

The attached document is a working draft of BPA's Binding Arbitration Policy.

Background:

The Administrative Dispute Resolution Act, 5 U.S.C. §§ 570a-584 (ADRA), sets various limits on a federal agency's authority to use binding arbitration to resolve disputes. One of ADRA's requirements is that a federal agency must have a binding arbitration policy in place before the agency may enter binding arbitration. Such policy must contain specific limitations provided for in the ADRA and must be approved by DOJ.

In order to comply with ADRA, BPA has drafted the attached Binding Arbitration Policy. BPA believes this Policy is consistent with the Long-Term Regional Dialogue Policy issued in July of 2007. This draft Binding Arbitration Policy is currently being reviewed by DOE, and will then be reviewed by DOJ. Thus, this draft is a work in progress and will be revised to address any issues DOE or DOJ raise.

BPA understands that customers are interested in knowing what BPA's Binding Arbitration Policy says because the dispute resolution provision in the Regional Dialogue contract template makes reference to the Policy. Therefore, BPA is sharing this draft with customers to give customers a sense of what the Policy contains. BPA is sharing this draft for informational purposes only and is not taking public comment on this Policy.

GUIDANCE ON THE USE OF BINDING ARBITRATION FOR BPA CONTRACTS

Introduction

Alternative dispute resolution (ADR) encompasses a variety of methods that parties may use to resolve disputes without litigation. Arbitration is a private, less formal process in which parties agree to submit a dispute to one or more impartial arbitrators who then render a decision or award, which a party is not required to accept. In contrast, a decision or award in binding arbitration is final and subject to only very limited rights of appeal. Both types of arbitration can provide benefits to BPA, its customers, and other stakeholders, such as greater flexibility, limited discovery, a streamlined hearing process, use of subject-area expert arbitrators, and restricted judicial review.

1. Purpose

This guidance provides the framework and standards for the use of binding arbitration for BPA contract claims. The guidance was developed consistent with the provisions of 5 U.S.C. §§ 570a-584, the Administrative Dispute Resolution Act of 1996 (ADRA). The BPA Office of General Counsel must be consulted before any commitment is made by BPA to pursue binding arbitration in any contract claim, regardless of whether this guidance specifically applies.

2. Scope

a. This guidance applies to all contracts where: 1) BPA is acquiring commodities, goods, or services; 2) BPA is selling commodities or goods; and 3) BPA is acquiring goods or services associated with the construction, alteration, repair, or maintenance of real property. See Contract Disputes Act, 41 U.S.C. § 602(a). Such contracts include, but are not limited to, procurements subject to the BPA Purchasing Instructions (BPI), BPA power sales contracts, BPA energy efficiency contracts, BPA resource and conservation acquisition contracts, and BPA energy exchange contracts. This guidance does not apply to real property contracts or where BPA is providing services, including, but not limited to, transmission services. This guidance does not apply to employment or labor agreements.

b. This guidance applies to all officers and employees of BPA. This guidance applies to federal court-based ADR programs for any BPA contract claims as defined in 2(a).

c. Binding arbitration may be used to resolve contract claims where it is more practical, cost-effective, or efficient than litigation. Before agreeing to binding arbitration, however, BPA should consider other consensual methods of ADR first, such as evaluation, negotiation, or mediation.

d. This guidance does not require BPA to participate in binding arbitration or in other consensual methods of ADR.

3. Definitions and Terms used in this guidance

a. Alternative Dispute Resolution (“ADR”). A generic term that encompasses a wide range of practices (binding or nonbinding) for managing and resolving disputes other than through litigation or administrative adjudication. Binding arbitration is a form of ADR.

b. Binding Arbitration. A dispute resolution process similar to litigation where parties agree to use a neutral decision-maker to hear and resolve a claim by rendering a final and binding award. Like litigation, binding arbitration is an adversarial, adjudicative process designed to resolve specific claims submitted by the parties. Arbitration differs from litigation because it may not require the use of the Federal rules of evidence and procedure, allows flexibility in both timing and choice of an arbitrator, is non-public, and results in an award that has no precedential value in other disputes. There are very limited rights of appeal from a binding arbitration award.

