

# BONNEVILLE PURCHASING INSTRUCTIONS

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Issued by the  
Head of the Contracting Activity





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## TRANSMITTAL HISTORY AND EFFECTIVE DATES

<u>NUMBER</u>	<u>TYPE</u>	<u>EFFECTIVE DATE</u>	<u>DATE CANCELLED OR SUPERSEDED</u>
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	September 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
07-02	BPI Update	October 1, 2007	N/A
08-1	Temporary instruction	February 29, 2008	November 3, 2008
08-02	BPI Update	November 3, 2008	N/A
09-1	Temporary Instruction	April 1, 2009	September 4, 2009

<b><u>NUMBER</u></b>	<b><u>TYPE</u></b>	<b><u>EFFECTIVE DATE</u></b>	<b><u>DATE CANCELLED OR SUPERSEDED</u></b>
09-2	Temporary Instruction	July 31, 2009	October 5, 2009
09-2A Rev 1	Temporary Instruction	October 5, 2009	January 29, 2010
09-2B Rev 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 27, 2013
13-3	BPI Update	August 28, 2013	N/A
13-4	BPI Update	October 1, 2013	N/A
14-1	BPI Update	April 30, 2014	N/A
14-2	BPI Update	May 8, 2014	N/A

<u>NUMBER</u>	<u>TYPE</u>	<u>EFFECTIVE DATE</u>	<u>DATE CANCELLED OR SUPERSEDED</u>
14-3	BPI Update	October 15, 2014	N/A
15-1	BPI Update	August 7, 2015	N/A
16-1	BPI Update	February 29, 2016	N/A
16-2	BPI Update	September 1, 2016	N/A
18-1	BPI Update	March 1, 2018	N/A
20-1	BPI Update	February 1, 2020	N/A
22-1	BPI Update	February 28, 2022	N/A
22-2	Interim Policy	June 1, 2022	April 30, 2024
22-3	Interim Policy	October 1, 2022	April 30, 2024
23-1	Interim Policy	October 1, 2023	April 30, 2024
23-2	Interim Policy	October 1, 2023	April 30, 2024
24-1	BPI Update	April 30, 2024	N/A

# 1 BONNEVILLE PURCHASING SYSTEM

## 1.1 OBJECTIVE

- (a) The Bonneville Purchasing Instructions (BPI) 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) In 1993, 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. However, many changes have been made to provide more standardized structure based on Federal procurement practices ensuring Bonneville is compliant with mandatory regulations. These changes have also sought to find a balance between private and government procurement principles and best practices. Proper application of the policies and procedures outlined in the BPI require that the contracting officer apply these principles individually to each transaction. These underlying principles were to:
  - (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 contracting officer to craft a purchase that achieves the “best buy” for Bonneville.
  - (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.

Today, with the changes made over the past 25 years, the BPI has incorporated additional guiding principles in order to maximize the procurement flexibilities and best buy model, while ensuring compliance with applicable Federal procurement regulations. These principles are:

- (1) Award compliant contracts that effectively manage/mitigate agency risk while meeting best buy goals.
- (2) Build quality into contract formulation to minimize administrative reviews while ensuring compliance with all applicable Federal procurement regulations.
- (3) Provide the correct contract tools to maximize procurement flexibilities to effectively meet agency needs.
- (c) Source selection decisions shall be made based on best buy since it provides maximum latitude for the contracting officer to determine which offer is in Bonneville’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 APPLICABILITY

- (a) The BPI is issued by the Head of the Contracting Activity under the authority of the Bonneville Project Act. They establish Bonneville-wide policies and procedures for the purchase of supplies and services (including construction) by the Bonneville Power Administration.
- (b) The BPI does not apply to:
  - (1) Financial assistance awards (see the Bonneville Financial Assistance Instructions – BFAI);
  - (2) Purchases of Land, including leases of property for Bonneville’s administrative use (see Bonneville Policy 461-1);

- (3) Purchases or sales of electric power (Bonneville Policy 140-1), except utilities for Bonneville facilities;
  - (4) Purchases of energy through power-savings agreements and resource proposals (Bonneville Policy 130-2);
  - (5) Specific field purchases (see 1.8.4.6);
  - (6) Limited types of work delegated to Senior Vice Presidents, Vice Presidents, and others (Bonneville Policy 140-1); or
  - (7) Some emergency conditions delegated to the Senior Vice President, Transmission Services (Bonneville Policy 140-1).
- (c) The BPI outlines procurement policies and procedures that are used by Bonneville personnel. If a policy or procedure, or a particular strategy or practice, is in the best interest of Bonneville and is not specifically addressed in the BPI, nor prohibited by law (statute or case law), Executive Order or other regulation, contracting personnel should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting personnel to innovate and use sound business judgement that is otherwise consistent with law and within the limits of their authority. Contracting officers should take the lead in encouraging business process innovations and ensuring that business decisions are sound.

### 1.3 AUTHORITY

- (a) Bonneville's Status - Federal vs. Commercial. The Bonneville Power Administration 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 Bonneville 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 Bonneville 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 Bonneville 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 Bonneville 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 Bonneville 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 Bonneville 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, 1987 ruled that Bonneville is authorized to issue its own purchasing instructions based on the broad authorities of the Bonneville Project Act.



- (d) Purchases for program operations. Bonneville contracts for supplies 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 Bonneville’s program operations, since it is subject only to the provisions of that Act.

#### **1.4 PUBLICATION OF THE BPI**

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

##### **1.4.1 Contract Clause**

The CO shall insert the clause 1-1, Applicable Regulations, in all solicitations and contracts exceeding the micro-purchase threshold, except for commercial acquisitions.

#### **1.5 PURCHASING POLICY CHANGE BOARD**

- (a) The Head of the Contracting Activity appoints and chairs a Policy Change Board. This group, made up of standing members, is convened by the Head of the Contracting Activity, as necessary, to assist in the review of significant changes to Bonneville’s purchasing policies. The Policy Change Board will follow a formal process for reviewing proposed policy changes. The Head of the Contracting Activity 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 Head of the Contracting Activity.
- (b) Proposals to change policy must be submitted on the form 4210.01e, titled Policy Change Proposal. Anyone in Bonneville with an interest in improving Bonneville purchase policy may submit the form with the required background information and analysis.

#### **1.6 ORGANIZATION OF THE BPI**

- (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) Bonneville’s purchasing professionals;
  - (2) Bonneville’s purchasing requisitioners/customers; and
  - (3) Businesses who sell goods/services to Bonneville.
- (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**

This subpart prescribes the policies and procedures for authorizing deviations from the BPI.

##### **1.7.1 Definitions**

*Deviation* means any one or combination of the following:

- (a) The issuance or use of a policy, procedure, solicitation provisions, contract clause, method, or practice of conducting acquisition actions of any kind at any stage of the acquisition process that is inconsistent with the BPI.
- (b) The omission of any solicitation provision or contract clause when its prescription requires its use.
- (c) The use of any solicitation provision or contract clause with modified or alternate language that is not authorized by the BPI.
- (d) The use of a solicitation provision or contract clause prescribed by the BPI on a *substantially as follows or substantially the same as basis* (see definitions in subpart 2.2), if such use is inconsistent with the intent, principle, or substance of the prescription or related coverage on the subject in the BPI.
- (e) The authorization of lesser or greater limitations on the use of any solicitation provision, contract clause, policy or procedure prescribed by the BPI.
- (f) The issuance of polices or procedures that govern the contracting process or otherwise control contracting relationships that are not prescribed by the BPI.

### 1.7.2 Policy

- (a) Deviations from the BPI may be granted as specified in this subpart when necessary to meet the specific needs and requirements of Bonneville. The development and testing of new techniques and methods of acquisition should not be stifled simply because such action would require a BPI deviation. The fact that deviation authority is required should not, of itself, deter organizations in their development and testing of new techniques and acquisition methods.
- (b) Deviations must be approved by the Head of the Contracting Activity. The contracting officer shall document the justification and Head of the Contracting Activity's approval in the contract file.
- (c) Any deviations required for solicitations shall be reviewed and receive concurrence from the Director of Contracts and Strategic Sourcing or his/her acting Tier 4 Manager prior to seeking Head of the Contracting Activity approval.

