

PART 21 PROTESTS AND DISPUTES

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21.1 GENERAL DISCUSSION.

21.1.1 General Policies.

It is BPA policy to pursue its purchasing activities in a reasonable, commercial manner. This includes treating offerors, potential offerors, and contractors fairly and equitably. In the event an offeror or contractor feels wrongly treated and seeks remedy, BPA will conduct its response in compliance with this Part 21 of the BPI.

21.2 PROTESTS.

21.2.1 Authorities.

POLICY: Pursuant to section 2(f) of the Bonneville Project Act, 16 U.S.C. 832a(f), the Chief Executive Officer is authorized to decide protests. The authority to decide protests has been delegated to the BPA HCA. The HCA has established protest policy and procedures for acquisitions subject to these Bonneville Purchasing Instructions (BPI), pursuant to 16 U.S.C. 832a(f), as set forth in this subpart 21.2.

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21.2.2 Definitions.

INFORMATION:

"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 a solicitation, proposed award, or award of a contract for the acquisition of supplies, services and construction by BPA, which includes statements of the grounds or bases supporting the objection.

"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 Notice to the CO of Objections.

PROCEDURE:

(a) An interested party must notify the CO of its objection to a solicitation, proposed award, or award in writing within 10 working days of the date on which it had actual or constructive notice of the subject matter of the objection. Objections based upon alleged adverse actions which are apparent prior to the closing date for the receipt of offers must be filed before that closing date. Objections not brought to the attention of the CO within this time limitation will not be considered unless, at the CO's sole discretion, the time limitation is waived.

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

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

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

21.2.4 Filing of Protest to the HCA.

PROCEDURE:

(a) An interested party who has complied with the provisions in 21.2.3 may file a written protest with the BPA HCA. In order to be considered by the HCA, a protest must be delivered to the HCA within 10 working days from the date the informal discussions with the CO, described in 21.2.3, are terminated.

(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 in support of the protest, and (4) a request for a specific ruling by BPA.

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(c) The HCA shall immediately send an acknowledgment of any written protests received to the protester and 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 report from the CO.

21.2.4.1 Award While Protest Is Pending.

PROCEDURE: Generally, a contract shall not be awarded until the HCA 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 21.2.4.2(b), below. On the basis of this statement and other considerations, including those listed in 21.2.4.2(b) which may be applicable, the HCA may approve the award. Upon receipt of approval by the HCA, the CO may proceed with award.

21.2.4.2 Protest Received After Award.

PROCEDURE:

(a) When a protest is received by the HCA after contract award, the HCA shall request the CO to immediately forward a copy of the protest to the successful contractor, advise the successful contractor of its right to comment thereon, and that it may be notified to temporarily suspend performance if the HCA determines it to be necessary.

(b) In consultation with the CO and other BPA staff, the HCA shall decide whether or not to temporarily suspend contractor performance on the basis of considerations which may include, but are not limited to: (1) the cost to the BPA of suspending performance until a final determination of the protest is made; (2) the impact of delay on program operations or budget availability; (3) the cost to the contractor of suspending performance until a final determination of the protest is made; (4) the importance to BPA of immediate performance of the subject contract; (5) the risks to customers, their consumers, or other third parties which are associated with a suspension; (6) the complexity of the issues involved in the protest; (7) the degree to which it appears that BPA may have acted contrary to statute or BPA regulation; (8) the likelihood that the HCA will uphold the apparent merits of the protest; and (9) the availability of other remedies.

21.2.4.3 HCA's Decision on the Protest.

PROCEDURE:

(a) Upon receipt of a written protest and a complete report from the CO (see, 21.2.5(a)) the HCA 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. It will include the grounds for the decision and, if adverse to the protester, will inform the protester that it may, within 10 working days following receipt of the notification from the HCA, discuss the decision with the HCA.

(b) If the protest is decided in favor of the protester, the HCA, having considered and balanced the needs of BPA with the requirement of fairness to all interested parties, will determine and advise the CO of the appropriate remedy. The HCA may grant remedies such as, but not limited to, the following: (1) issuing a new solicitation; (2) recompeting the contract; (3) awarding a

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contract consistent with statute and BPA regulation; (4) terminating the contract; (5) refraining from exercising options under the contract; (6) awarding reasonable proposal preparation costs; and (7) awarding reasonable protest and appeal costs.

(c) The HCA shall place a written record of the decision in the protest file, and forward a copy to the CO for inclusion in the solicitation file.

21.2.5 CO Responsibilities After Protest to the HCA.

PROCEDURE:

(a) 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 shall submit the statement, as described in 21.2.5(a), to the HCA within 10 working days of the date of the request.

