed and interpreted according to the federal common law of government contracts, as enunciated and applied by federal judicial bodies, boards of contract appeals, and quasi-judicial agencies of the Federal Government.

(End of Clause)

Clause 25-11 DISPUTES RESOLUTION PROCESS – FEDERAL AGENCIES (Dec 12)(BPI 25.4.1)

Should a dispute arise on the interpretation of this contract, the dispute shall be resolved pursuant to the applicable provisions of the Intragovernmental Business Rules delineated in the Treasury Financial Manual, Vol. 1, Bulletin 2011-04, Attachment 1, Section VII (Resolving Intragovernmental Disputes and Major Differences).

(End of Clause)

Clause 25-12 TERMINATION FOR CONVENIENCE BY EITHER PARTY – FEDERAL AGENCIES (Sept 09)(BPI 25.1.1)

Either party may terminate all or any part of this contract at any time upon 30 days written notice to the other party. If the requesting agency cancels the order, the servicing agency authorized to collect costs incurred prior to cancellation of the order plus any termination costs. Termination costs shall be negotiated between the parties.

(End of Clause)

Clause 25-13 TERMINATION BY MUTUAL CONSENT (Sep 09)(25.1.1)

Termination by mutual consent may be initiated by either party, by oral or written means. A termination for mutual consent is effective upon the execution of an agreement, documented on the Asset Suite Modification of Contract form, by the CO and Contractor which identifies the following:

(1) Whether the termination is partial or total.
(2) A description of the terminated portion of the contract, including the item numbers, descriptions, quantity terminated unit and total price of terminated items, and any other explanation to avoid uncertainty or understanding.
(3) The Contractor unconditionally waives any claim against BPA arising under the terminated portion of the contract or by reason of its termination, including, without limitation, all obligations of BPA to make further payments or to carry out any further undertakings under the terminated portion of the contract.
(4) BPA acknowledges that the Contractor has no obligation to perform further work or services or to make further deliveries under the terminated portion of the contract.
(5) Under the terminated portion of the contract, the rights and liabilities of the parties that are reserved.

(End of Clause)

PART 26 PURCHASE CARDS

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26.1 PURCHASE CARD (P-CARD) PROGRAM

INFORMATION:

(a) This part prescribes policies and responsibilities of parties for BPA's Purchase Card (P-Card) Program. The purchase card is a purchasing/payment tool established to streamline the purchasing process for standard, off-the-shelf, commercially available items and services. The program consists of the Agency/Organizational Program Coordinator (A/OPC), Card Holders (CH), Approving Officials (AO), Convenience Check writers, administrative or support staff, and supervisors of CHs and AOs.

(b) BPA maintains a contractual relationship with a financial institution for issuing the purchase cards and servicing these accounts.

(c) The authority to use a BPA Purchase Card is delegated from the HCA to the Card Holder through the application, training, and purchase card issuance process. A Certificate of Appointment as described in Part 2 of this Instruction is not required.

26.2 DEFINITIONS

"Agency/Organizational Program Coordinator (A/OPC), also known as and hereafter referred to as the P-Card Program Manager, is the person responsible for managing the P-Card Program for an organization.

"Approving Official (AO)" is the person who has primary responsibility for ensuring the Card Holder has used the P-Card in accordance with this policy and procedures in the P-Card Manual. The AO certifies the CH's monthly statement and approves the accounting via the agency's financial system.

"Card Holder (CH)" is a person with authority delegated by the HCA (via the P-Card Program Manager) to make off-the-shelf purchases of supplies and services with a Purchase Card (P-Card).

"Convenience Check" is a check (also known as a third-party draft) written by a Card Holder. It is used in lieu of the purchase card to complete a transaction with a payee/vendor who cannot or will not accept or process a P-Card transaction. Convenience checks are used infrequently at BPA, and only by named personnel approved by the Chief Certifying Officer in Finance.

"Final Pay Clearance" is the form and process used to ensure that the employee has returned BPA property prior to their leaving. For the P-Card Program, this means cancellation of the P-Card and receipt of all certified statements.

"Non-Emergency Field Purchases" are purchases needed to complete assigned field projects that would be delayed if the purchase is not executed immediately.

"P-Card Manual" is the manual issued by Supply Chain Services that contains operational guidance for all agency personnel who have a role in P-Card transactions. This manual is prepared by the P-Card Program Manager.

"P-Card Program Manager" is the same as the A/OPC.

"Personal-Use Items" are items that are solely of benefit to individual BPA employees. A specific listing of prohibited purchases and vendors may be found in the P-Card Manual.

"Purchase Card", also known as P-Card, is the credit card issued by a financial institution to named BPA employees, used to execute certain BPA purchases as described in 26.3.

26.3 POLICY

(a) Only standard, off-the-shelf materials and services that are needed to complete jobs or projects necessary to fulfill BPA's mission and are within the delegated P-Card authority and official business shall be made.

(b) Property that is tracked and tagged in accordance with the BPA Asset Management Instructions (AMI), items or material that require testing or inspection, or those items requiring blueprints may not be purchased by P-Card. The AMI is online at this BPA internal website: (http://internal.bpa.gov/Policy/Purchasing%20and%20Property/Pages/AssetManagementInstructions.aspx),

(c) Purchase-Card authority shall be used only by the employee whose name appears on the card and shall not be re-delegated.

(d) Deliberate use of the P-Card for other than authorized purchases shall result in the revocation of the P-Card and removal of the CH from participation in the P-Card Program. These activities may be viewed as committing fraud against the Government and the individual may be subject to disciplinary action and/or criminal penalty under 18 U.S.C.§287.

(e) Personal-use items shall not be purchased with Government funds except as defined in this instruction (see BPI 6.9), the BPA Manual, Safety and Health Program Handbook, specific Personnel Letters, etc. See the P-Card Manual for a complete listing. The Card Holder, and AO if the purchase action has been certified, may be held personally and financially responsible for personal-use items purchased outside of this policy.

(f) Card Holders who fail to properly execute their assigned responsibilities may be held personally liable to BPA for the amount of any unauthorized purchases, and may be subject to disciplinary action and/or criminal penalty under 18 U.S.C.§287.

(g) Each Card Holder shall have a fully trained and qualified Approving Official who is not subject to control or supervision in any way (including as a Team Lead) by the CH.

(h) An Approving Official shall not certify a purchase if it cannot be identified as a legitimate purchase for BPA purposes. When an AO has certified a Card Holder's transaction, the AO becomes responsible for those purchases.

(i) Approving Officials who fail to properly execute their assigned responsibilities may be held personally liable to BPA for the amount of any unauthorized purchases that have been certified, and may be subject to disciplinary action and/or the criminal penalty under 18 U.S.C.§287.

(j) All Card Holders and Approving Officials shall attend the required first time and refresher training and follow all policies and procedures in this Instruction and the P-Card Manual.

(k) Purchase Card training for all new Card Holders and Approving Officials, as scheduled by the P-Card Program Manager, shall contain the following:

(1) CH- and AO-delegated purchasing authority;
(2) CH, AO, and Card Holder's Supervisor responsibilities;
(3) What is considered acceptable documentation for purchases;
(4) How to asses potential risks to BPA associated with the P-Card (examples: suspicious e-mails that request detailed personal or purchase-card account information, using the wrong card for a transaction, add-on charges not agreed to by the purchaser, exempted taxes);
(5) Authorized dollar limits for CHs and Merchant Category Code (MCC) restrictions;
(6) Prohibited and coordinated purchases;
(7) Prohibition of personal-use items;
(8) Property policy;
(9) Formal "Acknowledgement of Responsibilities";
(10) Practice review and reconciliation of a P-Card statement.

(l) All Card Holders and Approving Officials shall also attend refresher training at least every two years as scheduled by the P-Card Program Manager. Refresher training may cover the topics mentioned in (k) above and may also include discussion of results of compliance reviews or audits, real and practice problem scenarios, etc.

(m) BPA will do business with responsible and reputable firms and individuals. Card Holders shall not knowingly place orders with firms or individuals who are delinquent on a Federal debt, or have been debarred or suspended by the Federal Government. The General Services Administration maintains a list of such entities, entitled the Excluded Parties List System (EPLS). If a Card Holder suspects a vendor's status, the Card Holder shall check the list at http://www.sam.gov or contact the P-Card Program Manager before placing the order.

26.4 RESPONSIBILITIES

26.4.1 Head of the Contracting Activity (HCA)

The Head of the Contracting Activity (HCA) shall:

(a) Delegate authority to the P-Card Program Manager to establish Card Holder and Approving Official accounts and make appropriate decisions to effectively manage the P-Card Program;

(b) Develop, publish, and maintain BPA Purchase Card Policy as part of the Bonneville Purchasing Instructions;

(c) Review the P-Card Manual to ensure the procedures are consistent with the policies in this Instruction;

(d) Conduct appropriate P-Card Program reviews to ensure effective management and compliance with current policy and procedures; and

(e) Consult with the P-Card Program Manager before implementing new procurement or property policies that could impact the P-Card Program; and

(f) Review and approve or deny any requests for single purchase limit one-time increase above $10,000 and monthly purchase limit requests above $50,000, as requested by a Card Holder through the P-Card Program Manager.

26.4.2 Supply Chain Services:

The Supply Chain Services organization shall designate the P-Card Program Manager, whose duties and responsibilities shall include management of the P-Card Program.

26.4.3 Agency/Organizational Program Coordinator (A/OPC) or P-Card Program Manager

The Agency/Organizational Program Coordinator (A/OPC), also known as the P-Card Program Manager, shall:

(a) Develop and publish procedures in the P-Card Manual, and implement the P-Card Program in accordance with the following policies and procedures:

(1) Bonneville Purchasing Instructions (BPI);
(2) Asset Management Instructions (AMI);
(3) The award instrument with the financial institution (BPI 26.1(b));
(4) OMB Circular A-123, Appendix B; and
(5) Other relevant internal policies issued by the Finance, Human Capital and Safety Offices;

(b) Educate Card Holders and Approving Officials in lost card procedures;

(c) Conduct P-Card training for all new Card Holders and Approving Officials and refresher training every two years for all CHs and AOs in accordance with this policy;

(d) Determine suitability of Card Holders and Approving Officials;

(e) Provide advice and guidance to Supervisors, Card Holders, Approving Officials, data entry persons, and vendors;

(f) Review P-Card statements to ensure policies and operational procedures are being followed, using data mining tools in addition to hard copy review;

(g) Take appropriate action when policies have not been followed, including immediate cancellation of the card and reporting possible fraud to the HCA, Financial Management and Internal Audit;

(h) Communicate all issues, including resolutions, audit results, and new policies to affected Card Holders, Approving Officials, and Supervisors;

(i) Report Card Holder problems that have not been reconciled to CH's Supervisor and CH's Approving Official;

(j) Maintain Card Holder profiles and Official Files on site for all certified P-Card Statements for six and one quarter years;

(k) Generate all required or requested DOE, BPA Finance, HCA, Supply Chain, Supervisor and Approving Official reports;

(l) Review and approve all Card Holder requests for one-time single purchase limit increase up to $10,000, and forward higher requests to the HCA. Review and approve all Card Holder requests for monthly purchase limit increases up to $50,000, and forward higher requests to the HCA. Oversee execution of all increased authorities for one-time and monthly limit increases and rescission of same when the transaction(s) are completed;

(m) Report to the HCA violations of Card Holder or Approving Official authorities and responsibilities, when the P-Card Program Manager has directed the CH or AO to make a refund payment to BPA or take other action to resolve an erroneous or improper purchase;

(n) Initiate and ensure completion of the Card Holder and Approving Official "Acknowledgement of Responsibilities" form, maintaining copies for the duration of the CH's or AO's term of service; and

(o) Attend all training required to achieve NOMINAL Certification, as defined in BPI Appendix 2-A, Appointment as a BPA Contracting Officer. The P-Card Program Manager shall also complete a minimum of 20 hours of relevant purchasing or purchase card training per year.

26.4.4 Approving Official (AO)

All Approving Officials shall:

(a) Follow all policies and procedures in the "Acknowledgement of Responsibilities," P-Card Manual, Bonneville Purchasing Instructions, BPA Manual, and Asset Management Instructions and ensure their Card Holders do the same;

(b) Sign and date the AO "Acknowledgement of Responsibilities" received during training, and submit to the P-Card Program Manager;

(c) Review statements to ensure all purchases are official and necessary, incidental to the proper execution of BPA's programs and mission, and to check for signs of re-delegation;

(d) Attend initial P-Card Training before becoming an AO and required refresher training;

(e) Understand their responsibility to not certify purchases that cannot be identified or determined to be proper; and

(f) Assist the Supervisor in determining appropriate purchase limits for Card Holders.

26.4.5 Card Holder (CH)

All Card Holders shall:

(a) Ensure that purchases are official and necessary to the proper execution of BPA's programs and mission, and that all policies in the CH "Acknowledgement of Responsibilities," P–Card Manual, and relevant portions of the Bonneville Purchasing Instructions, BPA Manual, Asset Management Instructions; and other relevant policies such as Personnel Letters, Safety and Health Handbook, etc., are followed;

(b) Sign and date the CH "Acknowledgement of Responsibilities" received during training, and submit to the P-Card Program Manager;

(c) Dispute original charges if an agreed-upon credit does not appear on the next statement;

(d) Immediately notify the financial institution and P-Card Program Manager if fraudulent charges appear on their statements;

(e) Promptly reconcile monthly statements, dispute unrecognized or inaccurate purchases or other incorrect charges, enter accounting information into the current purchasing data system, and forward to the Approving Official in accordance with procedure;

(f) Have reasonable assurance that funds are available prior to making purchases;

(g) Never purchase anything that solely benefits an individual employee such as personal clothing or footwear, eye glasses, sleeping rooms, medical services, entertainment, food (except as authorized by the agency recognition program), alcohol, tobacco products, etc.;

(h) Obtain the "best buy" for BPA, asking for Government or Best Customer discounts. When determining which vendor to choose, a CH must consider the total cost of merchandise such as quality, timeliness versus urgency of delivery, quantity, ease of service, warrantees, support and maintenance, standardization, shipping costs, CH's time, etc.;

(i) Attend initial P-Card Training prior to receipt of a P-Card, and prescribed refresher training at least every two years, regardless of when initial training is received;

(j) Inform merchants that they cannot charge the P-Card number until the order is complete and the merchandise has been shipped; and

(k) Never split purchases or allow vendors to split orders to fit within the cardholder's single purchase limit.