## 1.8 CONTRACTING AUTHORITY AND RESPONSIBILITIES

### 1.8.1 Head of the Contracting Activity

The Administrator delegates contracting authority to the Head of the Contracting Activity for contracts other than land, power and power-savings, and transmission sales. The Head of the Contracting Activity performs the following major functions:

- (a) Establishes and maintains purchasing policy and Bonneville-wide procedures through the BPI.
- (b) Delegates authority to execute and modify contracts and settle claims.
- (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.

### 1.8.2 Contracting Officer

#### 1.8.2.1 Authority

- (a) Except as provided in subsection 1.8.4, only persons who are certified as having obtained specific training and experience may be delegated contracting authority by the Head of the Contracting Activity, and may enter into, administer, or terminate contracts and make related

determinations and findings. Contracting officers may bind Bonneville only to the extent of the authority delegated to them. Contracting officers shall receive from the Head of the Contracting Activity clear instructions in writing regarding the limits of their authority. Information on the limits of the contracting officers' authority shall be readily available to the public and Bonneville personnel.

- (b) Contracting officers may be granted the following types of contract authority:
  - (1) Supplies and services;
  - (2) Construction;
  - (3) Grants and financial assistance (see the BFAI); and
  - (4) Ordering authority against established Bonneville and Federal Supply Schedule instruments.
- (c) No contract shall be entered into unless the contracting officer ensures that all requirements of the BPI, that are applicable to the action, have been met.
- (d) Contracting officers may enter into the following types of contractual commitments:
  - (1) New awards. The dollar value of a contract award, including the dollar value of option periods must be within the limits of the contracting officer's delegated authority.
  - (2) Modifications. The dollar value of the modification award, and not the aggregate contract value or the aggregate blanket purchase agreement dollar value, must be within the limits of the contracting officer's delegated authority.
  - (3) Indefinite Delivery Vehicles and Blanket Purchase Agreements. The anticipated aggregate value, including the dollar value of option periods, of the indefinite delivery vehicle or blanket purchase agreement shall be within the limits of the contracting officer's delegated authority. The contracting officer shall ensure the ceiling value is clearly identified in the indefinite delivery vehicle or blanket purchase agreement.
  - (4) Delivery Orders/Task Orders. The dollar value of an order award against an indefinite delivery, indefinite quantity contract (e.g. Federal Supply Schedules, Government-wide Acquisition Contracts) including the dollar value of option periods, and not the aggregate contract dollar value must be within the contracting officer's delegated authority.
  - (5) Utility Services. Except for written bi-lateral contracts, either contracting officers with at least a supplies and services warrant 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.
- (e) If an individual transaction includes additions and deductions, the aggregate, absolute value of the changes determines the warrant level required for award (e.g., the value of an individual action that adds \$75,000 of work and deducts \$100,000 it is \$175,000, or if the value of the individual action is a deduction to the contract of (\$10,000) it is a value of \$10,000).

#### 1.8.2.2 Responsibilities

- (a) Contracting officers are responsible for awarding contracts in a cost-effective manner, and for safeguarding the interests of Bonneville in its contractual relationships. In order to perform these responsibilities, contracting officers are allowed wide latitude to exercise business judgment. When the contract requires a decision by the contracting officer, advice and assistance from contract specialists, technical personnel, and/or legal counsel may be considered; however, the final decision shall be based on the contracting officer's own independent judgment.
- (b) The contracting officer is responsible for the following functions, as appropriate -
  - (1) Select the source or sources that represent the best buy to Bonneville;
  - (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) Establish an evaluation team tailored for the particular acquisition per subpart 12.4;
  - (4) Ensure that proposals are evaluated based solely on the evaluation factors identified within the solicitation, per subsection 11.13.1;
  - (5) Designate and authorize, in writing and in accordance with operating procedures, a contracting officer's representative (COR) on all contracts and orders other than those that are firm-fixed-price, and for firm-fixed-price contracts and orders as appropriate, unless the contracting officer retains and executes the COR duties, per subpart 14.21.
- (c) Contracting officers are legally responsible for their signed procurement documents. They shall not sign contracts, including options, estimated orders against an indefinite-delivery contract, or any other agreement, that will result in the total amount of the contract exceeding their delegated warrant authority. Therefore, all agreements and indefinite-delivery contracts shall have a stated aggregate cap listed within the contract to ensure contracting officer authority is not exceeded.

The contracting officer is responsible for assuring signed documents complies with all applicable laws, rules, and regulations. If a contract specialist assisted in the writing of procurement documents, the contracting officer may, at their discretion, require the contracting specialist's name and signature as the preparer.

### 1.8.3 Selection, Appointment, and Termination of Appointment for Contracting Officers

#### 1.8.3.1 General

In accordance with 41 U.S.C. § 1702(b)(3)(G), the Head of the Contracting Activity has established the Bonneville Acquisition Workforce Contracting certification program and a system for the selection, appointment, and termination of contracting officers. These selections and appointments are consistent with Office of Federal Procurement Policy's (OFPP) standards for skill-based training in performing contracting and purchasing duties. The Certification program and procedures are described in Appendix 2A, Bonneville Acquisition Workforce Contracting Certification Program.

#### 1.8.3.2 Selection

The Head of the Contracting Activity delegates authority to contracting officers by written Certificate of Appointment. These certificates are issued in accordance with BPI Appendix 2B, Contracting Officer Appointment Instruction. This is Bonneville's execution of its exemption from DOE Order 541.1B, Appointment of Contracting Officers and Contracting Officer's Representatives, and DOE Order 361.1C, Acquisition Career Management Program.

#### 1.8.3.3 Appointment

Contracting officers are appointed in writing on a Certificate of Appointment, which shall state any limitations on the scope of authority to be exercised, other than limitations contained in applicable law or regulation. The Head of the Contracting Activity maintains files containing copies of all appointments that have not been terminated.

### 1.8.4 Delegations for other Purchasing Authority

The Head of the Contracting Activity has granted unique and specific authority to assist in purchasing operational needs for low risk, commercial purchases as provided in this subsection.

#### 1.8.4.1 Policy

Except as provided in this subsection 1.8.4 and Part 27, persons other than contracting officers shall not contract for supplies and services on behalf of Bonneville.

#### 1.8.4.2 Training and Education

The Learning and Workforce Development Office (NHT) is authorized to make purchases up to \$50,000 for training and education courses. This authority is only for purchases with commercial firms or educational institutions and shall be procured utilizing the purchase card as outlined in Part 26.

#### 1.8.4.3 Utility Services

Utility services fall under two categories; utilities that are competed and utilities that are not competed. Utility services that allow for competition shall only be competed by a contracting officer with the appropriate level of supplies and services warrant authority (See subpart 11.2).

For utility services that are unable to be competed, personnel who have been designated by their job function, or those authorized per subsection 11.2.1(d)(1), may pay utility invoices by utilizing one of the options below, in the following prioritization:

- (a) Part 26 Purchase Card; or
- (b) Part 26 Authorization to Pay form; or
- (c) Part 30 Non-Procurement Obligation and use of associated form.

#### 1.8.4.4 Micro-Purchase Program (Purchase cards, Authorization to Pay (ATP) and Convenience Checks)

- (a) Employees who have been issued a Bonneville purchase card may make purchases within the limits prescribed for such cards. A purchase card is the preferred method for completing purchases under the micro-purchase threshold (see Part 2 for definition). Additionally, cardholders are also granted authority to make purchases utilizing the Authorization to Pay (ATP) process as prescribed/detailed in Part 26 and in the Micro-Purchase Program Manual.
- (b) An ATP process can be utilized exactly as a purchase card up to the established limits. The same rules that govern the usage of a purchase card also apply to ATP purchases.
- (c) A convenience check is a check written by a purchase cardholder and is least preferred method, as there is an external fee associated with its use. 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 credit card transaction (see Part 26).
- (d) Purchase card, ATP or convenience check authority does not constitute any other obligation authority.

