

BONNEVILLE POWER ADMINISTRATION'S 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. In non-binding arbitration a party is not required to accept the arbitrator's decision. In contrast, a decision or award in binding arbitration is final and subject to only very limited rights of appeal. See Federal Arbitration Act, 9 U.S.C. §§ 1-16 (FAA). Both types of arbitration can provide benefits to BPA, its customers, and other stakeholders including the public, such as greater flexibility, limited discovery, a streamlined hearing process, use of subject-area expert arbitrators, and finality.

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. §§ 571-584, 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. Attachment A contains a list of questions and answers that provide further detail on how this guidance should be applied.

2. Scope

The ADRA applies to BPA through the Contract Disputes Act (CDA). See 41 U.S.C. § 605(d). Accordingly, this guidance is generally intended to apply to contracts to which the CDA applies. This section provides some specificity as to which BPA contracts are subject to the CDA and therefore are subject to this guidance. This section also specifies types of contracts to which this guidance does not apply.

a. This guidance applies to all contracts involving the following, but not those set out below in (b):

- 1) where BPA is acquiring commodities, goods, or services;
- 2) where BPA is selling commodities or goods; and
- 3) where BPA is acquiring goods or services associated with the construction, alteration, repair, or maintenance of real property. See CDA, 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 resource and conservation acquisition contracts, and BPA energy exchange contracts.

b. This guidance does not apply:

(1) to real property contracts

(2) to contracts under which BPA is providing services, for example transmission services

(3) to contracts under which BPA is purchasing transmission services under other parties' Open Access Transmission Tariffs required by the Federal Energy Regulatory Commission under the Federal Power Act, 16 U.S.C. §§ 791a-828c, as amended

(4) to employment or labor agreements.

c. This guidance applies to all officers and employees of BPA.

d. 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.

e. This guidance alone 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 judicial or administrative adjudication. Binding arbitration is a form of ADR.

b. Administered Arbitration. Arbitration in which a private ADR provider organization or arbitrator manages the arbitration process. Among other things, the provider may set procedural rules, select or assist the parties in selecting arbitrators, schedule the arbitration, provide a meeting facility, transfer documents, mail the award and collect any fees.

c. Binding Arbitration. A dispute resolution process similar to trial where parties agree to use a neutral decision-maker to hear and decide 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 strict application of the Federal rules of evidence and procedure, allows flexibility in both timing and choice of an arbitrator, is a private proceeding, 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 and the judgment is enforceable by the courts. See FAA, 9 U.S.C. §§ 1-16.

d. BPA General Counsel. The General Counsel of Bonneville Power Administration.

e. BPA Office of General Counsel. The General Counsel's Office within Bonneville Power Administration.

f. 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; 2) a power sales contract; 3) a resource and conservation acquisition contract; or 4) an energy exchange contract.

g. Contract Claim or Claim. For purposes of this guidance, contract claim as that term is used in the CDA, means a written demand for monetary relief in response to a dispute between the contracting parties.

h. Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("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.

i. 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.

j. 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.

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

l. Post-Claim Agreement to Binding Arbitration. For purposes of this guidance, means a written and voluntary agreement to arbitrate after a contract claim has been submitted under a contract, and where no agreement to arbitrate was included in the original 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. The maximum amount that can be awarded is set forth in the agreement to arbitrate pursuant to 4.b above. In addition, the parties may agree to other limitations that may apply to the award of money damages. Such limitations will be included in the agreement to arbitrate on a case-by-case basis.

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)).

g. BPA will consider whether binding arbitration with foreign entities and foreign governments is appropriate on a case-by-case basis. If BPA determines that it is appropriate, the procedures and requirements set forth in this document shall apply to such binding arbitration.

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

a. BPA will not agree to binding arbitration (except in exceptional circumstances) if the 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 arbitration proceedings is important;
- (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 shall 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, even if the designated maximum award amount is higher.