26.4.6 Supervisors

Supervisors of Approving Officials and P-Card Holders shall:

(a) Request CHs and AOs via the P-Card application memo in the P-Card Manual;

(b) Consult with AO to ensure purchase limits requested are appropriate for the employee's occupation or organizational business needs;

(c) Ensure the requested AO is within the same major organization, is not under the control or supervision of the CH, and is in a position to question purchases as necessary;

(d) Review P-Card policies and procedures, especially as they relate to prohibited personal-use items and communicate the expectations that both CHs and AOs will follow them;

(e) Support the AO in carrying out the certification function; and

(f) In coordination with the P-Card Program Manager, take the following action for improper purchases as necessary:

(1) Request immediate cancellation of CH account (if not already canceled);
(2) Designate new AO if appropriate;
(3) Require CH to return merchandise for credit as appropriate;
(4) Require CH to pay for improper purchases personally;
(5) Other appropriate disciplinary action of the CH and/or AO as appropriate.

26.4.7 Finance Office

The Finance Office shall:

(a) Review and reconcile the monthly invoice from the financial institution with the total amount of purchase transactions;

(b) Report to the P-Card Program Manager any anomalies or problems discovered during review and reconciliation;

(c) Ensure payments to the financial institution are made in accordance with applicable policy and the award instrument;

(d) Ensure that all rebates offered by the financial institution are calculated correctly;

(e) Approve or disapprove applications for convenience checks and review quarterly convenience check report; and

(f) Determine appropriateness to purchase personal-use items (in coordination with subject matter experts) and maintain a listing of approved personal-use items.

PART 27 EMERGENCY PURCHASES

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27.1 EMERGENCY PURCHASES.

INFORMATION:
(a) BPA has developed and continues to upgrade its business continuity capabilities to prepare for and respond to disruptive events which could impact BPA's operations.

(b)This part prescribes policies and responsibilities of parties for BPA's purchasing activities in the case of a disruptive event that requires deviation from existing purchasing policies to enable timely acquisition of necessary goods and services.

(c) Provisions of this BPI part 27 are effective ONLY when activated during a major disruptive event by those authorized to do so as designated in the 27.3(b) of this part.

27.2 DEFINITIONS.

"Emergency", as used in this subpart, means: an event of significant impact requiring the activation of the agency incident management team. It does not have the same meaning of one-time immediacy for field emergency purchases specified in BPI 2.3.3.1.

"Administrator", as used in the subpart, means the Administrator/CEO of the BPA, or successor according to the line of succession defined in BPAM 20.4, or the on-duty Incident Commander for the agency defined in BPA's Incident Management Plan.

"Incident Commander" means the on-duty Incident Commander as defined in the agency's Incident Management Plan when the agency Incident Management Team is active. The Incident Commander is responsible for directing BPA's response to a disruptive event

"Head of Contracting Activity" or "HCA", as used in this subpart, refers to the individual currently assigned as Purchasing/Property Manager, or the designee in line of succession according to the Purchasing/Property Governance emergency plan.

27.3 POLICY.

(a) When an emergency has been declared, the agency and designated staff shall employ emergency purchasing flexibilities outlined below, as appropriate to the situation.

(b) For this section to be in effect, the BPA Administrator or other individual in direct line of succession, or the Incident Commander, must declare in writing the activation of this emergency purchasing section. The line of succession is specified in BPAM Chapter 20.4.

27.4 RESPONSIBILITIES.

27.4.1 Administrator.

The Administrator, or individual in line of succession during a state of emergency, or the Incident Commander, may:

(a) retain all purchase policy and authority as appropriate;

(b) act as, or appoint, the Incident Commander or other individual who retains purchase policy and authority as the situation warrants; and

(c) grant contracting officer authority and issue warrants in the absence or incapacitation of the HCA or HCA designees.

27.4.2 Head of the Contracting Activity (HCA).

The Head of the Contracting Activity (HCA), or the individual in line of succession, shall:

(a) delegate emergency purchasing authority to named individuals at appropriate levels for the duration of the activation of this emergency purchasing policy. The Delegation must be documented in writing as soon as practicable under the circumstances of the emergency declaration;

(b) rescind the delegations granted under (a) of this subpart when the emergency purchasing authority activation has been rescinded; and.

(c) provide advice and assistance to the Incident Commander regarding purchasing policies and practices that can be modified or waived to meet the agency's emergency needs.

27.4.3 Supply Chain Services.

The Supply Chain Services organization shall follow its own business continuity plans to meet the purchasing needs of the agency. In addition, Supply Chain Services shall:

(a) request additional CO authority necessary to respond to the agency's needs during an emergency and/or disruptive event, from the Administrator, HCA, Incident Commander, or other individual delegated to act in that capacity.

(b) ensure COs use purchasing flexibilities identified below only to the extent necessary.

27.4.4 Supervisors.

Supervisors of individuals appointed as COs during the state of emergency shall:

(a) cooperate with the Administrator, Incident Commander, or HCA to ensure staff are able to carry out the temporary duties of Contract Specialist and execute emergency purchases.

(b) not overrule or interfere with any purchase decisions made by the appointed COs or those provided temporary purchasing authority. All issues shall be presented to the Administrator, Incident Commander, or HCA who has retained the authority over purchase policy and practice.

27.4.5 Finance Office.

The Finance Office may activate the Emergency Cash Procedures.

27.5 RETAINED PURCHASING POLICIES.

The following policies are retained during an emergency.

(1) BPI Part 3 Standards of Conduct and Business Practices, unless suspended as part of the emergency declaration
(2) BPI Part 10.4 Labor Policies for Service Contracts. Purchases of services (including equipment rentals with operators) may not exceed $2500 when purchased using a purchase card or PO None.
(3) BPI Part 10.5 Labor Policies for Construction Contracts. Purchases of construction services may not exceed $2000 when purchased using a purchase card or PO None.

27.6 PURCHASING REQUIREMENTS.
(a) Purchases made under these emergency purchase provisions must be conducted under the policy at BPI 3.1.2, Conduct of Purchasing and Assistance Activities, following the general rule to maintain the integrity of purchasing practices, strictly avoiding any conflict of interest or even the appearance of a conflict of interest in BPA-contractor relationships.

(b) In a declared emergency, contract type, contract pricing, and terms and conditions should reflect the type of response effort required.

(c) Meaningful competition shall be secured as appropriate, considering the particular emergency circumstances and dollar value of the purchase

27.7 USE OF PURCHASE CARDS IN A DECLARED EMERGENCY.
Upon the activation of this BPI emergency purchases section, designated personnel shall contact BPA's purchase card vendor to activate the BPA emergency purchasing account and increase existing named card holders' spend limits.

27.8 SUMMARY OF PURCHASING FLEXIBILITIES.
27.8.1 Authorities.
(a) The Administrator or Incident Commander may grant contracting officer authority and issue warrants in the absence or incapacitation of the HCA.

(b) The Administrator or Incident Commander may act as, or appoint an individual who retains purchase policy responsibility and authority as the situation warrants

(c)The HCA may delegate emergency purchasing authority to named individuals at appropriate levels for the duration of the activation of the emergency purchasing section of the emergency declaration.

27.8.2 Purchase Methods.
(a) Persons with purchasing authority shall use simplified purchase methods as available, including:
(1) place oral orders and document with a contract after the fact or PO NONE (BPI 2.3.3).
(2) use a purchase card to complete transactions,
(3) Quick Response Contracts (BPI 7.2.9), however documentation of competition and written material request, purchase requisition, or contract requisitions may be provided after the fact
(4) use abbreviated purchase terms and conditions, as appropriate to the emergency and the nature of the contract.
(5) Advanced payments normally requiring HCA approval are authorized up to $100,000 without HCA approval, if necessary to obtain goods and services to meet the emergency (BPI Part 22.1.4)
(6) Intergovernmental contracts may be used. (BPI Part 25)

27.8.3 Documentation Requirements under Emergency Purchases.
(a) All documentation must be completed as soon as possible.

(b) Delegations of emergency purchasing authority (BPI 27.8.(c)) must be documented in writing as soon as is practicable under the circumstances of the emergency declaration.

(c) Purchases must be documented to the degree necessary to defend the purchase as necessary to meet the emergency needs of the agency. The length of explanation is less important than the cogency of the rationale for actions taken. This documentation may be reviewed by managers or auditors evaluating the agency's performance in the emergency.

(d) Documentation of oral orders must include: (1) name of person placing order, (2) vendor name, (3) what is to be purchased, (4) quantity, (5) unit price, (6) estimated total cost (including delivery charges, variations in quantity, etc.), (7) delivery location(s) and conditions.

(e) Documentation of purchases made under this section must reference the emergency declaration.

(f) Purchases made with either regular or emergency purchase cards must complete the monthly tasks associated with processing monthly invoices and maintaining proper documentation.

27.8.4 Tests for Reasonability of Emergency Purchases.
(a) Did the agency order an appropriate quantity of supplies given the nature of the emergency?

(b) Was the scope of work appropriate for the emergency?

(c) Did the description of the requirement accurately reflect what BPA needed?

(d) Did the agency possess the authority to make the purchase? If not, why was the purchase made?

(e) Was the product or service one that was appropriately acquired by the agency given the circumstance?

(f) Were prices fair and reasonable, given the circumstances?

(g) Was competition adequate given the emergency?

(h) Did the contractor deliver or furnish what the government ordered?

(i) Was documentation of the purchase appropriate given the emergency?

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28.1 Acquisition of Commercial Items and Services

INFORMATION: This part prescribes policies and procedures unique to the acquisition of commercial items and services as defined in BPI 1.8. It implements Bonneville Power Administration's preference for the acquisition of commercial items by establishing procurement policies more closely resembling those of the commercial marketplace and encouraging the acquisition of commercial items, components and services.

28.1.1 Applicability

POLICY:

(a) This part shall be used for the acquisition of supplies or services that meet the definition of commercial items at BPI 1.8, and applies to contracts as well as subcontracts for the acquisition of commercial items and services.

(b) Contracting Officers shall use the policies in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed elsewhere in the BPI, as appropriate for the particular acquisition.

(c) Contracts for the acquisition of commercial items may be subject to the policies in other parts of the BPI. When a policy in another part of the BPI is inconsistent with a policy in this part, this Part 28 shall take precedence for the acquisition of commercial items.

(d) The definition of a commercial item in BPI 1.8 uses the phrase "purposes other than governmental purposes." These purposes are those that are not unique to a government entity and occur in the commercial marketplace.

(e) COTS items are defined in BPI 1.8. Unless indicated otherwise, all of the policies that apply to commercial items also apply to COTS items. BPI 28.1.3 lists the laws, and modified sections of laws, that are not applicable to COTS items.

(f) This part shall not apply to the acquisition of commercial items purchased using the following methods:
(1) The BPA purchase card;
(2) The imprest fund: or
(3) Directly from another Federal agency.

28.1.2 Commercial Item/Services Policy

28.1.2.1 Contracting Officers shall:

(a) Conduct market research to determine whether commercial items or nondevelopmental items are available that could meet BPA's requirements;

(b) Acquire commercial items or nondevelopmental items when they are available to meet the needs of the agency; and

(c) Require prime contractors and subcontractors at all tiers to incorporate, to the maximum extent practicable, commercial items or nondevelopmental items as components of items supplied to the agency.

28.1.2.2 Contracting Officers shall determine whether an item or service meets the definition of commercial per BPI 1.8.

(a) Whenever possible, logical groupings of items should be identified as "commercial" without conducting an individual technical review of every item. The Contracting Officer retains authority to make a final determination on each item but is not required to examine the commercial item assessment unless there is reason to question it. These items include:

(1) Items for which industry standards are used as the sole procurement document (e.g., American Society for Testing and Materials (ASTM);
(2) Items described by commercial item description (CIDs);
(3) Items with an Acquisition Method suffix Code (AMSC);
(4) Federal Stock Classes (FSC's) that can reasonably be presumed to be commercial (e.g., lumber, specified metals, subsistence, and medical).

(b) Contracting Officer's assessment: Where a Contracting Officer has previously determined that an item meets the commercial item definition and has used commercial item policies and procedures to acquire the item, it is not necessary to repeat a full-scale commercial item assessment for subsequent acquisitions of the same item in similar circumstances. The Contracting Officer is responsible for examining a previous assessment if there is reason to believe that market conditions have changed significantly. Any decision to overturn a previous commercial assessment resulting in a noncommercial procurement must be documented in a memorandum to the official file.

(c) Contractor determination: If a contractor procured an item commercially, and BPA subsequently procures the same item, the Contracting Officer shall consider the item to be commercial.
(d) Agency class determinations: The HCA may designate specific categories or classes of items/services as commercial.

28.1.3 Commercial-Off-The-Shelf (COTS) Items

(a) **INFORMATION:**

(1) COTS items are commercial items that have been sold, leased, or licensed in substantial quantities in the commercial marketplace and that are offered to BPA without modification. The COTS definition does not include services. A product does not have to be a COTS item to meet the commercial item definition. COTS items are a subset of commercial items.
(2) The following laws are not applicable to contracts for the acquisition of COTS items:
(i) 41 U.S.C. 8302, portion of first sentence that reads "substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States," Buy American Act—Supplies, component test.
(ii) 41 U.S.C. 8303, portion of first sentence that reads "substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States," Buy American Act—Construction Materials, component test.
(3) The following laws are not applicable to subcontracts for the acquisition of COTS items:
(i) Subcontracting with Debarred or Suspended Entities (Clause 11-7); and
(ii) Requirement for US Flag Vessels (Clause 14-16).