#### 1.8.4.5 Cash

Employees may make purchases by means of cash (imprest funds) when authorized by the Chief Certifying Officer in Finance. Bonneville makes limited use of imprest funds. Refer to the U.S. Department of Treasury Manual of Procedures and Instructions for Cashiers (Cashier's Manual), which can be read online at [https://www.fiscal.treasury.gov/fsservices/gov/pmt/impFund/impFund\\_home.htm](https://www.fiscal.treasury.gov/fsservices/gov/pmt/impFund/impFund_home.htm)

#### 1.8.4.6 Field Purchases

- (a) Bonneville's mission requires an agile and quick procurement response to maintain and operate its business effectively. In order to respond to "emergency" or "urgent" conditions in

the field, it is recognized that field purchases are necessary when the time limitations make execution of a contract impractical and a purchase cardholder is unavailable to make the necessary purchases. Field purchases shall only be made within the limitations and restrictions set forth in this section. Part 27 outlines the purchasing policies, procedures, and authorities for *emergency purchases*. *Urgent* situations include unanticipated, non-repetitive, and non-recurring outages, quick and decisive actions to correct or mitigate loss of transmission capabilities and/or property, and unforeseen one-time events where a field project would be unduly delayed if materials or services are not purchased immediately.

(b) Limitations and Restrictions.

- (1) Purchases made under this part can be made using procurement tools outlined in Part 26 Micro-Purchase Program and shall not be used for routine jobs, projects and/or services.
- (2) Field purchases made under Part 26 shall not exceed the following thresholds:
  - (i) Materials, supplies, or equipment (excludes any labor, i.e., equipment operator) - limits established per the cardholder.
  - (ii) Services (includes equipment rentals with operator) - \$2,500
  - (iii) Construction and construction-related services (i.e., flaggers, inspection services, excavation, etc.) - \$2,000
- (3) The thresholds are in the total aggregate for the project, job and/or item. Splitting the requirements to circumvent the authorized thresholds is prohibited.

## 1.9 RATIFICATION OF UNAUTHORIZED COMMITMENTS

### 1.9.1 Definitions

As used in this subpart -

*Ratification* is the act of approving an unauthorized commitment by an official who has the authority to do so.

An *unauthorized commitment* is an agreement that is not binding solely because the Bonneville representative who made it lacked the authority to enter into that agreement on behalf of the Bonneville.

### 1.9.2 Unauthorized Commitment Policy

Bonneville employees shall not commit funds or enter into a contract without a written authority evidenced by a delegation of authority from the Administrator, delegation of authority (warrant) from the Head of the Contracting Activity, or explicit authority provided to individuals stipulated in 1.8.4 of this policy.

- (a) The Contracting Office shall maintain a record of all unauthorized commitments, and an annual report shall be provided to the HCA and the Finance Office.
- (b) When an employee performs an unauthorized commitment the following shall be performed.
  - (1) First violation.
    - (i) The Manager of the employee shall be notified by the contracting office to determine the appropriate disciplinary action in accordance with DOE Order 333.1 Administering Work Force Discipline.
    - (ii) The Human Capital Management office shall be notified by the manager of the employee to assist the manager in applying DOE Order 333.1 Administering Work Force Discipline.

- (iii) The employee shall complete Unauthorized Commitment training conducted by the contracting office, and may be required to attend other relevant training at the discretion of the contracting office.
  - (iv) The Micro Purchase Program office shall be notified by the contracting office and suspend the government purchase card for 30 days, if the employee is a card holder.
  - (v) The contracting officer may revoke the contract delegation, if the employee is a contracting officer's representative.
- (2) Second violation.
- (i) The Manager of the employee shall be notified by the contracting office to determine the appropriate disciplinary action in accordance with DOE Order 333.1 Administering Work Force Discipline.
  - (ii) The Human Capital Management office shall be notified by the manager of the employee to assist the manager in applying DOE Order 333.1 Administering Work Force Discipline.
  - (iii) The employee shall complete Unauthorized Commitment training conducted by the contracting office, and may be required to attend other relevant training at the discretion of the contracting office.
  - (iv) The Micro Purchase Program office shall be notified by the contracting office and suspend the government purchase card for 90 days, if the employee is a card holder.
  - (v) The contracting officer may revoke the contract delegation, if the employee is a contracting officer's representative.
- (3) For the third violation.
- (i) The Manager of the employee shall be notified by the contracting office to determine the appropriate disciplinary action in accordance with DOE Order 333.1 Administering Work Force Discipline.
  - (ii) The Human Capital Management office shall be notified by the manager of the employee to assist the manager in applying DOE Order 333.1 Administering Work Force Discipline.
  - (iii) The employee shall complete Unauthorized Commitment training conducted by the contracting office, and may be required to attend other relevant training at the discretion of the contracting office.
  - (iv) The Micro Purchase Program office shall be notified and suspend the government purchase card indefinitely, if the employee is a card holder.
  - (v) The contracting officer may revoke the contract delegation, if the employee is a contracting officer's representative.
- (c) Based upon unique circumstances and at the discretion of the Director of Contracts & Strategic Sourcing, the Director may authorize/recommend alternate remedies differing from the aforementioned progressive steps in managing unauthorized commitments. If the contracting office ratifies an unauthorized commitment, the following process shall be followed based on dollar thresholds.
- (1) Under \$50,000. A contracting officer may ratify an unauthorized commitment based on the procedures and documentation in 1.9.3 without further approvals where the purchase was for supplies and/or services under \$50,000.
  - (2) Up to \$150,000. The Director of Contracts and Strategic Sourcing or his/her acting Tier 4 Manager is authorized to approve the ratification based on the procedures and documentation in 1.9.3 below without further approvals.

- (3) Over \$150,000. The Head of the Contracting Activity shall approve all ratifications over \$150,000.
- (d) Limitations. The authority in paragraph (c) may be exercised only when –
- (1) Supplies or services have been provided to and accepted by Bonneville, or Bonneville otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;
  - (2) The ratifying contracting officer has the authority to enter into a contractual commitment;
  - (3) The resulting contract would otherwise have been proper if made by an appropriate contracting officer;
  - (4) The contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable;
  - (5) The contracting officer recommends payment; and
  - (6) Funds are available and were available at the time the unauthorized commitment was made.
- (e) The contracting office shall maintain a record of all unauthorized commitments.
- (f) If a pattern of unauthorized commitments by either the responsible employee or the organization is observed by the contracting organization, they shall contact the Head of the Contracting Activity. Risk Management and Office of General Counsel may also provide advice and assistance through this process. 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.

### 1.9.3 Ratification Procedures

If the contracting office ratifies an unauthorized commitment, the following procedures apply.

- (a) Notification of unauthorized commitment. Any employee discovering an unauthorized commitment shall immediately advise the responsible contracting officer, or the contracting office, if the contracting officer cannot be identified. The Director of Contracts & Strategic Sourcing will appoint a contracting officer if this unauthorized obligation is a new action that is not associated with an existing award.
- (b) The employee must also contact the appropriate staff in the affected program office to determine whether funds are available.
- (c) The individual who committed the unauthorized purchase will prepare a detailed statement of facts and a contract/materials request, then forward to his/her supervisor for review and action. The ratification package shall be completed within 5 business days of the commitment or discovery of the unauthorized commitment. At a minimum, the ratification package will contain the following:
  - (1) Detailed explanation and background information concerning the transaction;
  - (2) List of sources considered;
  - (3) The basis for selection of the contractor, contact names, dates and a summary of discussions made with the contractor;
  - (4) Estimate or agreed price for items or services;
  - (5) Description of products furnished or work performed, to include a statement of work, specifications, and other applicable technical documents;
  - (6) Explanation why a contract request was not utilized or a purchase card used for the purchase; and
  - (7) All records, documents, and correspondence concerning the commitment.
- (d) The supervisor will review the statement of facts for adequacy and certify that the item(s) and/or services were received and used for authorized purpose; that the funds were available at the time the commitment was made; and indicate what actions were taken to prevent recurrence. The supervisor will forward all documentation (employee's statement of



facts, supervisor's certification, invoice and other supporting evidence) to the contracting officer. In the event a signed statement from the individual who made the unauthorized commitment cannot be obtained, the supervisor of the individual will explain why the statement is unavailable.