c. Contract. For purposes of this guidance, contract means any written agreement between BPA and another entity that creates obligations between the parties, is supported by consideration, and is: 1) issued pursuant to the BPA Purchasing Instructions (BPI); 2) a power sales contract; 3) an energy efficiency contract; 4) a resource and conservation acquisition contract; or 5) an energy exchange contract.

d. Contract Claim or Claim. For purposes of this guidance, contract claim means a written demand for monetary relief in response to a dispute between the contracting parties, submitted in accordance with applicable federal law.

e. Court-Based ADR. Means an ADR procedure annexed to a court proceeding.

f. Evaluation. Means a non-binding process in which a third-party neutral provides an advisory opinion to the parties as to the merits of a contract claim, including an opinion as to the strengths and weaknesses of each party’s case.

g. Federal Arbitration Act, 9 U.S.C. §§ 1-14 (“FAA”). Means the statute that provides for the enforcement in federal court of agreements to arbitrate and arbitration awards. The FAA is procedural and creates no independent basis for federal subject matter jurisdiction.

h. Mediation. Means a non-binding, voluntary process that uses a third-party neutral to assist the parties in resolving a contract claim. Mediators have no decision-making authority and cannot impose an award on the parties.

i. Negotiation. Means the primary form of dispute resolution in which the parties communicate or bargain to settle a contract claim with no assistance from a third-party neutral.

j. Pre- Claim Agreement to Binding Arbitration. For purposes of this guidance, means a written agreement included as part of a contract, in which the parties agree, prior to any contract claim, to submit a contract claim to binding arbitration. The agreement must set forth the arbitration procedures that will be followed if a contract claim arises.

k. Post- Claim Agreements to Binding Arbitration. For purposes of this guidance, means a written agreement to arbitrate after a contract claim has been submitted under a contract, and where no arbitration provision was included originally in the contract.

4. Requirements for the Use of Binding Arbitration for BPA contract claims

To use binding arbitration, all of the following requirements must be met:

- a. All agreements to arbitrate a contract claim must be in writing and must specify the subject matter to be submitted to the arbitrator for decision (5 U.S.C. § 575(a)(2));
- b. All agreements to arbitrate a contract claim must include a maximum award that may be granted by the arbitrator (5 U.S.C. § 575(a)(2));
- c. All agreements to arbitrate a contract claim must only allow for money damages as relief. BPA will not participate in any binding arbitration that provides for any relief other than money damages. In addition, any money damages awarded in a binding arbitration are limited to those allowed under federal contract law;
- d. Any officer or employee of BPA offering to use binding arbitration in resolution of a contract claim must have either the authority to enter into a settlement of the claim, or have the specific delegated authority to consent to binding arbitration on behalf of BPA (5 U.S.C. § 575(b)(1) and (2));
- e. BPA may not require consent to binding arbitration as a condition to contracting with BPA (5 U.S.C. § 575(a)(3)); and
- f. The agreement to use binding arbitration must be voluntary on the part of all parties (5 U.S.C. § 575(a)(1)).

5. Restrictions on the Use of Binding Arbitration for Contract Claims

a. Except in unique circumstances, BPA will not agree to binding arbitration if a contract claim:

- (1) Requires an authoritative determination as precedent for other cases and such a proceeding is not likely to be accepted generally as authoritative precedent;
- (2) Involves a significant question of government policy;
- (3) Involves a matter for which BPA seeks to maintain consistent results should any other persons seek review;
- (4) Significantly impacts persons or organizations that are not parties to the proceedings;
- (5) A public record of the proceedings is required or used;
- (6) Must be monitored on an on-going basis by BPA;
- (7) Must be monitored on an on-going basis by a court or an administrative body to ensure compliance; or
- (8) Must be adjudicated to establish a body of law.

b. In addition, the following limits on the use of binding arbitration will be followed:

- (1) All agreements to resolve contract claims through binding arbitration must limit any award of money damages to those allowed under federal contract law.
- (2) All agreements to arbitrate must explicitly state that the parties to the arbitration proceedings will bear their respective arbitration costs and fees, including all attorney fees and expenses. The agreement to arbitrate must explicitly exclude any award of the other party's attorney fees or arbitration costs.
- (3) No arbitrator can serve as counsel, advisor, witness, or representative to any party to the arbitration proceedings. Potential conflicts of interest of arbitrators selected pursuant to this guidance must be reviewed by BPA's Office of General Counsel. The Office of General Counsel may approve or deny, in writing, waivers of arbitrator conflicts in appropriate circumstances.
- (4) The method to select the arbitrator(s) must be approved by BPA's Office of General Counsel.