(b) ***POLICY:***
All of the policies that apply to commercial items apply to COTS items. Additionally, the laws listed in BPI 28.1.3(c), and the components test of the Buy American Act (BPI 28.1.3(b)) are inapplicable or have been modified in their applicability to contracts or subcontracts for the acquisition of COTS items.

28.1.4 Subcontract Requirements

(a) ***INFORMATION:***
"Subcontract" includes a transfer of commercial items between divisions, subsidiaries, or affiliates of the Contractor or subcontractor at any tier.

All requirements should be drafted to require that both prime contractors and subcontractors at all levels incorporate commercial items, to the maximum extent practicable, as components of items supplied to BPA. The prime contractor has the authority and responsibility for determining whether an item to be supplied by a subcontractor is a commercial item. Contractors and subcontractors at all tiers are expected to exercise reasonable business judgment in making such determinations, as with any other subcontracting-related decisions. "Flowdown requirements" are requirements from a prime contractor's contract with BPA that are to be incorporated into the prime's subcontracts.

To extend the benefits of commercial item acquisitions to the subcontractor level, BPA contracts reflect limitations on the applicability of certain laws to the acquisition of commercial items at the subcontractor level, including a transfer of commercial items between divisions, subsidiaries, or affiliates of a contractor or subcontractor.

(b) ***POLICY***:
Contractors are required to flow down requirements as identified in Clause 28-20(d) in the BPA contract to their subcontractors when the commercial item acquisition can occur at a subcontractor level. To the maximum extent practicable, the Contractor shall incorporate, and require its subcontractors at all tiers to incorporate, commercial items or nondevelopmental items as components of items to be supplied under BPA contracts.

(c) ***PROCEDURE:*** The contractor shall flow-down the requirements included in the following clauses to its subcontractors when these clauses are included in the BPA contract for commercial items or services. The flow-down requirements are addressed in Clause 28-20(d) Requirements Unique to Government Contracts.

(1) Comptroller Examination of Records as described in Clause 28-20(c), except the authority of the Inspector General under paragraph (c)(2),does not flow down; and

(2) Those clauses identified in Clause 28-20(d) to the extent required by the clause:

(i) Utilization of Supplier Diversity Program Categories (Clause 8-3), if the subcontract offers further subcontracting opportunities.

(ii) Nondiscrimination and Affirmative Action (Clause 10-1), including Equal Opportunity for Veterans and Affirmative Action for Workers with Disabilities requirements.

(iii) Notification of Employee Rights Under the National Labor Relations Act (Clause 10-6).

(iv) Service Contract Act of 1965 (Clause 10-3).

(v) Employment Eligibility Verification (Clause 10-18), unless subcontracting for commercial or COTS items.

(vi) Equal Opportunity for Veterans (Clause 10-19)

(vii) Employment Reports on Veterans (Clause 10-20)

(viii) Subcontracting with Debarred or Suspended Entities (Clause 11-7), unless subcontracting for COTS items.

28.2 Special Requirements for Acquiring Commercial Items and/or Services

28.2.1 General

INFORMATION: This part identifies special requirements as well as other considerations necessary for proper planning, solicitation, evaluation and award of contracts for commercial items and/or services.

28.2.2 Market Research and Description of Agency Need

INFORMATION:

(a) Market research is an essential element of building an effective strategy for the acquisition of commercial items/services and establishes the foundation for the agency description of need, the solicitation, and the resulting contract. See BPI Part 11, and also BPI Part 6 for guidance on market research and description of agency need.

(b) The description of agency need must contain sufficient detail for potential offerors of commercial items to know which commercial products or services may be suitable to meet BPA's needs. Generally, BPA's statement of need for a commercial item will describe the type of product or service to be acquired and explain how BPA intends to use the product or service in terms of function to be performed, performance requirement or essential physical characteristics. Describing BPA's needs in these terms allows offerors to propose methods that will best meet the needs of BPA.

PROCEDURE:

(c) Contracting Officers shall use the policies unique to the acquisition of commercial items prescribed in this Part in conjunction with the policies and procedures prescribed elsewhere in the BPI for solicitation, evaluation and award, as appropriate for the particular acquisition.

(d) Contracting Officers shall follow the procedures in BPI Part 6 regarding the planning, strategy and requisitioning of BPA's requirements.

(e) When acquiring commercial information technology using Internet Protocol, Contracting Officers shall include the appropriate Internet Protocol compliance requirements in accordance with the IPv6 requirement in OMB Memo M-05-22, dated August 2, 2005.

28.2.2.1 Clause Usage Prescriptions

PROCEDURE: COs shall include Clause 28-23 Internet Protocol Version 6 in solicitations and contracts for commercial acquisitions of IT technology that use Internet Protocol (IP) technology.

28.2.3 Offers

PROCEDURE:

(a) Where technical information is necessary for evaluation of offers, Contracting Officers and program office staff shall, as part of market research, review existing product literature generally available in the industry to determine its adequacy for purposes of evaluation. If adequate, Contracting Officers shall request existing product literature from offerors of commercial items in lieu of unique technical proposals.

(b) Contracting Officers should allow offerors to propose more than one product that will meet a BPA need in response to solicitations for commercial items. The Contracting Officer shall evaluate each product as a separate offer.

28.2.4 Use of Past Performance

(a) ***INFORMATION:*** Per BPI 11.11.1.1(b)(3) and 11.11.1.2(b)(4), past performance should be an important element of every evaluation and contract award for commercial items.

(b) ***PROCEDURE:*** Contracting Officers shall consider past performance data from a wide variety of sources both inside and outside the Federal Government in accordance with the policies and procedures contained in BPI Part 12.5.7 Analysis of Past Performance, as applicable.

28.2.5 Price Reasonableness

(a) ***INFORMATION:*** Price reasonableness is an assessment by the Contracting Officer that the pricing is appropriate for the level of effort or deliverable and the complexity of the activity. Additionally, market conditions and product availability as well as functionality may change from year to year. BPA has the responsibility to its ratepayers to verify price reasonableness for new awards as well as for extensions or renewals. While the Contracting Officer must establish price reasonableness in accordance with BPI 12.5.2, as applicable, the Contracting Officer should be aware of customary commercial practices, terms and conditions when analyzing commercial item prices. Commercial item prices are affected by factors

that include, but are not limited to, speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements. The Contracting Officer must ensure that contract terms, conditions, and prices are commensurate with BPA's need.

(b) ***POLICY:*** Price reasonableness for commercial products and services shall be addressed in the best buy determination as described in BPI 12.8.2.

28.2.6 Evaluation Procedures for Commercial Items

(a) ***INFORMATION:*** For many commercial items, the evaluation factors need not be more detailed than technical capability of the item offered to meet the agency need, price and past performance, if appropriate. Technical capability may be evaluated by how well the proposed products meet BPA's requirement instead of using evaluation subfactors. Solicitations for commercial items do not have to contain subfactors for technical capability when the solicitation adequately describes the item's intended use. A technical evaluation would normally include examination of such things as product literature, product samples (if requested), technical features and warranty provisions. Past performance shall be evaluated in accordance with the procedures in BPI 12.5.7, as applicable.

(b) ***POLICY:***

(1) Offers shall be evaluated using only the evaluation factors contained in the solicitation.

(2) Contracting Officers shall issue the awards for commercial items on the basis of lowest price technically acceptable or tradeoff. Contracting Officers shall select the offer that is most advantageous to BPA based on the evaluation factors identified in the solicitation. Contracting Officers shall fully document the rationale for selection of the successful offeror including discussion of any tradeoffs considered per BPI Parts 11 and 12.

(c) ***PROCEDURE:***
Technical evaluation factors are not required in commercial item solicitations. The Contracting Officer shall ensure the instructions provided in Clause 11-2 Instructions to Offerors and the evaluation factors identified in the award basis clauses are in agreement. Contracting Officers shall select the offer that is most advantageous to BPA based on the factors contained in the solicitation and shall fully document the rationale for selection of the successful offeror, including discussion of any trade-offs considered, per BPI Part 12.

28.2.7 Contract Financing

INFORMATION: Customary market practice for some commercial items may include buyer contract financing. The Contracting Officer may offer BPA financing in accordance with the policies and procedures in Part 22.1.4 Advance Payments.

28.2.8 Technical Data

POLICY: BPA shall acquire only the technical data and the rights in that data customarily provided to the public with a commercial item or process. The Contracting Officer shall presume that data delivered under a contract for commercial items was developed exclusively at private expense. When a contract for commercial items requires the delivery of technical data, the Contracting Officer shall include appropriate clauses delineating the rights in the technical data in the solicitation and contract per BPI Part 17.

28.2.9 Computer Software

POLICY:
(a) Commercial computer software or commercial computer software documentation shall be acquired under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy BPA's needs. Generally, offerors and contractors shall not be required to --

(1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public; or
(2) Relinquish to, or otherwise provide, BPA rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation except as mutually agreed to by the parties.

(b) With regard to commercial computer software and commercial computer software documentation, BPA shall have only those rights specified in the license contained in any addendum to the contract. For additional guidance regarding the use and negotiation of license agreements for commercial computer software see BPI Part 17.

28.3 Contract Formation

28.3.1 Contract Type

PROCEDURE:
(a) Contracting Officers shall use the following contract types for acquiring commercial items and services: Firm Fixed Price, Fixed Price with Economic Price Adjustment, Fixed Price Award Fee and Time and Materials/Labor Rate; see BPI 7.1 for descriptions and guidance for these contract types.

(b) Except as provided in paragraphs (c) and (d) of this subpart, Contracting Officers shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items; see BPI 7.1.1 and 7.1.2 for additional instructions on the use of these contract types.

(c) A time-and-materials contract or labor-hour contract may be used for the acquisition of commercial services when the service is acquired, see BPI 7.1.4 for additional instructions regarding the use of time and materials contract type:
(1) Under a contract awarded using competitive procedures per BPI 11.6, or using the procedures for noncompetitive acquisitions in BPI 11.7 Noncompetitive Transactions; and
(2) The Contracting Officer includes a ceiling price in the contract or order that the contractor exceeds at its own risk; and authorizes any subsequent change in the ceiling price, documented in the official file that it is in the best interest of BPA to change the ceiling price.

(d) Indefinite-delivery purchase orders and contracts; see BPI 7.2.5 Master Agreement/Master Contracts:
(1) Indefinite-delivery contracts for commercial items and services may be used when:
(i) The prices are established based on a firm-fixed-price or fixed-price with economic price adjustment; or
(ii) Rates are established for commercial services acquired on a time-and-materials-or labor-hour basis.
(2) When an indefinite-delivery contract is awarded with services priced on a time-and-materials or labor-hour basis, Contracting Officers shall, to the maximum extent practicable, also structure the contract to allow issuance of orders on a firm-fixed-price or fixed-price with economic price adjustment basis (see BPI 7.1.1 and 7.1.2).

(e) The contract types authorized by this subpart may be used in conjunction with an award fee and performance or delivery incentives when the award fee or incentive is based solely on factors other than cost (see BPI 7.1.3).

(f) Use of any contract types to acquire commercial items and/or services other than those authorized by this subpart is prohibited.

28.3.2 Contract Method

(a) ***INFORMATION:*** It is in BPA's best interest that Contracting Officers use the most efficient and expeditious contract method as appropriate to the risk associated with the subject procurement. The contract method appropriate for the acquisition of commercial items and services should reflect the level

of risk associated with the nature of the procurement and whether the terms and conditions agreed to by the parties deviate from BPA's standard terms and conditions. Contracting methods appropriate for the acquisition of commercial items and services include purchase orders, blanket/master purchase orders, contracts, and master contracts/agreements.

Reference to "contract(s)" includes both a contract and a purchase order, as appropriate to the subject procurement. Where BPA's terms and conditions are unmodified, representing lower procurement risk, the Contracting Officer should consider the use of a simplified contract method such as a purchase order or blanket purchase order rather than a contract or master contract/agreement. See BPI 12.8.1 for guidance on acceptance of purchase orders by signature and by performance. Where BPA's terms and conditions have been modified, representing higher procurement risk to BPA, Contracting Officers should award using a contract or master contract/agreement, requiring contractor signature to evidence agreement to the modified terms and conditions.

(b) **POLICY:**

(1) The Contracting Officer shall select the contract method based on an assessment of the nature of the project and inherent risks.

(2) Contracting Officers shall use the following contract methods for acquiring commercial items and services: purchase orders, blanket/master purchase orders, contracts, and master contracts/agreements; see BPI 7.2 and subsequent subparts for more instructions regarding contract methods.

(3) Contracting Officers shall use the most efficient and expeditious contracting method appropriate to the subject procurement and level of procurement risk associated with the commercial item and/or service being acquired.

28.3.3 Period of Performance

(a) ***INFORMATION:*** In order to take advantage of changing conditions in the commercial market place, contracts with performance periods in excess of three years should be avoided when acquiring commercial items and services. This protects BPA from committing to pricing which may not be representative of changing market conditions and pricing.

(b) ***POLICY:*** HCA waiver is required for awards for commercial items and/or services where the performance period is expected to extend beyond three years, including option years.

(c) ***PROCEDURE:*** Contracting Officers shall limit the performance period for awards for the acquisition of commercial items and/or services to three years, including option periods.

28.3.3.1 Clause Usage Prescription

PROCEDURE:

(a) COs shall include Clause 28-1.1 Contract-Basic Terms in solicitations and contracts for commercial items and services where the execution of a contract will be the contracting method. Period of performance shall not exceed three years, including option periods.

(b) COs shall include Clause 28-1.2 Master Contract-Basic Terms in solicitations and contracts for commercial items and services where the contracting method will be a Master Contract. Period of performance shall not exceed three years, including option periods.