- (e) The contracting officer will review the ratification package for adequacy and prepare the necessary contractual documents. The Office of General Counsel shall review all ratification packages \$50,000.00 and above or those where Public Law has potentially been violated including, but not limited to labor laws, fraud, etc.
- (f) The ratification package is then forwarded to the ratifying authority for consideration. If approved by the appropriate approval authority, the contracting officer will sign the contract and make appropriate distribution. If the action is not ratified the file shall document the method used to resolve the matter.
- (g) If the approval authority determines the action is not to be ratified, a copy of the file and the decision shall be sent to the supervisor, business line Vice President, Office of General Counsel and Human Capital Management in accordance with DOE Order 333.1 Administering Work Force Discipline.

## 2 DEFINITIONS OF WORDS AND TERMS

### 2.1 SCOPE OF PART

- (a) This part –
  - (1) Defines words and terms that are frequently used in the BPI;
  - (2) Provides cross-references to other definitions in the BPI of the same word or term; and
  - (3) Provides for the incorporation of these definitions in solicitations and contracts by reference.
- (b) Other parts, subparts, and sections of this policy may define other words or terms and those definitions only apply to the part, subpart, or section where the word or term is defined.

### 2.2 DEFINITIONS

- (a) A word or a term, defined in this section, has the same meaning throughout the BPI, unless–
  - (1) The context in which the word or term is used clearly requires a different meaning; or
  - (2) Another BPI part, subpart, or section provides a different definition for the particular part or portion of the part.
- (b) If a word or term that is defined in this section is defined differently in another part, subpart, or section of the BPI, the definition in –
  - (1) This section includes a cross-reference to other definitions; and
  - (2) That part, subpart, or section applies to the work or term when used in that part, subpart, or section.
- (c) Terms defined here are used throughout the BPI, and may differ from those used within panels of the Enterprise Resource Planning (ERP) system, AssetSuite and PeopleSoft systems used by Bonneville.

*Acquisition Planning* means the process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition.

*Administrator* means the Administrator of the Bonneville Power Administration.

*Advisory and assistance services* means those services provided under contract by nongovernmental sources to support or improve: organizational policy development; decision-making; management and administration; program and/or project management and administration; or R&D activities. It can also mean the furnishing of professional advice or assistance rendered to improve the effectiveness of Federal management processes or procedures (including those of an engineering and technical nature). In rendering the foregoing services, outputs may take the form of information, advice, opinions, alternatives, analyses, evaluations, recommendations, training, and the day-to-day aid of support personnel needed for the successful ongoing Bonneville operations. All advisory and assistance services are classified in one of the following definitional subdivisions:

- (1) Management and professional support services, i.e., contractual services that provide assistance, advice or training for the efficient and effective management and operation of organizations, activities (including management and support services for R&D activities), or systems. Included are efforts that support or contribute to improved organization of program management, logistics management, project monitoring and reporting, data collection, budgeting, accounting, performance auditing, and administrative technical support for conferences and training programs.
- (2) Studies, analyses, and evaluations, i.e., contractual services that provide organized analytical, assessments/evaluations in support of policy development, decision-making,

management, or administration. Included are studies in R&D activities. Also included are acquisitions of models, methodologies, and related software supporting studies, analyses, or evaluations.

*Architect-engineer services* means –

- (1) Professional services of an architectural or engineering nature, as defined by State law, if applicable, that are required to be performed or approved by a person licensed, registered, or certified to provide those services;
- (2) Professional services of an architectural or engineering nature performed by contract that are associated with research, planning, development, design, construction, alteration, or repair of real property; and
- (3) Those other professional services of an architectural or engineering nature, or incidental services, that members of the architectural and engineering professions (and individuals in their employ) may logically or justifiably perform, including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals, and other related services.

*Bonneville* means the Bonneville Power Administration.

*BPA* means blanket purchase agreement.

*BPI* means the Bonneville Purchasing Instructions.

*BPAM* means Bonneville Power Administration Manual.

*Bundling* means a subset of consolidation that combines two or more requirements for supplies or services, previously provided or performed under separate smaller contracts, into a solicitation for a single contract, a multiple-award contract, or a task or delivery order that is likely to be unsuitable for award to a smaller business.

*Change order* means a written order, signed by the contracting officer, directing the contractor to make a change that the Changes clause authorizes the contracting officer to order without the contractor's consent.

*Commercial Items and Services*, see Commercial.

*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 –
  - (i) Has been sold, leased, or licensed to the general public; or
  - (ii) 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 solicitation;
- (3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) but for –
  - (i) Modifications of a type customarily available in the commercial marketplace; or
  - (ii) Minor modifications of a type not customarily available in the commercial marketplace and made to meet Bonneville 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 –
    - (i) 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
    - (ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to Bonneville;
  - (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 –
    - (i) *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
    - (ii) *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) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate division, subsidiaries, or affiliates of a contractor; or
  - (8) 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 component* means any component that is a commercial product.

*Commercially available off-the-shelf (COTS)* means –

- (1) Any item of supply (including construction material) that is –
  - (i) A product, 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;
  - (ii) That is sold, leased, or licensed in substantial quantities in the commercial marketplace; and
  - (iii) That is offered to Bonneville, 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 section 40102(4) of title 46, such as agricultural and petroleum products.

*Communications Technology* is a subset of Operational Technology

*Competition Threshold* means purchases at or below the competition threshold of \$25,000 for Construction, A&E and Services and \$50,000 for Supplies.

*Consolidation* means a solicitation for a single contract, a multiple-award contract, a task order or a delivery order to satisfy (1) two or more requirements for supplies or services that have been provided or performed for Bonneville under two or more separate contracts, each of which was lower in cost than the total cost of the contract for which offers are solicited; or (2) requirements for construction projects to be performed at two or more discrete sites.

*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.

*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 the BFAI.

*Contract clause or clause* means a term or condition used in contracts or in both solicitations and contracts, and applying after contract award or both before and after award.

*Contract modification* means any written change in the terms of a contract.

*Contract Specialist (CS)* is a person assigned to represent the contracting officer on administrative matters within the limits of their authority by the contracting officer.

*Contracting* means purchasing, renting, leasing, or otherwise obtaining supplies or services from non-federal sources. Contracting includes 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 does not include grants or cooperative agreements.

*Contracting Officer (CO)* means an individual with delegated authority by the HCA to enter into, administer, and/or terminate contracts and make related determinations and findings.

*Contracting Officer's Representative (COR)* means an individual designated and authorized in writing by the contracting officer to perform specific technical and/or administrative functions, and who has been formally trained and certified at Bonneville to perform such duties.

*Contractor* means a firm or individual that currently has a contract to supply goods or services to Bonneville.

*Day* means, unless otherwise specified, a calendar day.

*Delivery Order* means an order for supplies placed against an established contract or with Government sources.

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

*Determination* and *Findings* means a special form of written approval by an authorized official that is required by statute or regulation as a prerequisite to taking certain contract actions. The "determination" is a conclusion or decision supported by the "findings." The findings are statements of fact or rationale essential to support the determination and must cover each requirement of the statute or regulation.

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

*Federally Recognized Tribal Government* means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat. 688) certified by the Secretary of Interior as eligible for the special programs and services provided through the Bureau of Indian Affairs.

*Federal Supply Schedule* also referred to as Multiple Award Schedules (MAS) are long-term government-wide contracts, typically in the form of an Indefinite-Delivery-Indefinite-Quantity contract, with commercial firms providing federal, state, and local government buyers access to commercial supplies (products) and services at volume discount pricing.

*Field Inspector (FI)* means a designated representative of the contracting officer's representative (COR) for technical oversight of contract performance. This may include the functions of inspection and review of the work performed.

*Free on board (FOB)* is a trade term that indicates whether the seller or the buyer is liable for goods that are damaged or destroyed during shipping. "FOB shipping point" or "FOB origin" means the buyer is at risk once the seller ships the goods. "FOB destination" means the seller retains the risk of loss until the goods reach the buyer.

*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.