(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's fees and expenses. The agreement to arbitrate must explicitly exclude any award of the other party's attorney's 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 BPA 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 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 binding arbitration clauses must be reviewed and approved by the BPA 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, including limiting the use of binding arbitration to money damages with a maximum award amount as provided in sections 4(b) and 4(c), and applicable Delegations of Authority and approved by the BPA Office of General Counsel. BPA Office of General Counsel will file an annual report with the Department of Energy's Office of General Counsel listing all BPA Contracts requiring the use of binding arbitration to resolve any contract claim.

(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 BPA 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 BPA 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 BPA Office of General Counsel.

The provisions of this guidance are effective immediately. Dated, October 9, 2009

ATTACHMENT A

This Attachment contains a list of substantive binding arbitration issues identified in the U.S. Department of Justice Handbook: *Developing Guidance for Binding Arbitration*, and BPA's responses to those issues. Where the issue is addressed by language in the body of *BPA's Guidance on the Use of Binding Arbitration for BPA Contracts* ("BPA's Binding Arbitration Policy"), that language is quoted.

Issue 1: For what types of cases will the agency be willing to use binding arbitration?

BPA may be willing to use binding arbitration to resolve contract claims within the scope of BPA's Binding Arbitration Policy (contracts to which the Contract Disputes Act applies, including procurements subject to the BPA Purchasing Instructions (BPI), BPA power sales contracts, BPA resource and conservation acquisition contracts, and BPA energy exchange contracts), if the contract claim fits within the restrictions of section 5.a of the Policy.

See these relevant portions of BPA's Binding Arbitration Policy:

2. Scope

The ADRA applies to BPA through the Contract Disputes Act (CDA). See 41 U.S.C. § 605(d). Accordingly, this guidance is generally intended to apply to contracts to which the CDA applies. This section provides some specificity as to which BPA contracts are subject to the CDA and therefore are subject to this guidance. This section also specifies types of contracts to which this guidance does not apply.

a. This guidance applies to all contracts involving the following, but not those set out below in (b):

- 1) where BPA is acquiring commodities, goods, or services;
- 2) where BPA is selling commodities or goods; and
- 3) where BPA is acquiring goods or services associated with the construction, alteration, repair, or maintenance of real property. See CDA, 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 resource and conservation acquisition contracts, and BPA energy exchange contracts.

b. This guidance does not apply:

- (1) to real property contracts
- (2) to contracts under which BPA is providing services, for example transmission services
- (3) to contracts under which BPA is purchasing transmission services under other parties' Open Access Transmission Tariffs required by the Federal Energy Regulatory Commission under the Federal Power Act, 16 U.S.C. §§ 791a-828c, as amended
- (4) to employment or labor agreements.

c. This guidance applies to all officers and employees of BPA.

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

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

- a. BPA will not agree to binding arbitration (except in exceptional circumstances) if the 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 arbitration proceedings is important;
 - (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.

Issue 2: Will the agency agree to arbitrate issues other than money, e.g. specific performance, punitive damages, injunctive relief, apportionment of fees?

No, BPA will only arbitrate contract claims for money damages. See these relevant sections of BPA's Binding Arbitration Policy:

3.g. Contract Claim or Claim. For purposes of this guidance, contract claim as that term is used in the CDA, means a written demand for monetary relief in response to a dispute between the contracting parties.

4.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. The maximum amount that can be awarded is set forth in the agreement to arbitrate pursuant to 4.b above. In addition, the parties may agree to other limitations that may apply to the award of money damages. Such limitations will be included in the agreement to arbitrate on a case-by-case basis.

5.b(1) All agreements to resolve contract claims through binding arbitration must limit any award of money damages to those allowed under federal contract law, even if the designated maximum award amount is higher.

Issue 3: How and by whom will the agency's decision to arbitrate be made?

a. Who will have authority to recommend arbitration?

Either party may recommend binding arbitration, but binding arbitration must be entered into by consent of both parties. (4.f). A decision by BPA to enter binding arbitration requires the written approval of one or more employees or officers of BPA with the necessary delegated authority, as well as the written approval of BPA's General Counsel, or his delegate. BPA's authority is addressed in section 6 of BPA's Binding Arbitration Policy.

4.f. The agreement to use binding arbitration must be voluntary on the part of all parties (5 U.S.C. § 575(a)(1)).