(c) COs shall include Clause 28-1.3 Master Agreement-Basic Terms in solicitations and contracts for commercial items and services where the contracting method will be a Master Agreement. Period of performance shall not exceed three years, including option periods. COs shall delete any sections which are inapplicable to the subject procurement.

(d) COs shall include Clause 28-1.4 Purchase Order-Basic Terms in solicitations and contracts for commercial items and services where the contracting method will be a Purchase Order. Period of performance shall not exceed three years, including option periods.

(e) COs shall include Clause 28-1.5 Master Purchase Order-Basic Terms in solicitations and contracts for commercial items and services where the contracting method will be a Master Purchase Order. Period of performance shall not exceed three years, including option periods.

(f) COs shall include a clause similar to Clause 28-2 Schedule of Pricing in solicitations and contracts for commercial items and services.

28.3.4 Customary **Commercial Practices**

(a) ***INFORMATION:*** It is a common practice in the commercial marketplace for both the buyer and seller to propose terms and conditions written from their particular perspectives. The terms and conditions prescribed in this part seek to balance the interests of both the buyer and seller. These terms and conditions are generally appropriate for use in a wide range of acquisitions. However, market research may indicate other commercial practices that are appropriate for the acquisition of the particular item. These practices should be considered for incorporation into the solicitation and contract if the Contracting Officer determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or Executive Order which has the same force and effect as law.

"Standard commercial practice" refers to the customs of companies in a particular marketplace, regardless of the practices of an individual firm in that marketplace (e.g., a term may be a standard in the marketplace even if a firm does not normally use that specific term in its own practices).

(b) ***POLICY:*** Contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses:
(1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or
(2) Determined to be consistent with customary commercial practice.

(c) ***PROCEDURE:*** Notwithstanding prescriptions contained elsewhere in the BPI, when acquiring commercial items, Contracting Officers shall use only those clauses prescribed in this Part 28 for the acquisition of commercial items and services. COs shall not include non-Part 28 clauses which address the topics addressed in Part 28. Where BPA has additional requirements which are not addressed in the core Part 28 clauses, COs may address those requirements by adding appropriate non-Part 28 clauses which are customary to the commercial marketplace. See BPI 28.3.6.

28.3.5 Modifications Inconsistent with Customary Commercial Practices

POLICY:
(a) Subject to BPI 28.3.6, inclusion of non-Part 28 Clauses and as provided in BPI 28.4 Contract Clauses, the Contracting Officer shall not modify any clause or otherwise include any additional terms or conditions in a solicitation or contract for commercial items in a manner that is inconsistent with customary commercial practice for the item being acquired, unless a waiver from the HCA is granted.

(b) The request for waiver must describe the customary commercial practice found in the marketplace, support the need to include a term or condition that is inconsistent with that practice, and include a determination that use of the customary commercial practice is inconsistent with the needs of BPA. A waiver may be requested for an individual or class of contracts for that specific item.

28.3.6 Inclusion of Non-Part 28 Clauses in Commercial Procurements

(a) ***INFORMATION:*** Some procurements may need additional terms and conditions in the solicitation and contract to more adequately address BPA's requirements. The clauses contained in Part 28 are core clauses which must, absent a waiver, be included in all commercial solicitations and contracts. COs may add additional and appropriate non-Part 28 BPI clauses when the CO has determined that their inclusion complies with customary commercial practices in that marketplace.

For example:

(1) The Contracting Officer may include appropriate clauses when an indefinite-delivery type of contract will be used. The clauses prescribed at BPI 7.2.5 may be used for this purpose.
(2) The Contracting Officer may include appropriate clauses when the use of options is in BPA's interest. The clauses prescribed in BPI 7.2.7 may be used for this purpose.
(3) The Contracting Officer may include the clauses contained in BPI Part 17.2 through 17.6, Commercial Software, Hardware and Equipment, and Services for IT procurements.

(b) ***POLICY:***

(1) The Contracting Officer shall not include any additional terms and conditions in a solicitation or contract for commercial items or services in a manner that is inconsistent with customary commercial practice for the item being acquired, unless a waiver from the HCA is granted.
(2) The Contracting Officer may include in solicitations and contracts other (non-Part 28) BPI clauses when their use is consistent with the limitations contained in BPI Part 28 and with customary commercial practices for the item/service being procured. It is the Contracting Officer's responsibility to analyze the proposed clauses for consistency with Part 28 policies and with commercial practices.

28.4 Contract Clauses

28.4.1 Commercial Clauses

(a) ***INFORMATION:***

(1) Solicitations and contracts for commercial items and services should include only those clauses which are consistent with customary commercial practices. Part 28 clauses are intended to reflect generally held commercial practices. For most procurements of commercial items and services, Part 28 clauses should protect BPA's interests. However, in procurements for more complex procurements or projects, for critical business operations, or for specialized procurements, such as IT or supplemental labor services, the CO may need to modify some of the Part 28 clauses to more accurately reflect customary commercial practices or may need to add non-Part 28 clauses to the solicitation and contract. This section describes the usage of BPI commercial clauses, modification of the clauses, and the incorporation of non-Part 28 clauses into a solicitation or contract.
(2) The clauses in this BPI 28.4 are intended to address, to the maximum extent practicable, commercial market practices for a wide range of potential BPA acquisitions of commercial items and services. However, because of the broad range of commercial items and services acquired by BPA, variations in commercial practices, and the relative volume of BPA's acquisitions in the specific market, Contracting Officers may, within the limitations of BPI 28, after conducting appropriate market research, modify Clause 11-2 Instructions to Offerors and the Inspection/Acceptance and Warranty clauses to adapt to the market conditions for each acquisition.
(3) Modifications to the clauses listed in BPI 28.4(c) below will not reflect current customary commercial practices and will not be approved. Changes in payment frequency in Clauses 28-4.1 and 28-4.2 per BPI 28.4.16 are not considered to be modifications.

(b) ***PROCEDURE:***

(1) Contracting Officers are required to use Part 28 clauses for the acquisition of commercial items and services.

(2) Contracting Officers may include non-Part 28 clauses when their use is consistent with customary commercial practices and the contractor agrees with their use, or a waiver to use terms and conditions inconsistent with customary commercial practice is obtained per BPI procedures.
(3) Contracting Officers may modify the Inspection/Acceptance and Warranty clauses to reflect customary commercial practices per BPI 28.4.2 and 28.4.3 without HCA waiver. Modifications to the Inspection/Acceptance and Warranty clauses may include any other terms or conditions necessary for the performance of the proposed contract (such as options, ordering procedures for indefinite-delivery type contracts, warranties, contract financing arrangements, etc.) See BPI 28.3.5 for those modifications which are inconsistent with customary commercial practices.

(c) ***POLICY:***
The following clauses shall not be modified:
(1) 28-3 Invoice
(2) 28-4.1 Payment-Firm Fixed Price
(3) 28-4.2 Payment-Time and Materials/Labor Rate
(4) 28-13 Disputes
(5) 28-18 Assignment
(6) 28-19 Other Compliances
(7) 28-20 Requirements Unique to Government Contracts

28.4.2 Inspection and Acceptance

(a) ***INFORMATION:***
(1) BPI Part 28 Inspection and Acceptance clauses, Clauses 28-5.1 and 28-5.2, are based upon the assumption that BPA will rely on the contractor's assurances that the commercial item tendered for acceptance conforms to the contract requirements. BPA inspection of commercial items will not prejudice its other rights under the acceptance paragraph. Additionally, although the clause does not address the issue of rejection, BPA always retains the right to refuse acceptance of nonconforming items. This clause is generally appropriate when BPA is acquiring noncomplex commercial items.
(2) Other acceptance procedures may be more appropriate for the acquisition of complex commercial items or commercial items used in critical applications. In such cases, the Contracting Officer shall include alternative inspection procedure(s) and ensure these procedures and the postaward remedies adequately protect the interests of BPA.
(3) The acquisition of commercial items under other circumstances such as an "as is" basis may also require acceptance procedures different from those contained in Clause 28-5.1 Inspection/Acceptance-Firm Fixed Price.

(b) ***POLICY:***
(1) Contracts for commercial items shall rely on contractors' existing quality assurance systems as a substitute for BPA inspection and testing before tender for acceptance unless customary market practices for the commercial item being acquired include in-process inspection. Any in-process inspection by BPA shall be conducted in a manner consistent with commercial practice.
(2) BPA will rely on contractor's assurances that the commercial item tendered for acceptance conforms to the contract requirements. BPA has the right to refuse acceptance of nonconforming items.

(c) ***PROCEDURE:*** The Contracting Officer should consider the effect the specific circumstances will have on the acceptance paragraph as well as other paragraphs of the clause. The Contracting Officer also must carefully examine the terms and conditions of any express warranty with regard to the effect it may have on BPA's available postaward remedies.

28.4.2.1 Clause Usage Prescriptions

PROCEDURE:
(a) COs shall include a clause similar to Clause 28-5.1 Inspection/Acceptance-Firm Fixed Price in solicitations and contracts for commercial acquisitions issued on a firm fixed price basis. COs shall modify Clause 28-5.1 to include alternative inspection procedures for the acquisition of complex commercial items or commercial items used in critical applications. COs shall modify Clause 28-5.1 for acquisitions of commercial items sold on an "as is" basis.

(b) COs shall include a clause similar to Clause 28-5.2 Inspection/Acceptance-Time and Materials or Labor Rate in solicitations and contracts for commercial acquisitions issued on a time and materials basis or on a labor hour basis. COs shall modify Clause 28-5.2 to include alternative inspection procedures for the acquisition of complex commercial items or commercial items used in critical applications.

28.4.3 Warranty

POLICY: Contracting Officers are required to take advantage of commercial warranties. To the maximum extent practicable, solicitations for commercial items shall require offerors to offer BPA at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice. Solicitations may specify minimum warranty terms, such as minimum duration, appropriate for BPA's intended use of the item.

28.4.3.1 Implied Warranties

(a) ***INFORMATION:*** BPA's postaward rights contained in Clause 28-11 Warranty are the implied warranty of merchantability, the implied warranty of fitness for particular purpose, and the remedies contained in the acceptance paragraph.

(1) The implied warranty of merchantability provides that an item is reasonably fit for the ordinary purposes for which such items are used. The items must be of at least average, fair or medium-grade quality and must be comparable in quality to those that will pass without objection in the trade or market for items of the same description.

(2) The implied warranty of fitness for a particular purpose provides that an item is fit for use for the particular purpose for which BPA will use the items. BPA can rely upon an implied warranty of fitness for particular purpose when--

(i) The seller knows the particular purpose for which BPA intends to use the item; and

(ii) BPA relied upon the contractor's skill and judgment that the item would be appropriate for that particular purpose.

(b) ***POLICY:***

(1) BPA will accept an offeror's commercial items with the implied warranties of merchantability and fitness for a particular purpose.

(2) In some markets, it may be customary commercial practice for contractors to exclude or limit the implied warranties contained in Clause 28-11 in the provisions of an express warranty. Contracting Officers must ensure that the express warranty provides for the repair or replacement of defective items discovered within a reasonable period of time after acceptance.

(c) ***PROCEDURES:***

(1) Contracting Officers, to the maximum extent possible, shall include a description of the particular purpose for which BPA will use the item in the solicitation.

(2) Contracting Officers shall review an offeror's implied warranties or any disclaimers of implied warranties to verify that BPA's interests are adequately protected. If one of the above implied warranties has been expressly excluded by the offeror, the Contracting Officer should contact OGC for review.

(3) Per BPI 4.3(a)(4) OGC review of non-BPI warranty clauses is required prior to award.

(4) Contracting Officers shall consult with OGC prior to asserting any claim for a breach of an implied warranty.

28.4.3.2 Express Warranties

(a) ***INFORMATION:*** Express warranties are provided by the offeror in writing to purchasers of their commercially offered items and services. Any express warranty BPA intends to rely upon must meet the needs of the BPA.

(b) ***POLICY:*** Contracting Officers shall verify that offeror's express warranties offered to BPA are at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice.

(c) ***PROCEDURE:***

(1) The Contracting Officer should analyze any commercial warranty to determine if:

(i) The warranty is adequate to protect the needs of BPA: *e.g.*, items covered by the warranty and length of warranty;

(ii) The terms allow BPA effective postaward administration of the warranty to include the identification of warranted items, procedures for the return of warranted items to the contractor for repair or replacement, and collection of product performance information; and

(iii) The warranty is cost-effective.

(2) Where the offeror has excluded implied warranties contained in Clause 28-11 in the provisions of an express warranty, the Contracting Officer shall ensure that the express warranty provides for the repair or replacement of defective items discovered within a reasonable period of time after acceptance. Per BPI 4.3(a)(4), Contracting Officers shall obtain OGC review of procurements where the warranties of merchantability and fitness for a particular purpose have been excluded.

(3) COs shall include the offeror's express warranties in the contract by attachment.

(4) Contracting Officers shall consult with OGC prior to asserting any claim for a breach of an express warranty.

28.4.3.2.1 Clause Usage Prescription

PROCEDURE: COs shall include a clause similar to Clause 28-11 Warranty in solicitations and contracts for commercial acquisitions. COs may modify Clause 28-11 only to reflect commercial market practices. Modifications must be reviewed by OGC per BPI 4.3.

28.4.4 Termination

(a) ***INFORMATION:***

Part 28's commercial termination clauses, 28-9 through 28-10, permit BPA to terminate a contract for commercial items either for the convenience of BPA or for cause. However, the Termination for BPA's Convenience and the Termination for Cause clauses contain concepts which differ from those contained in the termination clauses prescribed in Part 20 Contract Termination. Consequently, the requirements of Part 20 do not apply when terminating contracts for commercial items and Contracting Officers shall follow the procedures in this Part 28. Contracting Officers may continue to use Part 20 as guidance to the extent that Part 20 does not conflict with this section and the language of Clauses 28-9.1, 28-9.2, 28-10.1 and 28-10.2.