*Guaranteed Maximum Price (GMP)* is the maximum compensation Owner agrees to pay Design-Builder for the scope of work included in a Guaranteed Maximum Price or Component Guaranteed Maximum Price Proposal. The Design-Builder agrees that it will be responsible for paying all costs of completing the work described in the GMP or CGMP proposal and shall not seek reimbursement from the Owner for any costs that exceed the GMP, as adjusted in accordance with the Contract Documents including those authorized by written Change Order. The GMP shall be prepared by the Design-Builder in consultation with Bonneville.

*Head of the Contracting Activity (HCA)* means the official who has overall responsibility for direction of purchasing activities. At Bonneville, the Administrator delegates this responsibility to the Manager for Purchasing/Property Governance (Bonneville Policy 140-1).

*Incoterms* are a set of rules which define the responsibilities of sellers and buyers, including risk of loss, for the delivery of goods under sales contracts. They are published by the International Chamber of Commerce (ICC) and are widely used in commercial transactions.

*Independent Government Estimate (IGE)* is an estimate of resources and cost of resources a prudent contractor will incur in the performance of a contract.

*Information technology* means any equipment or interconnected system or subsystem of equipment, used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the executive agency, if the equipment is used by the executive agency directly or is used by a contractor under a contract with the executive agency that requires –

- (1) Its use; or
- (2) To a significant extent, its use in the performance of a service or the furnishing of a product.

The term information technology includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources. All IP-addressable equipment or devices are included in this category.

*IGC* means Intergovernmental Contract.

*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 signed facsimile and electronic files with an image of a signature.

*Insurance* means a contract that provides that for a stipulated consideration, one party undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event.

*Institutions of Higher Education (IHE)* means an educational institution in any State that is legally authorized, accredited by a nationally recognized accrediting association, offers degree programs (i.e., awards a bachelor's degree or provides not less than a 2-year program that is acceptable for full credit toward such a degree, or awards a degree that is acceptable for admission to a graduate or professional degree program, subject to review and approval by the Secretary of Education); and is a public or nonprofit institution.

*Interagency Agreement (IAA)* means a procedure by which an agency needing supplies or services (the requesting agency) obtains them from another agency (the servicing agency), by an assisted acquisition or a direct acquisition. The term includes –

- (1) Acquisitions under the Economy Act (31 U.S.C. § 1535); and
- (2) Non-Economy Act acquisitions completed under other statutory authorities (e.g. The Bonneville Project Act, General Services Administration Federal Supply Schedules and Government-wide acquisition contracts (GWACs)).

*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.

*Irrevocable letter of credit (ILC)* means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon the Government's (the beneficiary presentation of a written demand for payment. Neither the financial institution nor the contractor can revoke or condition the letter of credit.

*Life-Cycle Cost (LCC)* is the cost to purchase, implement, own, operate, maintain, and at the end of its life decommission and dispose of an (IT/OT) asset.

*Life-Cycle Cost Analysis (LCCA)* is a tool to determine the most cost-effective best buy between different proposals in order to purchase, implement, own, operate, maintain and at the end of its life decommission and dispose of an asset, when each proposal is equally appropriate on technical grounds.

*Memorandum of Agreement (MOA) or Memorandum of Understanding (MOU)* mean a written agreement broadly stating basic understandings of tasks between Bonneville and another organization or government entity. It is a mechanism for coordinating activities.

*Micro-Purchase* means an acquisition of supplies, services, construction, and A&E, the aggregate amount of which does not exceed the micro-purchase threshold. Micro-purchases do not require provisions or clauses, but does not prohibit the inclusion of clauses, and is at the discretion of the CO.

*Micro-Purchase Threshold* means:

- (a) \$2,000 for Construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (formally known as Davis Bacon); and
- (b) \$2,500 for Services subject to 41 U.S.C. chapter 67, Service Contract Labor Standards (formally known as Service Contract Act); and
- (c) \$50,000 for Supplies.

*Noncommercial items* mean those items which do not meet the definition of “commercial items,” in that they are so Bonneville specific that use is limited to Bonneville, 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.

*Nonprofit Organization* means is primarily scientific, educational, service, charitable, or similar purposes in the public interest.

*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 Bonneville.

*OGC* means the Office of General Counsel.

*Open architecture* is defined for the purposes of IT/OT acquisitions as hardware or software specifications which are available in the public domain. This includes officially approved standards and privately designed architectures whose specifications are made available in the public domain by the engineers or designers. Open Architecture allows the end users to choose from a variety of manufacturers rather than a single or proprietary source. This increases supply chain robustness, lessens the probability of service or supply interruptions and lowers Bonneville’s IT/OT total cost of ownership.

Operational Technology (OT) is a subset of IT software, hardware, or service whose function is to directly control or support the operation, maintenance, or monitoring of the electrical grid and that satisfies any of the following: (a) Accesses or contains memory or storage, and/or (b) Has logical access, and/or (c) Processes commands that control operational devices (PLCs, etc.).



*Option* means a unilateral right in a contract by which, for a specified time, Bonneville may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

*Personal Property* includes both tangible and intangible property. Ideas, processes, data, information, symbols, software, and creative expressions such as literature and music are all examples of intangible property.

*Proprietary Information* is information an organization wishes to keep confidential. It is also known as a trade secret. Proprietary information is information not generally known, that has economic value and is protected from disclosure by its owner. Proprietary information is a broad category and covers technical data or financial information and may include a formula, pattern, method, process, or technique.

*Progressive Design-Build (PDB)* is a version of design-build where the team is selected through a one step, primarily qualifications-based model. The design-build team is involved during the earliest stages of the owner's project development, ensuring they are part of the project team developing design solutions. The owner, designer and contractor collaborate from the beginning to jointly perfect the scope and objectives of the project.

*Purchase Order* means an order for supplies or services. It is signed only by the contracting officer (CO). The Purchase Order becomes a contract binding on Bonneville 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 for supplies, services, or 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.

*Responsible source* means a prospective contractor that –

- (1) has adequate financial resources to perform the contract or the ability to obtain those resources;
- (2) is able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Government business commitments;
- (3) has a satisfactory performance record;
- (4) has a satisfactory record of integrity and business ethics;
- (5) has the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain the organization, experience, controls, and skills;
- (6) has the necessary production, construction, and technical equipment and facilities, or the ability to obtain the equipment and facilities; and
- (7) is otherwise qualified and eligible to receive an award under applicable laws and regulations.

*Schedule of Items* is a term that comes from the Uniform Contract Format and refers to Part I of the official contract file. The "schedule" includes the Solicitation/contract form, supplies or deliveries prices, descriptions/specifications, packaging and marking details, inspection and acceptance terms, deliveries or performance, contract administration data and any special contract requirements.

*Settlement* means a written agreement in the form of a contract modification settling all or severable portions of the contract. A settlement should compensate the contractor fairly for the work done 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 settlement.

*Settlement Proposal* means a proposal for effecting settlement of a contract terminated in whole or in part, submitted by a contractor or subcontractor in the form, and supported by the data, required by this part. A settlement proposal is included within the generic meaning of the word "claim" under false claims acts (see 18 U.S.C.287 and 31 U.S.C.3729).

*Shall* means the imperative.

*Should* means an expected course of action or policy that is to be followed unless inappropriate for a particular circumstance.

*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. A digital signature (using personal identity verification (PIV) card authentication) or electronic signature (handwritten signature scanned into electronic format) are recognized as valid signatures. Use of a typed name with "/s/" is NOT a valid signature.

*Solicitation* means any Request for Proposals (RFP), Request for Quotes (RFQ) or other requested priced submittals, to include any non-competitive, single, sole or unique source RFP, RFQ or other priced submittal.

*Subcontract* means any contract, as defined in this subpart, entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders and subcontracts.

*Subcontractor* means any supplier, distributor, vendor or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

*Subscription* means a purchase by prepayment for a certain number of issues (as of a periodical), or a subscription price to have access to a periodical or newspaper in an electronic format.

*Substantially as follows* or *substantially the same as*, when used in the prescription and introductory text of a provision or clause means that authorization is granted to prepare and utilize a variation of that provision or clause to accommodate requirements that are peculiar to an individual acquisition; provided that the variation includes the salient features of the BPI provision or clause, and is not inconsistent with the intent, principle, and substance of the BPI provision or clause or related coverage matter.