(c) The CO shall inform all other interested parties of the protest and, when appropriate, shall request an extension of acceptance time. The CO shall also furnish interested parties with a copy of the protest and advise them that they may, within five working days of receipt of the notice, mail written comments in connection therewith to the HCA. The interested parties should be informed that any comments they submit may be released to the successful offeror.

(d) 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. As per paragraph (b), clause 21-1, Protests Against Award, such costs are unallowable, unless the costs incurred in connection with protests of solicitations or contract awards, or defending against a protest are incurred pursuant to a written request from the CO.

21.2.6 Clause Usage Prescriptions.

PROCEDURE: The CO shall insert clause 21-1, Protests Against Award, in solicitations exceeding \$100,000, except for commercial supplies or commercial services or commercial construction.

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21.2.7 Other Protests.

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

21.3 DISPUTES RESOLUTION.

21.3.1 Definition.

INFORMATION:

"Claim" means a written demand or assertion by one of the contracting parties seeking, as a matter of right, the payment of money, the adjustment or interpretation of contract terms including the period of performance, or other relief arising under or relating to the contract. A voucher, invoice, or other routine request for payment or equitable adjustment that is not in dispute when submitted is not considered a claim. The submission may be converted to a claim, by written notice to the CO if it is disputed either as to liability or amount, or is not acted upon in a reasonable time.

"Misrepresentation of fact" means a false statement of substantive fact, or any conduct which encourages belief in a substantive fact material to proper understanding of the matter in 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. Debriefings are encouraged over arm's length communications where disagreements arise.

(b) Explanations of performance evaluations should clearly set forth the factual basis of the CO's decision. 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 Applicability of the Act.

PROCEDURE: BPA is guided by the general direction, but not all requirements of the Contract Disputes Act (41 U.S.C 601-603) and the Administrative Disputes Resolution Act of 1990 (P. Law 101-552) in order to simplify the resolution of disputes.

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21.3.4 Policy.

It is BPA's policy to try to resolve all contractual issues by mutual agreement at the CO level, without litigation. In appropriate circumstances, before issuance of a CO's decision on a claim, the CO should consider initiating informal discussions between the parties, facilitated by individuals who have not participated substantially in the matter in dispute, to aid in resolving the differences. If the informal discussions are not successful, the CO is encouraged to use arbitration or mediation to resolve the dispute.

21.3.5 Initiation of A Claim.

PROCEDURE:

(a) Contractor claims shall be submitted in writing to the CO for a decision before final payment. The CO shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the CO.

(b) The CO shall, based upon the CO's documented findings and decision, initiate a BPA claim against a contractor by asserting BPA's right to compensation, and requesting payment. If the contractor disagrees, and the CO is unable to negotiate a satisfactory settlement, the CO shall issue a written decision on the claim.

21.3.6 Interest on Claims.

PROCEDURE:

(a) BPA shall pay simple interest on a contractor's claim on the amount found due and unpaid during the pendency of the claim, commencing either from (a) the date the CO receives the claim, or (b) the date payment otherwise would be due, if that date is later than the date of the claim, until the date of payment.

(b) BPA shall determine simple interest due on a contractor's claim using the separate rate for each successive 6-month rate period established by the Secretary of Treasury, or portions thereof, during the pendency of the claim. The CO shall, using the amount found due and unpaid as of the date determined as per paragraph (a) above, compute simple interest through the remainder of the first 6-month Treasury rate period at the rate then in effect, and recomputed thereafter using the Treasury rate in effect for each successive 6-month Treasury rate period, or portion of rate period, until the date the claim is paid.

21.3.7 Suspected Fraudulent Claims.

PROCEDURE: If the contractor is unable to support the basis for a claim and there is material evidence of misrepresentation of fact or fraud on the part of the contractor, the CO shall refer the matter to the BPA Chief Auditor through the HCA.

21.3.8 Contracting Officer's Authority.

POLICY: COs are authorized, within any specific limitations of their warrants, to decide or settle all claims whether by BPA or by the Contractor arising under or relating to a contract, except

(a) 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

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- (b) The settlement, compromise, payment, or adjustment of a claim involving fraud.

21.3.9 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 legal and other advisors;
- (3) Prepare a written decision that shall include a --
 - (A) Description of the claim or dispute;
 - (B) Reference to the pertinent contract terms;
 - (C) Statement of the factual areas of agreement or disagreement;
 - (D) Statement of the CO's decision, with supporting rationale;
 - (E) Paragraph substantially as follows:

"This is the final decision of the Contracting Officer. You may submit this decision to one of the following disputes resolution processes. If you decide to submit this decision to such processes, you must, within the time frames specified below, file the request to do so with the appropriate body. A copy of that request shall simultaneously be sent to the Contracting Officer that issued the decision.