(b) ***POLICY:*** Contracting Officers shall follow Part 28 termination policies for the termination of contracts for commercial items and services. BPA's rights after a termination for cause shall include all the remedies available to any buyer in the marketplace. The Contracting Officer should exercise BPA's right to terminate a contract for commercial items and services either for BPA's convenience or for cause only when such a termination would be in the best interests of BPA. The Contracting Officer shall consult with OGC prior to terminating for cause.

28.4.4.1 Termination for Cause

(a) ***INFORMATION:***

(1) Termination for Default is used in noncommercial procurements while Termination for Cause is used in commercial procurements. BPA's rights and responsibilities differ under each. Under termination for default BPA is entitled to recover its costs for reprocurement of the items/services. In contrast, under termination for cause BPA is entitled to all the rights and remedies available to any buyer in the commercial marketplace, including recovery of its costs for reprocuring the subject items/services, as well as any incidental or consequential damages. The contractor's rights and responsibilities differ as well under the differing termination clauses.

(b) ***POLICY:***

(1) BPA may terminate for cause upon the contractor's lack of, or improper, performance, upon a breach of contract terms, upon receipt of the contractor's oral or written communication indicating that the contractor will not perform the contract, or upon the contractor's failure to provide BPA, on written request, with adequate assurances of future performance.

(2) BPA may not terminate the contract for cause if the contractor experiences a force majeure/ excusable delay event and provides the required notice to the Contracting Officer. See BPI 28.4.6 for additional information and policy regarding force majeure and excusable delay.

(c) ***PROCEDURE:*** The Contracting Officer shall send a cure notice prior to terminating a contract for any reason other than late delivery or the contractor's oral or written communication that they do not intend to perform. The Contracting Officer may terminate for cause without a cure notice for late deliveries unless the contractor has provided an acceptable notification of an excusable delay in accordance with Clause 28-8 Force Majeure/Excusable Delay.

28.4.4.1.1 Remedies

(a) ***INFORMATION:*** BPA's preferred remedy when terminating for cause is to acquire similar items or services from another contractor and to charge the defaulted contractor with any excess reprocurement costs together with any incidental or consequential damages incurred because of the termination.

(b) ***PROCEDURE:***

(1) When a termination for cause is appropriate, the Contracting Officer shall send the contractor a written notification regarding the termination. At a minimum, this notification shall:

(i) Indicate the contract is terminated for cause;

(ii) Specify the reasons for the termination;

(iii) Indicate which remedies BPA intends to seek or provide a date by which BPA will inform the contractor of the remedy; and

(iv) State that the notice constitutes a final decision of the Contracting Officer and that the contractor has the right to appeal under the Disputes Clause 28-13.

(2) The Contracting Officer shall ensure that information related to Termination for Cause notices are included in the official file per BPI 12.8.2. In the event the termination for cause is subsequently converted to a termination for convenience, or is otherwise withdrawn, the Contracting Officer shall also ensure that a notice of the conversion or withdrawal is documented in the official file.

28.4.4.1.1.1 Clause Usage Prescriptions

PROCEDURE:

(a) COs shall include Clause 28-9.1 Termination for Cause-Firm Fixed Price in solicitations and contracts for commercial acquisitions issued on a firm fixed price basis.

(b) COs shall include Clause 28-9.2 Termination for Cause-Time and Materials/Labor Rate in solicitations and contracts for commercial acquisitions issued on a time and materials/labor rate basis.

28.4.4.2 Termination for BPA's Convenience

(a) ***POLICY***: When the Contracting Officer terminates a contract for commercial items or services for BPA's convenience, the contractor shall be paid

(1) The percentage of the contract price reflecting the percentage of the work performed prior to the notice of the termination for fixed-price or fixed-price with economic price adjustment contracts, or

(2) An amount for direct labor hours (as defined in the Schedule) determined by multiplying the number of direct labor hours expended before the effective date of termination by the hourly rates(s) in the Schedule; and

(3) Any charges the contractor can demonstrate directly resulted from the termination. The contractor may demonstrate such charges using its standard record keeping system or the contract cost principles in BPI Part 13 Cost Principles and Audit Considerations. BPA does not have any right to audit the contractor's records solely due to the termination for convenience.

(b) Generally, the parties should mutually agree upon the requirements of the termination proposal. The parties must balance BPA's need to obtain sufficient documentation to support payment to the contractor against the goal of having a simple and expeditious settlement.

28.4.4.2.1 Clause Usage Prescriptions

PROCEDURE:

(a) COs shall include Clause 28-10.1 Termination for BPA's Convenience-Firm Fixed Price in solicitations and contracts for commercial acquisitions issued on a firm fixed price basis.

(b) COs shall include Clause 28-10.2 Termination for BPA's Convenience-Time & Materials/Labor Rate in solicitations and contracts for commercial acquisitions issued on a time and materials or labor rate basis.

28.4.5 Changes

(a) **POLICY:** Changes to commercial contracts shall be bilateral by written agreement of the parties with no unilateral government right to direct changes

(b) **PROCEDURE:**

(1) For contracts, bilateral agreement is achieved by signature of the parties on a contract modification.

(2) For purchase orders, bilateral agreement to the purchase order revision is achieved through BPA's acceptance of the contractor's invoice in response to the revised purchase order. COs, depending on the circumstances for the revision, may also require contractor signature on the revised purchase order.

28.4.5.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-6 Changes in solicitations and contracts for commercial acquisitions.

28.4.6 Force Majeure/Excusable Delay

(a) ***INFORMATION***: In the event of an occurrence beyond the reasonable control of the contractor and without its fault or negligence, the contractor's lack of performance under the contract would not be considered a default. Those occurrences include acts of God or the public enemy, acts of the Government in its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather and delays of common carriers. The contractor must give the Contracting Officer written notice as soon as reasonably possible after commencement of any excusable delay, setting forth the particulars, and remedy such occurrence with all reasonable dispatch, and notify

the Contracting Officer of the cessation of the occurrence. In most situations, this requirement should eliminate the need for a show cause notice prior to terminating a contract.

(b) ***POLICY:*** BPA will excuse contractor's non-performance without considering it a default when the non-performance is the direct result of an identified occurrence beyond the reasonable control of the contractor and without its fault or negligence, provided the contractor gives BPA written notice as soon as reasonably possible after the commencement of the excusable delay.

(c) ***PROCEDURE:*** The Contracting Officer shall send a cure notice prior to terminating a contract for any reason other than late delivery. The Contracting Officer may terminate for cause without a cure notice for late deliveries.

28.4.6.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-8 Force Majeure/Excusable Delay in solicitations and contracts for commercial acquisitions.

28.4.7 Indemnification

(a) ***INFORMATION:*** When commercial items are sold in the marketplace, the offeror is asserting its rightful ownership of the patent, trademark or copyright to the items being offered to BPA. BPA is relying on the offeror's representations of rightful use and ownership and expects the offeror to protect BPA against any allegations of infringement.

(b) ***POLICY:*** Contractors are required to indemnify BPA, its officers, employees and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark or copyright, arising out of the performance of the contract for commercial items and services, provided the contractor is reasonably notified of such claims and proceedings.

(c) ***PROCEDURE:*** Contracting Officers shall promptly notify OGC and the HCA of any claim or proceeding alleging infringement.

28.4.7.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-14 Indemnification in solicitations and contracts for commercial acquisitions.

28.4.8 Risk of Loss

(a) ***INFORMATION***: Customary commercial practice establishes that risk of loss for commercial items is transferred to the buyer when the items are delivered to a carrier (f.o.b. origin) or delivered to the buyer's identified delivery destination (f.o.b. destination).

(b) ***POLICY****:* For commercial items provided under its contracts, BPA accepts the risk of loss when the items are either delivered to a carrier, if transportation is f.o.b. origin, or delivered to BPA at the delivery destination specified in the contract if transportation is f.o.b. destination.

28.4.8.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-15 Risk of Loss in solicitations and contracts for commercial acquisitions when the procurement includes delivery of commercial items to BPA.

28.4.9 Title

POLICY: Unless specified elsewhere in the contract, title to commercial items passes to BPA upon acceptance, regardless of when or where BPA takes physical possession.

28.4.9.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-16 Title in solicitations and contracts for commercial acquisitions.

28.4.10 Taxes

POLICY: BPA pays applicable taxes on the procurement of commercial items and services in the same manner as it procures noncommercial items and services. See BPI 22.5 Taxes for more information on applicable taxes.

28.4.10.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-17 Taxes in solicitations and contracts for commercial acquisitions.

28.4.11 Limitation of Liability

(a) ***INFORMATION:*** Liability in the commercial marketplace typically excludes consequential damages resulting from defects or deficiencies in accepted commercial items or services. Consequential damages resulting from the seller's breach include:

(1) Any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and

(2) Injury to person or property proximately resulting from any breach of warranty.

(b) ***POLICY***: Except as otherwise provided by an express warranty, contractors shall not be liable to BPA for consequential damages resulting from any defect or deficiencies in accepted commercial items or services.

28.4.11.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-12 Limitation of Liability in solicitations and contracts for commercial acquisitions.

28.4.12 Order of Precedence

INFORMATION: The Order of Precedence clause assists the parties in resolving inconsistencies within the contract. For example, a statement in the terms and conditions of a contract may conflict with a statement in the Statement of Work or Specifications. In this case, the parties look to the Order of Precedence clause to determine which statement would take precedence.

28.4.12.1 Clause Usage Prescription

PROCEDURE: COs shall include a clause similar to Clause 28-21 Order of Precedence in solicitations and contracts for commercial acquisitions. COs shall modify the clause as necessary to meet the needs of the particular purchase. If the contractor's documents, such as quotes, proposals, or contracts, are incorporated into the contract, the clause shall be modified to identify their place in the order of precedence.

28.4.13 Assignment

(a) ***INFORMATION***: When procuring commercial items and/or services, BPA permits contractors to assign their payment rights to a financial institution without prior approval of BPA. Customary commercial practice requires that contractors have the ability to assign their payment rights under their contracts for financing purposes.

(b) ***POLICY:***

(1) BPA's commercial contracts shall not prohibit assignment of payment rights.
(2) BPA will accept assignment documents prepared by a financial institution and signed by an officer of the financial institution.
(3) Assignment of contract payments shall not be permitted when the contract provides for advance payments.
(4) When a third party makes payment, such as under the BPA P-card, the Contractor may not assign its rights to receive payment under the contract.
(5) Assignment clauses for commercial procurements shall not be waived or modified.

(c) ***PROCEDURE***: Upon receipt of assignment documents from the contractor, the Contracting Officer shall notify BPA's disbursements department that an assignment has been made, and forward the bank generated forms.

28.4.13.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-18 Assignment in solicitations and contracts for commercial acquisitions.

28.4.14 Disputes

(a) ***INFORMATION***: BPA's contracts for the acquisition of commercial items and services are subject to the Contract Disputes Act (41 U.S.C. 7101-7109). Disputes arising under or relating to BPA's procurement contracts for commercial items/services will be resolved in accordance with BPI Clause 21-3 Disputes, which is incorporated into commercial contracts by reference in the text of Clause 28-13.

(b) ***POLICY:*** The Disputes clause for commercial procurements shall not be waived or modified.

28.4.14.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-13 Disputes in solicitations and contracts for commercial acquisitions.

28.4.15 Invoice

(a) ***INFORMATION:*** BPA pays invoices in accordance with the Prompt Payment Act. Proper invoices contain all of the required information as listed in Clause 28-3 Invoice. Failure to provide the required invoice information will result in a delay in invoice processing and payment.

(b) ***POLICY:*** The Invoice clause for commercial procurements shall not be waived or modified.

28.4.15.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-3 Invoice in solicitations and contracts for commercial acquisitions.

28.4.16 Payment

(a) ***INFORMATION:*** Contracts for commercial items/services shall be on a firm fixed price or time and materials/labor rate basis only. The payment clauses, Clauses 28-4.1 and 28-4.2 address federal prompt payment, electronic funds transfer, discounts, overpayments, and interest requirements in one clause. BPA will make payments in accordance with the Prompt Payment Act (31 U.S.C. 3903) and OMB prompt payment regulations at 5 CFR Part 1315. BPA's payments are made by Electronic Funds Transfer (EFT). Contractors must submit their taxpayer identification number (TIN) and other necessary banking information to BPA to receive EFT payment.

(b) ***POLICY:*** The Payment clauses for commercial procurements shall not be waived or modified with the exception that COs may modify the frequency of BPA's payment per BPI 22.2(b). BPA's payment for commercial items/services procured shall conform to the type of contract executed. Contracts for the acquisition of commercial items/services shall be either on a firm fixed price basis or on a time and materials basis as described in BPI 28.3.1.

28.4.16.1 Payment-Firm Fixed Price

POLICY: Contracts issued on a firm fixed price basis, including those issued on a Fixed Price with Economic Price Adjustment or Fixed Price Award Fee basis shall be paid in accordance with federal requirements for prompt payment, interest, discounts, electronic funds transfer and overpayment.

28.4.16.1.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-4.1 Payment-Firm Fixed Price in solicitations and contracts for commercial acquisitions when the basis of payment is firm fixed price. COs may modify the frequency of payments per BPI 22.2(b). The face page of the award form shall indicate the address to which invoices are to be sent for processing.

28.4.16.2 Payment-T&M

POLICY: Contracts issued on a time and materials basis, including those issued on a labor rate basis, shall be paid in accordance with federal requirements for prompt payment, interest, discounts, electronic funds transfer and overpayment.

28.4.16.2.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-4.2 Payment-Time and Materials/Labor Rate in solicitations and contracts for commercial acquisitions when the basis of payment is time and materials or labor rate. COs may modify the frequency of payments per BPI 22.2(b). The face page of the award form shall indicate the address to which invoices are to be sent for processing.

28.4.17 Other Compliances

(a) ***INFORMATION:*** BPA requires its contractors to adhere to all applicable Federal, State and local laws, executive orders, rules and regulations while performing under its contract with BPA. Contractors may not use their performance on a BPA contract as justification or rationale for noncompliance with other applicable laws, executive orders, rules or regulations.