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

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

*Task order* means an order for services placed against an established contract or with Government sources.

*Technically Acceptable* means a determination that minimum standards identified in the solicitation have been met through assessment by an evaluation team and/or contracting officer. Minimum standards are determined by using non-price evaluation factors and stating how offerors can meet the minimum requirements. Non-price evaluation factors may include risks to Bonneville, past performance, quality of goods or services offered, technical and management features, time of delivery and/or performance, and other factors as determined by the evaluation team or CO.

Technology when defined for import or export control purposes; means both technical data and technical assistance and includes both Information Technology and Operational Technology.

*Trade Secret*, see Proprietary Information.

### 3 STANDARDS OF CONDUCT AND BUSINESS PRACTICES

#### 3.1 STANDARDS OF CONDUCT REGARDING PURCHASING AND ASSISTANCE

##### 3.1.1 General

Bonneville's policy for acquisition activities shall be conducted to comply with the ethical standards of conduct for employees of the Executive Branch. Fiduciary responsibility exists for Bonneville employees involved in the conduct of purchasing activities; therefore Bonneville employees shall avoid any conflict of interest or the appearance of such in the conduct of Bonneville 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 Bonneville efficiency or economy;
- (d) Lack of complete independence or impartiality;
- (e) Making decisions on behalf of Bonneville outside official channels;
- (f) Adversely affecting the public's confidence in the ability of Bonneville 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

- (a) Bonneville purchases 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 Bonneville-contractor relationships. This subpart 3.1 and BPI Appendix 3 provide Bonneville policy for the conduct of every Bonneville purchase of supplies, services or construction and financial assistance. In conducting such Bonneville purchases and financial assistance—
  - (1) Employees and former employees of Bonneville who participate personally and substantially, as defined in BPI Appendix 3, 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;
  - (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.
- (b) During the conduct of any Bonneville purchase (including financial assistance), no Bonneville employee who participates personally and substantially during the conduct of a Bonneville 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 subsection 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 Bonneville 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 Bonneville contract to which the purchase information relates.

### 3.1.3 Annual Certification by Bonneville Employees

- (a) The Office of General Counsel and the HCA relies upon the annual certification by all Bonneville 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 subpart 3.1 and BPI Appendix 3) as the basis for Bonneville employee certification of standards of conduct for purchasing and financial assistance activities of Bonneville. The HCA will not separately maintain annual certifications for standards of conduct regarding purchasing and assistance, relying instead upon the annual ethics briefing and certifications maintained by the Office of General Counsel.
- (b) The standards of conduct regarding purchasing and assistance specifically applies to the following Bonneville 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 CORs and Field Inspectors;
  - (4) All employees who “participate personally and substantially in the conduct of a Bonneville purchase,” as defined in BPI Appendix 3, Section 2; and
  - (5) All personnel who have a purchase card with a single purchase limit greater than \$3,500.

### 3.1.4 Disqualification

- (a) If a Bonneville employee is involved, both personally and substantially in any acquisition, and intends to discuss future employment (or business opportunities) with a contractor, the employee shall submit a written proposal to the HCA, prior to initiating or engaging in such discussions, for disqualification from further participation in acquisitions which relate to that contractor. The proposal shall:
  - (1) Identify the purchase(s) involved;
  - (2) Describe the nature of the employee’s participation in the purchase(s) and specify the approximate dates or time period of participation; and
  - (3) Identify the 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 acquisition 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

- (a) If the CO receives or obtains information of a violation of subpart 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 their supervisor. With the concurrence of that supervisor, the CO shall, without further approval, proceed with the purchase.
  - (2) If the supervisor 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 subpart 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 Bonneville, the CO may be authorized to award the contract.

### 3.1.6 Questions Regarding Standards of Conduct

Other than the HCA procedures in subsections 3.1.4 and 3.1.5, should any Bonneville 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 Ethics Office; as necessary.

### 3.1.7 Solicitation Provision

COs shall include the provision 3-1, Purchasing Standards of Conduct, in all solicitations expected to exceed \$250,000, except for commercial acquisitions.

## **3.2 STANDARDS OF CONDUCT REGARDING INDEPENDENT FUNCTIONING AND TRANSMISSION INFORMATION**

### 3.2.1 General

- (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. Bonneville 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 non-affiliated customers or potential customers of the Transmission Provider. The marketing function within Bonneville 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 Bonneville'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

COs shall contact the SOC Compliance Officer at [SOC@bpa.gov](mailto:SOC@bpa.gov) to address any concerns or questions regarding SOC. Requisitioners, CORs and Field Inspectors shall contact both the CO and the SOC Compliance Officer to address and resolve SOC issues.

### 3.3 ORGANIZATIONAL CONFLICTS OF INTEREST

#### 3.3.1 Policy

- (a) Bonneville 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.

#### 3.3.2 Disclosure of OCI

- (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) Bonneville will consider the information obtained and may seek additional relevant information, if needed. All such information, and any other relevant information known to Bonneville, 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, Bonneville 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 Bonneville 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.
- (e) When an unsolicited proposal is accepted, the CO shall determine OCI before or during the negotiation process.
- (f) COs shall attempt to determine whether such conflicts exist prior to the solicitation of offers. Whenever possible, such information should be verified during negotiation.

### 3.3.3 Contract Clause

COs shall include the clause 3-2, Organizational Conflicts of Interest, in all solicitations and contracts above the micro-purchase threshold, except in awards with Federal agencies.

### 3.3.4 Remedies for Nondisclosure

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 Bonneville contracts, and be subject to such other remedial action as may be permitted or provided by law or in the resulting contract.

### 3.3.5 Evaluation, Findings and Contract Award

- (a) In all cases of potential organizational conflicts of interest, COs shall obtain approval prior to award of contracts. The supervisor 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 Bonneville. 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 the OCI finding in the official contract file.

### 3.3.6 Action in Lieu of Termination

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 Bonneville to terminate the contract, the CO shall take every reasonable action to avoid or mitigate the effects of the conflict.

## 3.4 LIMITATIONS ON PAYMENTS TO INFLUENCE TRANSACTIONS

This subpart prescribes policies and procedures implementing 31 U.S.C § 1352, “Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions”.

### 3.4.1 Statutory Prohibition and Requirement

- (a) 31 U.S.C § 1352 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) 31 U.S.C. § 1352 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.

### 3.4.2 Exceptions

- (a) The prohibitions of paragraph 3.4.1(a) do not apply under the following conditions:
- (1) Agency and legislative liaison by own employees.
- (i) 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.
  - (ii) For purposes of subdivision (a)(1)(i) of this section, providing any information specifically requested by an agency or Congress is permitted at any time.
  - (iii) 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:
    - (A) 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;
    - (B) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.
  - (iv) The following agency and legislative liaison activities are permitted where they are prior to formal solicitation of any covered Federal action:
    - (A) Providing any information, not specifically requested, about a covered Federal action;
    - (B) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,
    - (C) 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.
  - (v) Only those activities expressly authorized by subparagraph (a)(1) of this section are permitted under this section.
- (2) Professional and technical services.
- (i) 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 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;
    - (B) 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.
- (ii) For purposes of subdivision (a)(2)(i) 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.
  - (iii) 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.
  - (iv) Only those services expressly authorized by subdivision (a)(2)(i)(1) and (2) of this section are permitted under this section.
  - (v) The reporting requirements of 3.4.2(a) shall not apply with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

### 3.4.3 Certifications and Disclosures

- (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 the 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 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.

#### 3.4.4 Policy

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

#### 3.4.5 Processing Suspected Violations

Suspected violations of the requirements of 31 U.S.C. § 1352 shall be referred to the HCA.

#### 3.4.6 Procedures

- (a) Obtaining disclosures before award. COs shall obtain any disclosure form as required by the clause 3-3, Certification, 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 the clause 3-3, Certification, Disclosure and Limitation 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 pre-priced 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 in the GSA Forms Library at <http://www.gsa.gov/portal/forms>.
- (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.

#### 3.4.7 Contract Clause

COs shall include the clause 3-3, Certification, Disclosure and Limitation Regarding Payments to Influence Certain Federal Transactions, in solicitations and contracts expected to exceed \$150,000, including IGCs with non-Federal entities.