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.

b. Who has the authority to enter into settlement? Can this authority be delegated?

See response to 3a.

c. Who will negotiate the cap on the award?

The officers of BPA with delegated expenditure and/or compromise and settlement authority will negotiate the cap, in consultation with the BPA 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.

d. Who will negotiate the rules and selection of the arbitrator?

The parties must mutually agree on the rules for the arbitration and for the selection of the arbitrator. For BPA, the BPA Office of General Counsel will negotiate the rules and selection of the arbitrator, in coordination with the BPA employee with responsibility for the issue being arbitrated. (8.b(5) & (6)).

8. Responsibilities

b. The BPA Office of General Counsel must:

- (5) Assist in arbitration design;
- (6) Assist in selection of arbitrators;

e. Who will draft the agreement to arbitrate?

BPA's Office of General Counsel in negotiation with the other party, will draft the agreement to arbitrate. (8.b(2) & (4)).

8. Responsibilities

b. The BPA Office of General Counsel must:

- (2) Review and provide legal advice in each proposal for a binding arbitration agreement;
- (4) Provide a requesting BPA officer or employee the appropriate agreements, clauses, and the like to use binding arbitration where approved;

Issue 4: How can an agency encourage the efficiency of the arbitration process?

- In most cases a single arbitrator will conduct the arbitration.
- The parties should attempt to set expeditious deadlines for discovery, submittal of written argument, and hearing dates (if a hearing is necessary) when negotiating the binding arbitration process. In most cases, the arbitrator should be required to issue an award within 30 days after the close of the hearing or the filing of post-hearing briefs if authorized by the arbitrator, unless otherwise agreed to by the parties.
- Whether the arbitration will allow for discovery by the parties, and the manner in which testimony of witnesses and documents will be presented at the arbitration, will be decided by the arbitrator, unless otherwise agreed to by the parties.

Issue 5: How and by whom will requests for binding arbitration from people outside the agency be accepted?

To request binding arbitration, a party must submit a written request to the appropriate BPA representative responsible for the contract claim. The written request must include: (1) a description of the specific claim in dispute; and (2) the amount of monetary relief

the party is seeking. BPA may require additional information based on the particular contract claim.

Issue 6: Will the agency allow arbitration clauses to be written into contracts?

Yes, in consultation with BPA's Office of General Counsel. In such cases, the clause is a "Pre-Claim Agreement" to arbitrate. See section 7.b(1) of BPA's Binding Arbitration Policy.

7.b(1) Pre-Claim Agreements: Binding arbitration clauses may be drafted to be 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 binding arbitration clauses must be reviewed and approved by the BPA 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, including limiting the use of binding arbitration to money damages with a maximum award amount as provided in sections 4(b) and 4(c), and applicable Delegations of Authority and approved by the BPA Office of General Counsel. BPA Office of General Counsel will file an annual report with the Department of Energy's Office of General Counsel listing all BPA Contracts requiring the use of binding arbitration to resolve any contract claim.

8. Responsibilities

b. The BPA Office of General Counsel must:

(2) Review and provide legal advice in each proposal for a binding arbitration agreement;

Issue 7: If the agency allows arbitration clauses in contracts, what should be included in the clause?

The clause must include the following: a maximum award that can be granted by the arbitrator (4.b); a statement that monetary relief is the only type of relief available (4.c); and arbitration procedures (3.k).

3.k. Pre-Claim Agreement to Binding Arbitration. For purposes of this guidance, means a written clause included as part of a negotiated contract, in which the parties agree, prior to any contract dispute, to submit any contract claim to binding arbitration. The clause must set forth the arbitration procedures that will be followed if a contract claim arises, including a maximum award amount.

4.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));

4.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. The maximum amount that can be awarded is set forth in the agreement to arbitrate pursuant to 4.b above. In addition, the parties may agree to other limitations that may apply to the award of money damages. Such limitations will be included in the agreement to arbitrate on a case-by-case basis.

Issue 8: What is the arbitrator's role under the ADRA?