(b) ***POLICY***: The Other Compliances clause for commercial procurements shall not be waived or modified.

28.4.17.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-19 Other Compliances in solicitations and contracts for commercial acquisitions.

28.4.18 Requirements Unique to Government Contracts

(a) ***INFORMATION:*** BPA is a federal agency within the United States Department of Energy and complies with applicable federal laws and executive orders. The Requirements Unique to Government Contracts clause incorporates by reference only those provisions of law or Executive Orders applicable to BPA's acquisition of commercial items and services. The clause also identifies which requirements must be included in subcontracts for commercial items and services. See BPI 28.1.4 Subcontract Requirements.

(b) ***POLICY:*** The Requirements Unique to Government Contracts clause for commercial procurements shall not be waived or modified.

28.4.18.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-20 Requirements Unique to Government Contracts in solicitations and contracts for commercial acquisitions and indicate which, if any, of the additional clauses identified in Clause 28-20 are applicable to the subject acquisition. If the clauses require fill-in, the fill-in language shall be inserted as appropriate. This clause may not be modified other than as described herein.

28.4.19 Stop Work Order

(a) ***INFORMATION***: Performance on all, or any part, of the work under a commercial contract may be stopped upon the Contracting Officer's written notice to the contractor for a period of up to 90 days. Any further period of stoppage must be agreed to by BPA and the contractor. Within the 90 day period, or within any agreed upon extension of that period, the CO must either cancel the stop-work order or terminate the work covered by the stop-work order as provided in the Termination for BPA's Convenience clauses. BPA will pay the contractor's reasonable costs resulting from the stop-work order, provided the contractor asserts its rights to adjustment within 30 days after the end of the period of work stoppage.

(b) ***POLICY:***

(1) BPA may issue a stop-work order for performance on all, or any part, of work performed under a contract for commercial items and/or services for a period of 90 days after the order is delivered to the contractor. The period of work stoppage may be further extended upon mutual agreement between BPA and the contractor.

(2) Within a period of 90 days after the order is delivered to the contractor, or within any agreed upon extension of that period, the Contracting Officer shall either cancel the stop-work order or terminate the work covered by the order as provided in the Termination for BPA's Convenience clauses.

(3) The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified in writing if the stop-work order results in an increase in the time required for, or in the contractor's cost properly allocable to the performance of any part of this contract, provided the contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage.

28.4.19.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-7 Stop Work Order in solicitations and contracts for commercial acquisitions to retain the right to suspend the work during contract performance.

28.4.20 Applicable Law

POLICY: Federal law will apply to any claim of breach of BPA's contracts for the acquisition of commercial items and/or services.

28.4.20.1 Clause Usage Prescription

PROCEDURE: COs shall include Clause 28-22 Applicable Law in solicitations and contracts for commercial acquisitions.

28.50 Text of Clauses

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Clause 28-1.1 CONTRACT-BASIC TERMS
(Jul 13)(BPI 28.3.3.1**)**
(a) This is a (FFP or T&M) contract for ____year(s) (with options to extend for _____ additional pre-priced option year periods). By signing the contract cover page, BPA and the Contractor agree, subject to the attached terms and conditions, that Contractor shall sell to BPA the (items, services, or items and services) identified herein at the prices set forth in the Schedule of Pricing.

(b) This contract shall become effective upon receipt of the signed contract and shall continue until the earlier of its expiration or termination pursuant to Clauses 28-9.1 and 28-9.2, Termination for Cause or Clauses 28-10.1 and 28-10.2, Termination for BPA's Convenience. BPA may extend the term of the base contract by exercising the pre-priced option, if any, by giving written notice to the Contractor.

(End of clause)

Clause 28-1.2 MASTER CONTRACT-BASIC TERMS
(Jul 13)(BPI 28.3.3.1**)**
(a) This is a (FFP or T&M) Master Contract for ____year(s) (with options to extend for _____ additional pre-priced option year periods). By signing the master contract cover page, BPA and the Contractor agree, subject to the attached terms and conditions, that Contractor shall sell to BPA the (items, services, or items and services) identified herein at the prices set forth in the Schedule of Pricing.

(b) This Master Contract shall become effective upon receipt of the signed Master Contract and shall continue until the earlier of its expiration or termination pursuant to Clauses 28-9.1 and 28-9.2, Termination for Cause or Clauses 28-10.1 and 28-10.2, Termination for BPA's Convenience. BPA may extend the term of the base contract by exercising the pre-priced option, if any, by giving written notice to the Contractor.

(End of clause)

Clause 28-1.3 MASTER AGREEMENT-BASIC TERMS
(Jul 13)(BPI 28.3.3.1)
(a) This is a (FFP or T&M) Master Agreement for ____year(s) (with options to extend for _____ additional pre-priced option year periods). By signing the Master Agreement cover page, BPA and the Contractor agree that BPA is under no obligation until a binding order (release), subject to the Master Agreement terms and conditions, is issued by the Contracting Officer or his/her authorized representative to the Contractor and a confirmation is received from the Contractor. BPA is obligated only to the extent of authorized orders actually placed against this Master Agreement.

(b) This Master Agreement shall become effective upon BPA's receipt of the fully executed Master Agreement. The orders (releases) become binding contracts upon BPA's receipt of the Contractor's written confirmation of the order. The Master Agreement shall continue until the earlier of its expiration or termination pursuant to Clauses 28-9.1 and 28-9.2, Termination for Cause or Clauses 28-10.1 and 28-10.2, Termination for BPA's Convenience.

(c) Ordering: Orders shall identify the number of the order (release) and the Master Agreement number. Orders may be transmitted to the Contractor verbally, by hard copy, by facsimile, or electronically. Orders or confirmations sent via facsimile or electronically shall be considered "writings." There is no limit on the number of orders that may be issued, unless otherwise limited in the Schedule of Pricing.

(d) Packing Slip: All deliveries made under this agreement shall be accompanied by a packing or sales slip which shall contain the following minimum information: (1) Name of Contractor; (2) Master Agreement Number; (3) Date of order; (4) Name of BPA employee placing order; (5) Order number; (6) Itemized list of supplies or services furnished (quantity, unit price, and extended price, less discounts); and (7) Date of delivery or shipment.

(e) Variation in Quantity: No variation in the quantity of any item ordered will be accepted unless such variation has been caused by conditions of loading, shipping, packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this agreement or in any specific order.

(f) Transportation Charges: No allowance will be made for packing, cartage, carting, or transportation charges unless specifically provided elsewhere in this agreement or unless provided at the time a specific order is placed.

(End of clause)

Clause 28-1.4 PURCHASE ORDER-BASIC TERMS
(Jul 13)(BPI 28.3.3.1**)**
(a) This is a purchase order issued on a firm fixed price or time and materials basis. By accepting this purchase order, the Contractor agrees, subject to the attached terms and conditions, to sell BPA the (items, services, or items and services) identified herein as set forth in the Schedule of Pricing.

(b) This Purchase Order shall become effective upon Contractor's acceptance of BPA's Purchase Order as evidenced by 1) BPA's receipt of Contractor's order confirmation; 2) BPA's receipt of the fully executed Purchase Order; 3) shipment of the goods or any portion thereof; or 4) Contractor's performance under the Purchase Order. This Purchase Order shall continue until the earlier of its expiration or termination pursuant to BPA's termination clauses.

(End of clause)

Clause 28-1.5 MASTER PURCHASE ORDER-BASIC TERMS
(Jul 13)(BPI 28.3.3.1**)**
(a) This is a (FFP or T&M) Master Purchase Order for ____year(s) (with options to extend for _____ additional pre-priced option year periods). By signing the Master Purchase Order cover page, BPA and the Contractor agree that BPA is under no obligation until a binding order (release), subject to the Master Purchase Order terms and conditions, is issued by the Contracting Officer or his/her authorized representative to the Contractor.

(b) This Master Purchase Order shall become effective upon Contractor's acceptance of BPA's Master Purchase Order as evidenced by 1) BPA's receipt of Contractor's order confirmation; 2) BPA's receipt of the fully executed Master Purchase Order; 3) Shipment of the goods or any portion thereof; or 4) Contractor's performance under the Master Purchase Order. This Master Purchase Order shall continue until the earlier of its expiration or termination pursuant to BPA's termination clauses.

(End of clause)

Clause 28-2 SCHEDULE OF PRICING
(Jul 13)(BPI 28.3.3.1**)**
The contractor shall provide the (items, services, or items and services) at the prices identified in accordance with: (CO fill-in: the list below, the Specifications document, or Statement of Work, or identify other appropriate document).

Item No.	Description	Quantity	Unit	Unit Price	Amount
FILL IN	CO FILL IN	FILL IN	FILL IN	$ CO FILL IN	$ CO FILL IN
FILL IN	CO FILL IN	FILL IN	FILL IN	$ CO FILL IN	$ CO FILL IN

(End of clause)

Clause 28-3 INVOICE
(Jul 13) (BPI 28.4.15.1**)**
(a) The Contractor shall submit an electronic invoice (or one hard-copy invoice, if authorized) to the address designated in the contract to receive invoices. An invoice must include --

(1) Name and address of the Contractor;
(2) Invoice date and number;
(3) Contract number, contract line item number and, if applicable, the order number;
(4) Description, quantity, unit of measure, unit price and extended price of the items delivered;
(5) Shipping number and date of shipment, including the bill of lading number and weight of shipment if shipped on Government bill of lading;
(6) Terms of any discount for prompt payment offered;
(7) Name and address of official to whom payment is to be sent;
(8) Name, title, and phone number of person to notify in event of defective invoice; and
(9) Taxpayer Identification Number (TIN). The Contractor shall include its TIN on the invoice only if required elsewhere in this contract.(10) Electronic funds transfer (EFT) banking information.

(b) Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. 3903) and Office of Management and Budget (OMB) prompt payment regulations at 5 CFR part 1315.

(End of clause)

Clause 28-4.1 PAYMENT-FIRM FIXED PRICE
(Jul 13)(BPI 28.4.16.1.1**)**
(a) Payment.

(1) Items accepted. Payment shall be made for items accepted by BPA that have been delivered to the delivery destinations set forth in this contract.
(2) Prompt Payment. BPA will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations at 5 CFR Part 1315.
(3) Electronic Funds Transfer.

(i) Payments under this contract shall be made by electronic funds transfer (EFT). Contractor shall provide its taxpayer identification number (TIN) and other necessary banking information for BPA to make payments through EFT. Receipt of payment information, including any changes, must be received by BPA 30 days prior to effective date of the change. BPA shall not be liable for any payment under this contract until receipt of the correct EFT information from Contractor, nor be liable for any penalty on delay of payment resulting from incorrect EFT information. BPA shall notify the Contractor within 7 days of its receipt of EFT information which it determines to be defective.
(ii) If Contractor assigns the proceeds of this contract per Clause 28-18 Assignment, the Contractor shall require, as a condition of any such assignment, that the assignee agrees to be paid by EFT and shall provide its EFT information as identified in (iii) below. The requirements of this clause shall apply to the assignee as if it were the Contractor.
(iii) Submission of EFT banking information to BPA: The Contractor shall submit EFT enrollment banking information directly to BPA Vendor Maintenance Team, using Substitute IRS Form w9e, Request for Taxpayer Identification Number and Certification, available from the CO or the BPA Vendor Maintenance Team. Contact and mailing information:

Bonneville Power Administration
PO Box 491
ATTN: NSTS-MODW Vendor Maintenance
Vancouver, WA 98666-0491

email: VendorMaintenance@BPA.gov
phone: 360-418-2800
fax: 360-418-8904

(4) Discount. In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date which appears on the payment check or the specified payment date if an electronic funds transfer payment is made. (5) Overpayments. If the Contractor

becomes aware of a duplicate contract financing or invoice payment or that BPA has otherwise overpaid on a contract financing or invoice payment, the Contractor shall:

(i) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the-

(A) Circumstances of the overpayment (e.g. duplicate payment, erroneous payment, liquidation error, date(s) of overpayment); (B) Affected contract number and delivery order number, if applicable; (C) Affected contract line item or subline item, if applicable; and (D) Contractor point of contact.

(ii) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(6) Interest.

(i) All amounts that become payable by the Contractor to BPA under this contract shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. The interest rate shall be the interest rate established by the Secretary of Treasury as provided in Section 611 of the Contracts Disputes Act of 1978 (Public Law 95-563)(41 U.S.C. 7101-7109), which is applicable to the period in which the amount becomes due, as provided in (a)(6)(v) of this clause, and then at the rate applicable for each six-month period as fixed by the Secretary until the amount is paid. (ii) BPA may issue a demand for payment to the Contractor upon finding that a debt is due under the contract. (iii) Final decision. The Contracting Officer will issue a final decision as required by BPI 21.3.11 if:

(A) The Contracting Officer and the Contractor are unable to reach agreement on the existence or amount of a debt within 30 days;

(B) The Contractor fails to liquidate a debt previously demanded by the Contracting Officer within the timeline specified in the demand for payment unless the amounts were not repaid because the Contractor has requested an installment payment agreement; or

(C) The Contractor requests a deferment of collection on a debt previously demanded by the Contracting Officer.

(iv) If a demand for payment was previously issued for the debt, the demand for payment included in the final decision shall identify the same due date as the original demand for payment.

(v) Amounts shall be due at the earliest of the following dates:

(A) The date fixed under this contract.(B) The date of the first written demand for payment, including any demand for payment resulting from a default termination.

(vi) The interest charge shall be computed for the actual number of calendar days involved beginning on the due date and ending on—

(A) The date on which the designated office receives payment from the Contractor;(B) The date of issuance of a BPA check to the Contractor from which an amount otherwise payable has been withheld as a credit against the contract debt; or(C) The date on which an amount withheld and applied to the contract debt would otherwise have become payable to the Contractor.