### **3.5 RESTRICTION ON COMMERCIAL ADVERTISING**

#### 3.5.1 Policy

It is Bonneville's policy to restrict contractors from referring to Bonneville contracts in commercial advertising in a manner that states or implies that Bonneville 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 Bonneville preference toward any product or service.

### 3.5.2 Contract Clause

COs shall include the 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 subpart 11.6), or when the requisitioner deems necessary to protect Bonneville's interests.

## 3.6 CONTRACTOR EMPLOYEE WHISTLEBLOWER PROTECTIONS

This section implements the contractor employee whistleblower protections established at 41 U.S.C. § 4712 by section 828 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239).

### 3.6.1 Definitions

As used in this subpart –

*Abuse of authority* means an arbitrary and capricious exercise of authority that is inconsistent with the mission of the executive agency concerned or the successful performance of a contract of such agency.

*Inspector General* means an Inspector General appointed under the Inspector General Act of 1978 and any Inspector General that receives funding from, or has oversight over contracts awarded for, or on behalf of, the executive agency concerned.

### 3.6.2 Policy

- (a) Contractors and subcontractors are prohibited from discharging, demoting, or otherwise discriminating against an employee as a reprisal for disclosing, to any of the entities listed at paragraph (b) of this subsection, information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract, a gross waste of Federal funds, an abuse of authority relating to a Federal contract, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract). A reprisal is prohibited even if it is undertaken at the request of an executive branch official, unless the request takes the form of a non-discretionary directive and is within the authority of the executive branch official making the request.
- (b) Entities to whom disclosure may be made –
  - (1) A member of Congress or a representative of a committee of Congress;
  - (2) An Inspector General;
  - (3) The Government Accountability Office (GAO);
  - (4) A Federal employee responsible for contract oversight or management at the relevant agency;
  - (5) An authorized official of the Department of Justice (DOJ) or other law enforcement agency;
  - (6) A court or grand jury; or
  - (7) A management official or other employee of the contractor or subcontractor who has the responsibility to investigate, discover, or address misconduct.
- (c) An employee who initiates or provides evidence of contractor or subcontractor misconduct in any judicial or administrative proceeding relating to waste, fraud, or abuse on a Federal contract shall be deemed to have made a disclosure.
- (d) A complaint by the employee may not be brought under 41 U.S.C. § 4712 more than three years after the date on which the alleged reprisal took place.

- (e) No waiver. The rights and remedies provided for in 41 U.S.C. § 4712 may not be waived by any agreement, policy, form, or condition of employment.
- (f) Additional rights and responsibilities for contractors, contractor employees, and federal agencies are provided in 41 U.S.C. § 4712.

3.6.3 Filing Contractor Employee Whistleblower Complaints

A contractor or subcontractor employee who believes that he or she has been discharged, demoted, or otherwise discriminated against contrary to the policy in this section may submit a complaint with the Department of Energy Inspector General using any of the following methods:

Phone	(800) 541-1625
Fax	(202) 586-4902
Email	ighotline@hq.doe.gov
Correspondence	U.S. Department of Energy Office of Inspector General ATTN: IG Hotline 1000 1000 Independence Avenue, SW Mail Stop 5D-031 Washington, DC 20585

3.6.4 Contract Clause

The CO shall include the clause 3-10, Contractor Employee Whistleblower Rights, in all solicitations and contracts.

**3.7 CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT**

3.7.1 Definitions

*Subcontract* means any contract entered into by a subcontractor to furnish supplies, services or construction for performance of a prime contract or a subcontract.

*Subcontractor* means any supplier, distributor, vendor, or firm that furnished supplies, services or construction to or for a prime contractor or another subcontractor.

*United States* means the 50 States, the District of Columbia, and other U.S. territories.

3.7.2 Policy

- (a) The Contractor Code of Business Ethics and Conduct is applicable to contracts if the value of the contract is expected to exceed \$6 million and the performance period is 120 days or more.
- (b) This policy implements Title 18 of the U.S.C., and DOE Order 221.1B, as amended September 27, 2016.
- (c) Prescribes policies and procedures for the establishment of contractor codes of business ethics and conduct, and display of agency Office of Inspector General (OIG) fraud hotline posters.
- (d) Bonneville contractors must conduct themselves with the highest degree of integrity and honesty.
- (e) Contractors should have a written code of business ethics and conduct. To promote compliance with such code of business ethics and conduct, contractors should have an employee business ethics and compliance training program and an internal control system that;

- (i) Are suitable to the size of the company and extent of its involvement in Government contracting;
- (ii) Facilitate timely discovery and disclosure of improper conduct in connection with Bonneville contracts; and
- (iii) Ensure corrective measures are promptly instituted and carried out.
- (f) Contractor requirements
  - (i) Display of Hotline Poster(s), are mandatory if the contract meets the conditions specified in the clause prescriptions at 3.7.3.
  - (ii) A contractor may be suspended and/or debarred for failure by a principal to timely disclose to Bonneville, in connection with the award, performance, or closeout of a contract performed by the contractor or a subcontract awarded thereunder, credible evidence of a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code or a violation of the civil False Claims Act.
  - (iii) If the contractor becomes aware that Bonneville has overpaid on an invoice payment, the contractor shall remit the overpayment amount to the Bonneville. A contractor may be suspended and/or debarred for failure by a principal to timely disclose credible evidence of a significant overpayment.
- (g) Notification of possible contractor violation. If the contracting officer is notified of possible contractor violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C.; or a violation of the civil False Claims Act, the contracting officer shall;
  - (i) Take action in accordance with agency procedures, see BPA Policy 230-2 Reporting Violations of Law and BPA Policy 230-7 Hotline found at <https://connection.bud.bpa.gov/workplace-resources/policy/>
    - (A) Call BPA Ethics Hotline 800-440-2241, and the hotline will coordinate with the appropriate office to include OGC and the HCA; and
    - (B) Bonneville Ethics Office will notify the Office of the Inspector General.
- (h) Fraud Hotline Poster
  - (i) Agency OIGs are responsible for determining the need for, and content of, their respective agency OIG fraud hotline poster(s).
  - (ii) When requested by the Department of Homeland Security, agencies shall ensure that contracts funded with disaster assistance funds require display of any fraud hotline poster applicable to the specific contract. As established by the agency OIG, such posters may be displayed in lieu of, or in addition to, the agency's standard poster.

### 3.7.3 Clause

Insert the clause at 3-11, Contractor Code of Business Ethics and Conduct, in solicitations and contracts if the value of the contract is expected to exceed \$6 million and the performance period is 120 days or more.

## 4 ADMINISTRATIVE MATTERS

### 4.1 SCOPE OF PART

This part prescribes policies and procedures for the contract numbering system, clause numbering system, and forms. This part prescribes policies and procedures for administrative matters pertaining to contract execution, paper documents, distribution, reporting, retention and files.

### 4.2 CONTRACT, CLAUSE AND FORM ORGANIZATION

This subpart prescribes organization for contract numbering, clause numbering, clause incorporation and form numbering.

#### 4.2.1 Contract Numbering System

Bonneville has an established, automated numbering system for purchasing instruments. The automated numbering system uses the schema of the Enterprise Resource Planning (ERP) system. Instruments to be numbered using this system include purchase orders, contracts, and intergovernmental contracts. Bonneville has implemented this system as it is exempt from DOE Order 540.2.