- (1) Within 90 days from the date of receipt of such decision the Contractor or Contracting Officer initiates disputes resolution processes described in Subchapter IV of the Administrative Disputes Resolution Act of 1990 (P. Law 101-552, 104 Stat. 2736) with the Seattle Office of the American Arbitration Association at the address,

American Arbitration Association
701 Pike Street, Suite 950
Seattle, WA 98101-4111

whose telephone number is (206) 622-6435 and facsimilie number is(206) 343-5679;
or

- (2) Within 90 days from the date of receipt of such decision the Contractor appeals the decision to the US Department of Energy, Board of Contract Appeals at either its postal or courier address.

US Postal Service (USPS) mailing address: US Department of Energy
Board of Contract Appeals
HG-50, Building 950
L'Enfant Plaza Building
1000 Independence Avenue SW
Washington, DC 20585-0116

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Courier and other than USPS address: US Department of Energy
Board of Contract Appeals
Room 7115e 810
950 L'Enfant Plaza SW
Washington, DC 20024

whose telephone number is (202) 287-1900 and facsimile (202) 287-1700, (a copy of the Board's rules of procedures is attached); or

(3) Within 12 months from the date of receipt of such decision the Contractor brings an action thereon in the United States Court of Federal Claims.

(F) Demand for payment in all cases where a decision results in a finding that the contractor is indebted to BPA.

(b) Before releasing the final decision, the CO in his/her sole judgement may seek the review by the HCA and Office of General Counsel, but their review is advisory only. The CO has the ultimate responsibility for the decision being that person's independent act.

(c) The CO shall furnish a copy of the decision (and the rules of the DOE Board of Contract Appeals) to the contractor by any method that provides evidence of receipt.

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

(1) For claims of \$100,000 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 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.

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

(f) 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.

21.3.10 Contracting Officer's Duties Upon Appeal.

PROCEDURE: The CO shall provide data, documentation, information, and support as required by the appropriate reviewing body or person for use on a pending arbitration, mediation, or appeal from the CO's decision. The CO is also responsible for following up with the reviewing person or body to obtain the decision and the final disposition of charges and costs of the resolution process and their distribution to the involved parties.

21.3.11 Obligation to Continue Performance.

POLICY: The contractor is required to continue performance of a contract in accordance with the CO's decision pending final decision on a claim relating to the contract.

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21.3.12 Clause Usage Prescriptions.

PROCEDURE:

(a) Disputes clauses are not normally used for transactions less than \$100,000 or for commercial supplies or commercial services or commercial construction.

(b) The CO shall include either clause 21-2, Disputes, or 21-3, Disputes Resolution Process, in all solicitations and contracts over \$100,000, except those for commercial supplies or commercial services or commercial construction. Clause 21-3, Disputes Resolution Process, is more appropriate where the nature of the contract is such that disputes are common or expected.

(c) The CO may include clause 21-4, Release of Claims, in solicitations and contracts where the likelihood of claims is high, and when it is not already included in the applicable payment clause.

(d) The CO shall include clause 21-5, Applicable Law, in all contracts exceeding \$100,000.

21.50 TEXT OF CLAUSES

The following clauses are referenced in Part 21:

- Clause 21-1 Protests Against Award.
- Clause 21-2 Disputes
- Clause 21-3 Disputes Resolution Process
- Clause 21-4 Release Of Claims.
- Clause 21-5 Applicable Law.

Clause 21-1 PROTESTS AGAINST AWARD (Sep 98)(BPI 21.2.6)

(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) An interested party must notify the Contracting Officer of its objection to a solicitation, proposed award, or award in writing within 10 working days of the date on which it had actual or constructive notice of the subject matter of the objection. Objections based upon alleged adverse action in any type of solicitation which are apparent prior to the closing date for the receipt of proposals must be filed before that date. Objections not brought to the attention of the Contracting Officer within this time limitation will not be considered unless, at the Contracting Officer's sole discretion, the time limitation is waived. The costs of any party, if incurred in connection with protests of solicitations or contract awards, or the defense against protests of such solicitations or contract awards, are unallowable, unless the costs of defending against a protest are incurred pursuant to a written request from the CO.

(c) 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, the protest must be delivered to the Head of the Contracting Activity within 10 working days from the date informal discussions with the Contracting Officer are terminated.

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(d) 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).

(End of clause)

Clause 21-2 DISPUTES (Sep 98)(BPI 21.3.12)

Disputes arising under or related to this contract will be settled in accordance with Bonneville Purchasing Instructions, Subpart 21.3. 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 pending decision of the Contracting Officer regarding matters in dispute.

(End of clause)

Clause 21-3 DISPUTES RESOLUTION PROCESS (Oct 05)(BPI 21.3.12)

(a) All disputes arising under or relating to this contract shall be resolved under this clause.