(End of clause)

Clause 28-4.2 PAYMENT- TIME AND MATERIALS/LABOR RATE
(Jul 13)(BPI 28.4.16.2.1**)**

(1) Services accepted. Payments shall be made for services accepted by BPA that have been delivered to the delivery destination(s) set forth in this contract. BPA will pay the Contractor as follows upon the submission of proper invoices approved by the Contracting Officer:

(i) Hourly rate.

(A) The amounts shall be computed by multiplying the appropriate hourly rates prescribed in the contract by the number of direct labor hours performed. Fractional parts of an hour shall be payable on a prorated basis.

(B) The rates shall be paid for all labor performed on the contract that meets the labor qualifications specified in the contract. Labor hours incurred to perform tasks for which labor qualifications were specified in the contract will not be paid to the extent the work is performed by individuals that do not meet the qualifications specified in the contract, unless specifically authorized by the Contracting Officer.

(C) Invoices may be submitted once each month (or at more frequent intervals, if approved by the Contracting Officer) to the Contracting Officer or the authorized representative.
(D) When requested by the Contracting Officer or the authorized representative, the Contractor shall substantiate invoices (including any subcontractor hours reimbursed at the hourly rate in the schedule) by evidence of actual payment, individual daily job timecards, records that verify the employees meet the qualifications for the labor categories specified in the contract, or other substantiation specified in the contract.
(E) Unless the Schedule prescribes otherwise, the hourly rates in the Schedule shall not be varied by virtue of the Contractor having performed work on an overtime basis.
(1) If no overtime rates are provided in the Schedule and the Contracting Officer approves overtime work in advance, overtime rates shall be negotiated.
(2) Failure to agree upon these overtime rates shall be treated as a dispute under the Disputes clause of this contract.
(3) If the Schedule provided rates for overtime, the premium portion of those rates will be reimbursable only to the extent the overtime is approved by the Contracting Officer.

(ii) Materials.
(A) If the Contractor furnishes materials that meet the definition of a commercial item at BPI 1.8, the price to be paid for such materials shall not exceed the Contractor's established catalog or market price, adjusted to reflect the--
(1) Quantities being acquired; and
(2) Any modifications necessary because of contract requirements.
(B) Except as provided for in paragraph (i)(1)(ii)(A) and (D)(2) of this clause, BPA will reimburse the Contractor the actual cost of materials (less any rebates, refunds, or discounts received by the Contractor that are identifiable to the contract) provided the Contractor—
(1) Has made payments for materials in accordance with the terms and conditions of the agreement or invoice; or
(2) Makes these payments within 30 days of the submission of the Contractor's payment request to BPA and such payment is in accordance with the terms and conditions of the agreement or invoice.
(C) To the extent able, the Contractor shall—
(1) Obtain materials at the most advantageous prices available with due regard to securing prompt delivery of satisfactory materials; and
(2) Give credit to BPA for cash and trade discounts, rebates, scrap, commissions, and other amounts that are identifiable to the contract.
(D) Other Costs. Unless listed below, other direct and indirect costs will not be reimbursed.
(1) Other direct Costs. BPA will reimburse the Contractor on the basis of actual cost for the following, provided such costs comply with the requirements in paragraph (i)(1)(ii)(B) of this clause: [Insert each element of other direct costs (e.g., travel, computer usage charges, etc. Insert "None" if no reimbursement for other direct costs will be provided. If this is an indefinite delivery contract, the Contracting Officer may insert "Each order must list separately the elements of other direct charge(s) for that order or, if no reimbursement for other direct costs will be provided, insert 'None'."]
(2) Indirect Costs (Material handling, Subcontract Administration, etc.). BPA will reimburse the Contractor for indirect costs on a pro-rata basis over the period of contract performance at the following fixed price: [Insert a fixed amount for the indirect costs and payment schedule. Insert "$0" if no fixed price reimbursement for indirect costs will be provided. (If this is an indefinite delivery contract, the Contracting Officer may insert "Each order must list separately the fixed amount for the indirect costs and payment schedule or, if no reimbursement for indirect costs, insert 'None'."]

(2) Total cost. It is estimated that the total cost to BPA for the performance of this contract shall not exceed the ceiling price set forth in the Schedule and the Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within such ceiling price. If at any time the Contractor has reason to believe that the hourly rate payments and material costs that will accrue in performing this contract in the next succeeding 30 days, if added to all other payments and costs previously accrued, will exceed 85 percent of the ceiling price in the Schedule, the Contractor shall

notify the Contracting Officer giving a revised estimate of the total price to BPA for performing this contract with supporting reasons and documentation. If at any time during the performance of this contract, the Contractor has reason to believe that the total price to BPA for performing this contract will be substantially greater or less than the then stated ceiling price, the Contractor shall so notify the Contracting Officer, giving a revised estimate of the total price for performing this contract, with supporting reasons and documentation. If at any time during performance of this contract, BPA has reason to believe that the work to be required in performing this contract will be substantially greater or less than the stated ceiling price, the Contracting Officer will so advise the Contractor, giving the then revised estimate of the total amount of effort to be required under the contract.

(3) Ceiling price. BPA will not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the Contracting Officer notifies the Contractor in writing that the ceiling price has been increased and specifies in the notice a revised ceiling that shall constitute the ceiling price for performance under this contract. When and to the extent that the ceiling price set forth in the Schedule has been increased, any hours expended and material costs incurred by the Contractor in excess of the ceiling price before the increase shall be allowable to the same extent as if the hours expended and material costs had been incurred after the increase in the ceiling price.

(4) Access to records*.* At any time before final payment under this contract, the Contracting Officer (or authorized representative) will have access to the following (access shall be limited to the listing below unless otherwise agreed to by the Contractor and the Contracting Officer):

(i) Records that verify that the employees whose time has been included in any invoice met the qualifications for the labor categories specified in the contract.

(ii) For labor hours (including any subcontractor hours reimbursed at the hourly rate in the Schedule), when timecards are required as substantiation for payment—

(A) The original timecards (paper-based or electronic);

(B) The Contractor's timekeeping procedures;

(C) Contractor records that show the distribution of labor between jobs or contracts; and

(D) Employees whose time has been included in any invoice for the purpose of verifying that these employees have worked the hours shown on the invoices.

(iii) For material and subcontract costs that are reimbursed on the basis of actual cost—

(A) Any invoices or subcontract agreements substantiating material costs; and

(B) Any documents supporting payment of those invoices.

(5) Overpayments/Underpayments. Each payment previously made shall be subject to reduction to the extent of amounts, on preceding invoices, that are found by the Contracting Officer not to have been properly payable and shall also be subject to reduction for overpayments or to increase for underpayments. The Contractor shall promptly pay any such reduction within 30 days unless the parties agree otherwise. BPA within 30 days will pay any such increases, unless the parties agree otherwise. The Contractor's payment will be made by check. If the Contractor becomes aware of a duplicate invoice payment or that BPA has otherwise overpaid on an invoice payment, the Contractor shall—

(i) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the—

(A) Circumstances of the overpayment (*e.g.,* duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);

(B) Affected contract number and delivery order number, if applicable;

(C) Affected contract line item or subline item, if applicable; and

(D) Contractor point of contact.

(ii) Provide a copy of the remittance and supporting documentation to the Contracting Officer.

(6)

(i) All amounts that become payable by the Contractor to BPA under this contract shall bear simple interest from the date due until paid unless paid within 30 days of becoming due. 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.
(ii) BPA may issue a demand for payment to the Contractor upon finding a debt is due under the contract.
(iii) Final Decisions. The Contracting Officer will issue a final decision as required by BPI 21.3.11 if—
(A) The Contracting Officer and the Contractor are unable to reach agreement on the existence or amount of a debt in a timely manner;
(B) The Contractor fails to liquidate a debt previously demanded by the Contracting Officer within the timeline specified in the demand for payment unless the amounts were not repaid because the Contractor has requested an installment payment agreement; or
(C) The Contractor requests a deferment of collection on a debt previously demanded by the Contracting Officer.
(iv) If a demand for payment was previously issued for the debt, the demand for payment included in the final decision shall identify the same due date as the original demand for payment.
(v) Amounts shall be due at the earliest of the following dates:
(A) The date fixed under this contract.
(B) The date of the first written demand for payment, including any demand for payment resulting from a default termination.
(vi) The interest charge shall be computed for the actual number of calendar days involved beginning on the due date and ending on—
(A) The date on which the designated office receives payment from the Contractor;
(B) The date of issuance of a BPA check/payment to the Contractor from which an amount otherwise payable has been withheld as a credit against the contract debt; or
(C) The date on which an amount withheld and applied to the contract debt would otherwise have become payable to the Contractor.
(vii) The interest charge made under this clause may be reduced under the procedures prescribed in the Bonneville Purchasing Instructions 22.1.4.3(b) in effect on the date of this contract.
(viii) Upon receipt and approval of the invoice designated by the Contractor as the “completion invoice” and supporting documentation, and upon compliance by the Contractor with all terms of this contract, any outstanding balances will be paid within 30 days unless the parties agree otherwise. The completion invoice, and supporting documentation, shall be submitted by the Contractor as promptly as practicable following completion of the work under this contract, but in no event later than 1 year (or such longer period as the Contracting Officer may approve in writing) from the date of completion.

(7) Release of claims. The Contractor, and each assignee under an assignment entered into under this contract and in effect at the time of final payment under this contract, shall upon BPA’s request, execute and deliver, at the time of and as a condition precedent to final payment under this contract, a release discharging BPA, its officers, agents, and employees of and from all liabilities, obligations, and claims arising out of or under this contract, subject only to the following exceptions.
(i) Specified claims in stated amounts, or in estimated amounts if the amounts are not susceptible to exact statement by the Contractor.
(ii) Claims, together with reasonable incidental expenses, based upon the liabilities of the Contractor to third parties arising out of performing this contract, that are not known to the Contractor on the date of the execution of the release, and of which the Contractor gives notice in writing to the Contracting Officer not more than 6 years after the date of the release or the date of any notice to the Contractor that BPA is prepared to make final payment, whichever is earlier.
(iii) Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of BPA against patent liability), including reasonable incidental expenses, incurred by the Contractor under the terms of this contract relating to patents.

(8) Prompt payment. BPA will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations at 5 CFR part 1315.

(9) Electronic Funds Transfer (EFT).

(i) Payments under this contract shall be made by electronic funds transfer (EFT). Contractor shall provide its taxpayer identification number (TIN) and other necessary banking information for BPA to make payments through EFT. Receipt of payment information, including any changes, must be received by BPA 30 days prior to effective date of the change. BPA shall not be liable for any payment under this contract until receipt of the correct EFT information from Contractor, nor be liable for any penalty on delay of payment resulting from incorrect EFT information. BPA shall notify the Contractor within 7 days of its receipt of EFT information which it determines to be defective.

(ii) If Contractor assigns the proceeds of this contract per Clause 28-18 Assignment, the Contractor shall require, as a condition of any such assignment, that the assignee agrees to be paid by EFT and shall provide its EFT information as identified in (iii) below. The requirements of this clause shall apply to the assignee as if it were the Contractor.

(iii) Submission of EFT banking information to BPA: The Contractor shall submit EFT enrollment banking information directly to BPA Vendor Maintenance Team, using Substitute IRS Form w9e, Request for Taxpayer Identification Number and Certification, available from the CO or the BPA Vendor Maintenance Team. Contact and mailing information:

Bonneville Power Administration	email: VendorMaintenance@BPA.gov
PO Box 491	phone: 360-418-2800
ATTN: NSTS-MODW Vendor Maintenance	fax: 360-418-8904
Vancouver, WA 98666-0491	

(10) Discount. In connection with any discount offered for early payment, time shall be computed from the date of the invoice. For the purpose of computing the discount earned, payment shall be considered to have been made on the date that appears on the payment check or the specified payment date if an electronic funds transfer payment is made.

(End of clause)

Clause 28-5.1 INSPECTION/ACCEPTANCE-FIRM FIXED PRICE
(Jul 13)(BPI 28.4.2.1**)**

The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. BPA reserves the right to inspect or test any supplies or services that have been tendered for acceptance. BPA may require repair or replacement of nonconforming supplies or re-performance of nonconforming services at no increase in contract price. If repair/replacement or re-performance will not correct the defects or is not possible, BPA may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. BPA must exercise its post-acceptance rights:

1) within a reasonable time after the defect was discovered or should have been discovered; and
2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(End of clause)

Clause 28-5.2 INSPECTION/ACCEPTANCE-TIME AND MATERIALS/LABOR RATE
(Jul 13)(BPI 28.4.2.1**)**

(a) BPA has the right to inspect and test all materials furnished and services performed under this contract, to the extent practicable at all places and times, including the period of performance, and in any event before acceptance. BPA may also inspect the plant or plants of the Contractor or any subcontractor engaged in contract performance. BPA will perform inspections and tests in a manner that will not unduly delay the work.

(b) If BPA performs inspection or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(c) Unless otherwise specified in the contract, BPA will accept or reject services and materials at the place of delivery as promptly as practicable after delivery, and they will be presumed accepted 60 days after the date of delivery, unless accepted earlier.
(d) At any time during contract performance, but not later than 6 months (or such other time as may be specified in the contract) after acceptance of the services or materials last delivered under this contract, BPA may require the Contractor to replace or correct services or materials that at time of delivery failed to meet contract requirements. Except as otherwise specified in paragraph (f) of this clause, the cost of replacement or correction shall be determined under Clause 28-4.2(1)(i), but the "hourly rate" for labor hours incurred in the replacement or correction shall be reduced to exclude that portion of the rate attributable to profit. Unless otherwise specified below, the portion of the "hourly rate" attributable to profit shall be 10 percent. The Contractor shall not tender for acceptance materials and services required to be replace or corrected without disclosing the former requirement for replacement or correction, and when required, shall discloser the corrective action taken. *[insert portion of labor rate attributable to profit.]*
(e)

(i) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, and if the replacement or correction can be performed within the ceiling price (or the ceiling price as increased by BPA), BPA may:

(A) By contract or otherwise, perform the replacement or correction, charge to the Contractor any increased cost, or deduct such increased cost from any amounts paid or due under this contract; or

(B) Terminate this contract for cause.