The arbitrator will have the authority to:

- Regulate the course and conduct of arbitration proceedings, within the limitations, if any, set out in the parties' agreement to arbitrate
- Set the time and place for the hearing, if any, and notify the parties of the hearing date(s)
- Administer oaths
- Compel attendance of witnesses and production of evidence to the extent permitted by law
- Issue decisions or awards

It is suggested that the parties specify in their agreement to arbitrate any other specific authority they wish the arbitrator to have, and further afford the arbitrator broad discretion to implement procedures that allow for efficient case management.

Issue 9: Will the agency agree to a panel of arbitrators in some circumstances?

In most cases a single arbitrator will be used, but there may be some cases where a panel of arbitrators may be appropriate.

Issue 10: What selection criteria will be considered in choosing an arbitrator?

Among the primary criteria to consider when selecting the arbitrator are:

- 1) overall reputation of the arbitrator in terms of competence, integrity, and impartiality;
- 2) degree of expertise and experience with the subject matter and technical issues involved in the controversy;
- 3) availability of the arbitrator during periods most convenient to the parties; and
- 4) the absence of any actual or potential conflict of interest.

To the extent rosters of qualified arbitrators exist or are developed, such rosters should be consulted.

Issue 11: What should an agreement to arbitrate include?

A Pre-Claim Agreement to Arbitration must include: the names of the parties; a maximum award that can be granted by the arbitrator (4.b); a statement that monetary relief is the only type of relief available (4.c); arbitration procedures (3.k); any other conditions limiting the range of possible outcomes.

A Post-Claim Agreement to Arbitrate must include: the names of the parties; a specific description of the particular issues to be submitted to the arbitrator for decision (4.a); a maximum award that can be granted by the arbitrator (4.b); a statement that monetary

relief is the only type of relief available (4.c); arbitration procedures (3.1); any other conditions limiting the range of possible outcomes.

Relevant sections from BPA's Binding Arbitration Policy:

3.k. Pre-Claim Agreement to Binding Arbitration. For purposes of this guidance, means a written clause included as part of a negotiated contract, in which the parties agree, prior to any contract dispute, to submit any contract claim to binding arbitration. The clause must set forth the arbitration procedures that will be followed if a contract claim arises, including a maximum award amount.

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

4.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));

4.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));

4.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. The maximum amount that can be awarded is set forth in the agreement to arbitrate pursuant to 4.b above. In addition, the parties may agree to other limitations that may apply to the award of money damages. Such limitations will be included in the agreement to arbitrate on a case-by-case basis.

Issue 12: How will the agency pay the arbitrator(s)?

Each party must pay its respective arbitration costs, including attorney fees and expenses. (5.b(2)).

5.b(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's fees and expenses. The agreement to arbitrate must explicitly exclude any award of the other party's attorney's fees or arbitration costs.

Issue 13: Is the agency willing to use administered arbitration?

Yes, upon agreement of the parties, administered arbitration may be used. Parties may utilize services of the American Arbitration Association ("AAA"), CPR International Institute for Conflict Prevention & Resolution ("CPR"), or any other qualified arbitration provider mutually agreed to by the parties.

Issue 14: What must the arbitration award include?

Unless the parties agree otherwise, the arbitration award need not be in the form of formal findings of fact and conclusions of law, but must at least provide in summary form the monetary amount of the award, if any, and the factual and legal basis for the

arbitrator's decision. The award will be subject to the "cap" and any other limitations agreed upon by the parties. Arbitration awards will not be treated as confidential documents.

Issue 15: Will the agency allow arbitration on the documents only, without a hearing, and if so, in what circumstances?

Yes, if all parties agree, BPA will allow arbitration on the documents only, in an appellate-like fashion.

Issue 16: What selection criteria will be considered in choosing or amending arbitration rules and what must those rules include?

If administered arbitration is used, the rules shall be selected as specified by the arbitrator.

In non-administered arbitration, the rules of any given arbitration will be determined by the parties, and should be set forth within the agreement to arbitrate. Whatever rules are in the agreement should be aimed at obtaining an expeditious and impartial resolution of the contract claim. Simpler cases may require less in terms of process (*e.g.*, more limited discovery and abbreviated hearings) than cases that are more complex.