6. Delegations of Authority

The decision to use binding arbitration in a contract claim, whether pre- or post-claim (see paragraph 7 below), is similar to a decision to initiate litigation or to settle or compromise a contract claim. Each of these decisions requires the written approval of one or more officers of BPA with the necessary delegated authority, as well as the written approval of BPA's General Counsel, or his delegate. BPA's practice is to treat binding arbitration as either the compromise of a contract claim or the settlement of litigation, with approval required at the appropriate level for both the compromise or settlement activity, and for the dollar amount. Authority to determine the maximum award amount for any given arbitration is reflected in the expenditure and/or compromise and settlement delegations.

7. Pre- and Post- Claim Agreements to Arbitrate

a. Form of Agreement: Binding arbitration is a complete dispute resolution mechanism which has few, if any, rights of appeal. It is imperative that any arbitration provisions for use by BPA in contract claims (whether in a pre- or post-claim agreement) be carefully drafted and reviewed by BPA's Office of General Counsel to ensure that all pertinent arbitration issues have been addressed. Any language intended to invoke the use of binding arbitration for a contract claim where BPA is a party must be reviewed and approved by BPA's General Counsel, or his delegate.

b. Approval for Binding Arbitration:

(1) Pre-Claim Agreements: Binding arbitration clauses may be drafted to be voluntarily invoked as agreed to by the parties when a dispute arises during performance of the contract, but prior to the submittal of a contract claim. The decision to invoke voluntary binding arbitration clauses must be reviewed and approved by the Office of the General Counsel in accordance with this guidance. Binding arbitration clauses may be written to require that the parties must resolve any contract claim through binding arbitration. Clauses requiring the use of binding arbitration to resolve any contract claim must be prepared in accordance with the procedures in this guidance, and applicable Delegations of Authority.

(2) Post-Claim Agreements: When a contract does not require binding arbitration, BPA will consider whether to use binding arbitration after a contract claim is submitted on a case-by-case basis. The decision to use binding arbitration must be in accordance with the procedures for requesting the authority to settle or compromise a contract claim.

8. Responsibilities

a. All BPA officers and employees considering the use of binding arbitration for contract claims must:

- (1) Identify subject areas and transactions where binding arbitration may be appropriate to resolve contract claims;
- (2) Develop plans and strategies for the implementation of binding arbitration in general, and this guidance specifically, in identified subject areas; and
- (3) Work with the Office of General Counsel to identify legal issues that may affect the substantive transaction/subject area and the implementation of the use of binding arbitration for contract claims.

b. The Office of General Counsel must:

- (1) Provide consultation and assistance in determining the need for binding arbitration in all contract claims;
- (2) Review and provide legal advice in each proposal for a binding arbitration agreement;
- (3) At the request of a BPA officer or employee, address legal issues that may occur if binding arbitration is used to resolve contract claims arising out of a contract;
- (4) Provide a requesting BPA officer or employee the appropriate agreements, clauses, and the like to use binding arbitration where approved;
- (5) Assist in arbitration design;
- (6) Assist in selection of arbitrators;
- (7) Advise and assist, if appropriate, in the preparation of the witnesses or documents to be used in the arbitration;
- (8) Assist in the enforcement of arbitration agreements or awards pursuant to the terms of the Federal Arbitration Act; and
- (9) Represent, or assist in representation of, BPA in arbitration.

Questions regarding this guidance should be directed to the Office of General Counsel.

The provisions of this guidance are effective immediately. This guidance is not retroactive and does not apply to any contracts executed before the adoption date of this guidance.

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