(b) "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. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. A voucher, invoice, or other routine request for payment or equitable adjustment that is not in dispute when submitted is not a claim. The submission may be converted to a claim, by complying with the requirements of this clause, if it is not disputed either as to liability or amount or is not acted upon in a reasonable time.

(c) A claim by the Contractor shall be made in writing and submitted to the Contracting Officer for a written decision before final payment. A claim by BPA against the Contractor shall be subject to a written decision by the Contracting Officer.

(d) 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 receipt of the request. For Contractor claims in excess of \$100,000, the Contracting Officer must, within 60 days, decide the claim or notify the Contractor of the date when the decision will be made. At any time prior to issuance of the Contracting Officer's final decision, either party may request mediation or other alternate disputes resolution process (see paragraph (g)) by a third party in order to assist in settling the claim. Should the contractor request the use of an alternate disputes resolution process, the time frames for issuing a CO decision and payment of interest shall be suspended.

(e) The decision of the Contracting Officer shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency unless:

(1) Within 90 days from the date of receipt of such decision the Contractor or Contracting Officer initiates disputes resolution processes described in Subchapter IV of the Administrative Disputes Resolution Act of 1990 (P. Law 101-552, 104 Stat. 2736) with the Seattle Office of the American Arbitration Association at the address,

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American Arbitration Association
701 Pike Street, Suite 950
Seattle, WA 98101-4111

whose telephone number is (206) 622-6435 and facsimile number is(206) 343-5679; or

(2) Within 90 days from the date of receipt of such decision the Contractor appeals the decision to the US Department of Energy, Board of Contract Appeals at either its postal or courier address:

US Postal Service (USPS) mailing address: US Department of Energy
Board of Contract Appeals
HG-50, Building 950
L'Enfant Plaza Building
1000 Independence Avenue SW
Washington, DC 20585-0116

Courier and other than USPS address: US Department of Energy
Board of Contract Appeals
Suite 810
950 L'Enfant Plaza SW
Washington, DC 20024

whose telephone number is (202) 287-1900 and facsimile (202) 287-1700, in the manner specified in the decision; or

(3) Within 12 months from the date of receipt of such decision the Contractor brings an action thereon in the United States Court of Federal Claims.

(f) The authority of the Contracting Officer under the Act does not extend to claims or disputes which by statute or regulation other agencies are expressly authorized to decide.

(g) Alternative disputes resolution process.

(1) The parties are encouraged to attempt an alternative dispute resolution as described by Subchapter IV of the Administrative Disputes Resolution Act of 1990 (P. Law 101-552, 104 Stat. 2736), including, at the request of any party, mediation or binding arbitration, prior to commencing litigation in any court, board or tribunal. Mediation shall be accomplished as agreed between the parties. Arbitration, if any, shall be done through the Seattle, Washington Office of the American Arbitration Association, and shall be done according to the Commercial Arbitration Rules of the American Arbitration Association, using one arbitrator unless otherwise agreed to by the parties. If the contractor rejects BPA's request to use an alternate dispute resolution process, the reason for its rejection shall be furnished to the Contracting Officer.

(2) The parties stipulate that any tribunal to which any controversy or claim is brought should stay its proceedings, except in aid of arbitration, pending completion of arbitration and the issuance of the Arbitrator's award.

(3) Service of summons in any court action to enforce or challenge an award must be effectuated according to Rule 4 of the Federal Rules of Civil Procedure for the United States District Courts or under the comparable rule of another court or tribunal with subject matter jurisdiction.

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(4) Except as specified below in this paragraph, there shall be no discovery in connection with any dispute resolution process. However, in the event that any party to such dispute resolution process shall receive information pertaining to the dispute through anyone's use of the Freedom of Information Act with the Department of Energy or Bonneville Power Administration, then, at the option of Bonneville Power Administration, other discovery shall be permitted and, if thus permitted at all, shall be opened fully to all parties. To the extent that such discovery cannot be effectuated by consent and agreement, it shall be under the supervision of the individual assisting with the dispute resolution.

(h) BPA shall pay interest on the amount found due and unpaid from: (1) the date the Contracting Officer receives the claim, or (2) the date payment otherwise would be due, if that date is later, until the date of payment. Simple interest on claims shall be paid at the rate fixed by the Secretary of the Treasury, and applicable for each 6-month period as fixed by the Treasury Secretary 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 21-4 RELEASE OF CLAIMS. (Sep 98)(BPI 21.3.12)

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. (Sep 98)(BPI 21.3.12)

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. To the extent that the federal common law of government contracts is not dispositive, the laws of the State of Oregon shall apply.

(End of clause)