(ii) Failure to agree to the amount of increased cost to be charged to the Contractor shall be a dispute under the Disputes clause of the contract.

(f) Notwithstanding paragraphs (e)(i) and (ii) above, BPA may at any time require the Contractor to remedy by correction or replacement, without cost to BPA, any failure by the Contractor to comply with the requirements of this contract, if the failure is due to:

(i) Fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel; or

(ii) The conduct of one or more of the Contractor's employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

(g) This clause applies in the same manner and to the same extent to corrected or replacement materials or services as to materials and services originally delivered under this contract.
(h) The Contractor has no obligation or liability under this contract to correct or replace materials and services that at the time of delivery do not meet contract requirements, except as provided in this clause or as may be otherwise specified in the contract.
(i) Unless otherwise specified in the contract, the Contractor's obligation to correct or replace BPA-furnished property shall be governed by the clause relating to BPA property, if included in this contract.

(End of clause)

Clause 28-6 CHANGES
(Jul 13)(BPI 28.4.5.1**)**
Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(End of clause)

Clause 28-7 STOP WORK ORDER
(Jul 13)(BPI 28.4.19.1**)**
(a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within

a period of 90 days after a stop work order is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either—

(1) Cancel the stop work order; or

(2) Terminate the work covered by the order as provided in the Termination for BPA's Convenience clause of this contract.

(b) If a stop work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume the work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if—

(1) The stop work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and

(2) The Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon the claim submitted at any time before final payment under this contract.

(c) If a stop work order is not canceled and the work covered by the order is terminated for the convenience of BPA, the Contracting Officer shall allow reasonable costs resulting from the stop work order in arriving at the termination settlement.

(d) If a stop work order is not canceled and the work covered by the order is terminated for cause, the Contracting Officer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop work order.

(End of clause)

Clause 28-8 FORCE MAJEURE/EXCUSABLE DELAY
(Jul 13)(BPI 28.4.6.1**)**

The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence.

(End of clause)

Clause 28-9.1 TERMINATION FOR CAUSE-FIRM FIXED PRICE
(Jul 13)(BPI 28.4.4.1.1.1**)**

BPA may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide BPA, upon request, with adequate assurances of future performance. In the event of termination for cause, BPA shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to BPA for any and all rights and remedies provided by law. If it is determined that BPA improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(End of clause)

Clause 28-9.2 TERMINATION FOR CAUSE-TIME AND MATERIALS/LABOR RATE
(Jul 13)(BPI 28.4.4.1.1.1**)**

BPA may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide BPA, upon written request, with adequate assurances of future performance. Subject to the terms of this

contract, the Contractor shall be paid an amount computed under Clause 28-4.2 Payment-Time and Materials/Labor Rate, but the "hourly rate" for labor hours expended in furnishing work not delivered to or accepted by BPA shall be reduced to exclude that portion of the rate attributable to profit. Unless otherwise specified in Clause 28-5.2(d) Inspection/Acceptance-Time and Materials/Labor Rate, the portion of the "hourly rate" attributable to profit shall be 10 percent. In the event of termination for cause, the Contractor shall be liable to BPA for any and all rights and remedies provided by law. If it is determined that BPA improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(End of clause)

Clause 28-10.1__ TERMINATION FOR BPA'S CONVENIENCE-FIRM FIXED PRICE
(Jul 13)(BPI 28.4.4.2.1**)**
BPA reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting a percentage of the work performed prior to the notice of termination, plus reasonable charges that the Contractor can demonstrate to the satisfaction of BPA using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give BPA any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(End of clause)

Clause 28-10.2 __TERMINATION FOR BPA'S CONVENIENCE-TIME AND MATERIALS/LABOR RATE
(Jul 13)(BPI 28.4.4.2.1**)**
BPA reserves the right to terminate this contract, or any part thereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid an amount for direct labor hours (as defined in the Schedule of the contract) determined by multiplying the number of direct labor hours expended before the effective date of termination by the hourly rate(s) in the contract, less any hourly rate payments already made to the Contractor plus reasonable charges the Contractor can demonstrate to the satisfaction of BPA using its standard record keeping system that have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this purpose. This paragraph does not give BPA any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

(End of clause)

Clause 28-11 __WARRANTY
(Jul 13)(BPI 28.4.3.2.1**)(BPI 17.3.7.1)(BPI 17.4.2.1)(BPI 17.2.10.1)**
The Contractor warrants and implies that the items delivered hereunder are merchantable and fit for use for the particular purpose described in this contract. All express warranties offered by the Contractor shall be incorporated into this contract.

(End of clause)

Clause 28-12 __LIMITATION OF LIABILITY
(Jul 13)(BPI 28.4.11.1**)**
Except as otherwise provided by an express warranty, the Contractor shall not be liable to BPA for consequential damages resulting from any defect or deficiencies in accepted items.

(End of clause)

Clause 28-13__ DISPUTES
(Jul 13)(BPI 28.4.14.1**)**
This contract is subject to the Contract Disputes Act of 1978, as amended (41 U.S.C. 7101-7109). Failure of the parties to this contract to reach agreement on any request for equitable adjustment, claim, appeal, or action arising under or relating to this contract shall be a dispute to be resolved in accordance with the clause at BPI Clause 21-2 Disputes, which is incorporated by reference. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute under the contract.

(End of clause)

Clause 28-14__ INDEMNIFICATION
(Jul 13)(BPI 28.4.7.1**)**
The Contractor shall indemnify BPA and its officers, employees, and agents against liability, including costs, for actual or alleged direct or contributory infringement of, or inducement to infringe, any United States or foreign patent, trademark, or copyright, arising out of the performance of this contract, provided the Contractor is reasonably notified of such claims and proceedings.

(End of clause)

Clause 28-15 RISK OF LOSS
(Jul 13)(BPI 28.4.8.1**)**
Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to BPA upon:
1) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or
2) Delivery of the supplies to BPA at the destination specified in the contract, if transportation is f.o.b. destination.

(End of clause)

Clause 28-16 TITLE
(Jul 13)(BPI 28.4.9.1**)**
Unless specified elsewhere in this contract, title to items furnished under this contract shall pass to BPA upon acceptance, regardless of when or where BPA takes physical possession.

(End of clause)

Clause 28-17 TAXES
(Jul 13)(BPI 28.4.10.1**)**
The contract price includes all applicable Federal, State, and local taxes and duties.

(End of clause)

Clause 28-18 ASSIGNMENT
(Jul 13) (BPI 28.4.13.1**)**
The Contractor or its assignee may assign rights to receive payment due as a result of performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency in accordance with the Assignment of Claims Act (31 U.S.C. 3727). However, when a third party makes payment (e.g. use of a BPA purchase card), the Contractor may not assign its rights to receive payments under this contract.

(End of clause)

Clause 28-19 OTHER COMPLIANCES
(Jul 13)(BPI 28.4.17.1**)**
The Contractor shall comply with all applicable Federal, State and local laws, executive orders, rules and regulations applicable to its performance under this contract.

(End of clause)

Clause 28-20 REQUIREMENTS UNIQUE TO GOVERNMENT CONTRACTS
(Aug 13)(BPI 28.4.18.1**)**
(a) The Contractor shall comply with the BPI clauses in this paragraph (a) that the Contracting Officer has indicated as being incorporated into this contract by reference to implement provisions of law or Executive Orders applicable to acquisitions of commercial **items**:
[Contracting Officer check as appropriate.]
____ (1) Certification, Disclosure and Limitation Regarding Payments to Influence Certain Federal Transactions (Clause 3-3)
____ (2) Contractor Policy to Ban Text Messaging While Driving (Clause 3-4)
____ (3) Utilization of Supplier Diversity Program Categories (Clause 8-3)
____ (4) Buy American-Supplies (Clause 9-3)
____ (5) Restriction on Certain Foreign Purchases (Clause 9-8)
____ (6) Non-Discrimination and Affirmative Action (Clause 10-1)
____ (7) Notification of Employee Rights Under the NLRA (Clause 10-6), see attached text.
____ (8) Equal Opportunity for Veterans (Clause 10-19)
____ (9) Employment Reports on Veterans (Clause 10-20)
____ (10) Subcontracting with Debarred or Suspended Entities (Clause 11-7)
____ (11) Requirements for US Flag Vessel (Clause 14-16)
(12) Sustainability:
____ Ozone Depleting Substances (Clause 15-7)
____ Refrigeration Equipment (Clause 15-8)
____ Energy Efficiency in Energy Consuming Products (Clause15-9)
____ Recovered Materials (Clause 15-10)
____ Bio-Based Materials (Clause 15-11)

(b) The Contractor shall comply with the BPI clauses in this paragraph (b) that the Contracting Officer has indicated as being incorporated into this contract by reference to implement provisions of law or Executive Orders applicable to acquisitions of commercial **services**:
[Contracting Officer check as appropriate.]
____ (1) Organizational Conflicts of Interest (Clause 3-2)
____ (2) Certification, Disclosure and Limitation Regarding Payments to Influence Certain Federal Transactions (Clause 3-3)
____ (3) Contractor Policy to Ban Text Messaging While Driving (Clause 3-4)
____ (4) Utilization of Supplier Diversity Program Categories (Clause 8-3)
____ (5) Non-Discrimination and Affirmative Action (Clause 10-1)
____ (6) Service Contract Act of 1965 (Clause 10-3), see attached text**.**
____ (7) Notification of Employee Rights Under the NLRA (Clause 10-6); see attached text.
____ (8) Employment Eligibility Verification (Clause 10-18)
____ (9) Equal Opportunity for Veterans (Clause 10-19)
____ (10) Employment Reports on Veterans (Clause 10-20)
____ (11 Subcontracting with Debarred or Suspended Entities (Clause 11-7)
____ (12) Sustainability:
____ Ozone Depleting Substances (Clause 15-7)
____ Refrigeration Equipment (Clause 15-8)
____ Energy Efficiency in Energy Consuming Products (Clause 15-9)
____ Recovered Materials (Clause 15-10)
____ Bio-Based Materials (Clause 15-11)

____ (13) Nondisplacement of Qualified Workers (Clause 23-5)

(c) Examination of Records.

(1) The Comptroller General of the United States, an appropriate Inspector General appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. app.), the Contracting Officer or authorized representatives thereof shall have access to and right to-

(i) Examine any of the Contractor's or any subcontractors' records that pertain to, and involve transactions relating to, this contract; and

(ii) Interview any officer or employee regarding such transactions.

(2) The Contractor shall make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction, until 3 years after final payment under this contract. If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement. Records relating to appeals under the disputes clause or to litigation or the settlement of claims arising under or relating to this contract shall be made available until such appeals, litigation, or claims are finally resolved.

(3) As used in this clause, records include books, documents, accounting procedures and practices, and other data, regardless of type and regardless of form. This does not require Contractor to create or maintain any record that the Contractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(d) The Contractor shall include the requirements in the following clauses in its subcontracts when these clauses are included in the BPA contract for commercial items or services:

(1) Paragraph (c) Examination of Record of this clause. This paragraph shall flow down to all subcontracts, except the authority of the Inspector General under paragraph (c)(2)does not flow down; and

(2) Those clauses contained in this paragraph (d)(2). Unless otherwise indicated below, the extent of the flow down shall be as required by the clause:

(a) Utilization of Supplier Diversity Program Categories (Clause 8-3), if the subcontract offers further subcontracting opportunities.

(b) Nondiscrimination and Affirmative Action (Clause 10-1),

(c) Notification of Employee Rights under the National Labor Relations Act (Clause 10-6).

(d) Service Contract Act of 1965 (Clause 10-3).

(e) Employment Eligibility Verification (Clause 10-18), unless subcontracting for commercial items.

(f) Equal Opportunity for Veterans (Clause 10-19)

(g) Employment Reports on Veterans (Clause 10-20)

(h) Subcontracting with Debarred or Suspended Entities (Clause 11-7), unless subcontracting for COTS items.

(i) Nondisplacement of Qualified Workers (Clause 23-5).

(e) Text of clauses incorporated by reference is available at
http://www.bpa.gov/Doing%20Business/purchase/Pages/default.aspx

(End of clause)

Clause 28-21 ORDER OF PRECEDENCE
(Jul 13)(BPI 28.4.12.1)(BPI 17.2.1.1)(BPI 17.3.1.1)

Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:

1) The Schedule of Pricing.
2) The Assignments, Disputes, Payments, Invoice, Other Compliances, and Requirements Unique to Government Contracts clauses of this contract.
3) Solicitation provisions if this is a solicitation.
4) Other documents, exhibits, and attachments, including any license agreements for computer software.
5) The specification or statement of work.

(End of clause)

Clause 28-22 APPLICABLE LAW
(Jul 13)(BPI 28.4.20.1**)**
United States law will apply to resolve any claim of breach of this contract.

(End of clause)

Clause 28-23 INTERNET PROTOCOL VERSION 6
(Jul 13)(BPI 28.2.2.1**)**
This contract involves the acquisition of Information Technology (IT) that uses Internet Protocol (IP) technology. The Contractor agrees that (1) all deliverables that involve IT that uses IP (products, services, software, etc.) comply with IPv6 standards and interoperate with both IPv6 and IPv4 systems and products; and (2) it has IPv6 technical support for fielded product management, development and implementation available. If the Contractor plans to offer a deliverable that involves IT that is not initially compliant, the Contractor shall (1) obtain the Contracting Officer's approval before starting work on the deliverable; and (2) have IPv6 technical support for fielded product management, development and implementation available.

Should the Contractor find that the Statement of Work/Specifications of this contract do not conform to IPv6 standards, it must notify the Contracting Officer of such nonconformance and act in accordance with the instructions of the Contracting Officer.

(End of clause)