#### 4.2.2 Provisions and Clause Numbering System

- (a) *Numbering System.* The number in front of the hyphen in the provision or clause number corresponds to the number of the subject part in which the clause is described. After the hyphen, the provision or clause number is completed by a sequential number assigned within each part of the BPI.
- (b) *Use and Modification of Provisions and Clauses.* The instructions for use of each provision or clause are set forth in the BPI text where the subject matter receives its primary treatment. Some provisions and/or clauses are required (as indicated by the words “shall include the clause xx-xx”) and may only be modified as prescribed or for purely editorial purposes and the edited change has no substantial impact on the legal effect of the clause. Otherwise, mandatory clauses shall not be modified without a waiver or deviation approved by the HCA. Other provisions and clauses are optional (as indicated by the phrase “may include”). Optional provisions and/or clauses shall not be modified to change their legal meaning without HCA approval unless the clause instructions permit such modification. The title of any clause or provision shall not be modified. When a provision or clause (either required or optional) provided by the BPI is modified, the letter “M” shall be inserted at the end of the provision or clause number (for example 11-6M), and the BPI date shall be replaced with the current date. The “M” designation and date change are not required if the provision or clause is modified to only complete the *CO fill in or CO insert* portion of the clause.
- (c) *Requirements for Use.* All provisions and 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 and applicable.
- (d) *CO-created clauses.* When the CO drafts a clause or clauses not based on an existing required or optional clause provided in the BPI, the CO shall number the clause with the BPI part number most applicable to the subject matter of the new clause, followed by a sequential number starting at 100. For example, a new CO-created clause on a contract administration policy issue would be numbered 14-100. The CO shall obtain an OGC review and HCA approval for all CO-created clauses.

#### 4.2.3 Clause Incorporation

- (a) 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 [bpa.gov](http://www.bpa.gov), or at <http://www.bpa.gov/Doing%20Business/purchase/Pages/default.aspx>.
- (b) Clauses should be incorporated by reference into solicitations and contracts whenever practicable and permitted by law, rather than generated in full text.
- (c) The full text of clauses which may be incorporated by reference shall be available on the Bonneville website for contract reference under the “Doing Business with BPA” link.

#### 4.2.4 Forms Numbering System

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

### 4.3 CONTRACT EXECUTION

This subpart prescribes policies and procedures for contract execution, distribution, paper and electronic documents, safeguarding information and contract reporting.

#### 4.3.1 Contracting Officer’s Signature

- (a) Only COs shall sign contracts on behalf of Bonneville. Acceptable signatures are a wet signature to the document or an electronic signature using approved software (i.e., Adobe, PIV/CAC Card). It does not mean the CO’s typed name into the document, “/s/” or any variance of these examples. The CO’s name and official title shall be displayed on the contract. Generally, the CO 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.
- (b) In the absence of the principal CO responsible for a particular contract:
  - (1) Another CO with appropriate authority may sign the contract or modification. 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; and
  - (2) COs are legally responsible for their signed procurement documents. COs cannot sign “for”, or over the name of, another CO.
- (c) A purchase order does not require the signature of the contractor, i.e., it is an offer from Bonneville which becomes a binding contract upon commencement of performance by the contractor. 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.

#### 4.3.2 Contract Distribution

COs shall distribute copies of contracts or modifications to the contractor and the COR, if assigned, generally within 10 working days after execution by all parties.

#### 4.3.3 Paper Documents

Electronic communication is the preferred method of doing business, however when electronic methods are not able to be used, acquisition documents should be printed in black and white and double-sided whenever possible.



#### 4.3.4 Safeguarding Critical Information within Industry

COs and CORs shall take the necessary steps to control and protect Critical Information (CI) that is distributed to contractors during contract performance and after contract completion. This includes but is 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.

#### 4.3.5 Electronic Commerce in Contracting

Bonneville should use electronic commerce whenever practicable or cost-effective. The use of terminology commonly associated with paper transactions shall not be interpreted to restrict the use of electronic methods. Bonneville may accept electronic signatures and records in connection with Government contracts.

#### 4.3.6 Contract Reporting

The contracting office is responsible for collecting and maintaining records of purchasing data for acquisition 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 Bonneville supplier diversity program activities; and
- (c) Data for HCA oversight, management decisions, and operational purchasing management and internal control purposes.

### 4.4 CONTRACT FILES

This subpart prescribes requirements for establishing, maintaining, and disposing of contract files.

#### 4.4.1 Contract Files

- (a) A contract file should generally consist of –
  - (1) The official contract file shall document the basis for the acquisition and the award, the assignment of contract administration (including payment responsibilities), and any subsequent actions taken by the CO;
  - (2) The official contract file shall document the actions reflecting the basis for and the performance of contract administration responsibilities; and
  - (3) The finance office shall maintain files that document actions prerequisite to, substantiating, and reflecting contract payments.
- (b) Files must be maintained to ensure –
  - (1) Effective documentation of contract actions;
  - (2) Ready accessibility to principal users;
  - (3) Minimal establishment of duplicate and working files;
  - (4) The safeguarding of critical information documents; and
  - (5) Conformance with Bonneville policies for file location and maintenance.
- (c) Contents of contract files that are contractor proposal information or source selection information must be protected from disclosure to unauthorized persons.
- (d) Bonneville should utilize electronic software systems (ERP) for maintenance and storage of pre-award to closeout documentation. When it is not feasible to maintain files within the ERP, the CO remains responsible to ensure record retention and disposition of contract files are in accordance with BPA Policy 236-1.

#### 4.4.2 Contents of Contract Files

The examples below are items to be contained in or addressed and/or referenced in the official contract file.

- (a) Pre-Award Documentation –
  - (1) Purchase/contract request, acquisition planning information, and other pre-solicitation documents;
  - (2) Validate the acquisition is fulfilling a Bonneville need and requirement;
  - (3) Validate the requirement is not an inherently government function (attestation signed);
  - (4) Evidence of availability of funds;
  - (5) The list of sources solicited, and a list of any firms or persons whose requests for copies of the solicitation were denied, together with the reasons for denial;
  - (6) Unique source or sole source justification documentation;
  - (7) Market research conducted (including requests for information (RFI));
  - (8) Government estimate of contract price;
  - (9) Security requirements (e.g., Federal Information Security Management/Modernization Act (FISMA)) and evidence of required clearances;
  - (10) Evaluation documentation;
  - (11) Contracting officer risk assessment / SPRAW;
  - (12) Strategy Panel presentation and meeting minutes;
  - (13) Subcontracting Plan;
  - (14) A copy of the solicitation and all amendments; and
  - (15) A copy of each offer or quotation, the related abstract, and records of determinations concerning late offers or quotations. Unsuccessful offers or quotations may be maintained separately, if cross-referenced to the contract file.
- (b) Award Documentation –
  - (1) Source selection, often referred to as the Document of Award Decision, providing the best buy analysis;
  - (2) CO's determination of the contractor's responsibility, e.g., SAM verification or equivalent;
  - (3) Data and information related to the CO's determination of fair and reasonable price;
  - (4) Cost or price analysis;
  - (5) Record of negotiation;
  - (6) Justification for type of contract;
  - (7) Reference attestation, validating the need is not an inherently government function;
  - (8) Authority for deviations from this policy, statutory requirements, or other restrictions;
  - (9) Approvals or disapprovals of requests for waivers or deviations from contract requirements;
  - (10) Contractor's representations and certifications;
  - (11) Required approvals of award and evidence of legal sufficiency review;
  - (12) Notice of award; and
  - (13) The signed contract or award.
- (c) Post Award Documentation:
  - (1) All contract modifications; and any documents supporting modifications executed by the contracting office;
  - (2) Any document assigning contract administration functions and responsibility;
  - (3) Notice to unsuccessful offerors and record of any debriefing;
  - (4) Report of post award conference;
  - (5) Notices to proceed and stop work orders;
  - (6) Documentation regarding contract termination actions;
  - (7) Documentation regarding settlement;

- (8) Unauthorized commitment documentation;
- (9) Ratification documentation;
- (10) Audits/Reviews and resolution;
- (11) Nondisclosure agreements;
- (12) Any additional documents on which action was taken or that reflect actions by the CO pertinent to the contract;
- (13) Documentation of contract reassignment from CO to successor, with effective dates of responsibility;
- (14) Performance and payment bonds and surety information;
- (15) Post award conference records;
- (16) Insurance policies or certificates of insurance;
- (17) Quality assurance records;
- (18) Property administration records;
- (19) Documentation regarding termination actions;
- (20) Cross reference to other pertinent documents that are filed elsewhere;
- (21) Any relevant communications with contractors;
- (22) Release of claims;
- (23) Warranty documentations; and
- (24) Contract completion documents.

#### 4.4.3 Standardized Forms

- (a) Contracting solicitations, amendments, awards and modifications, and associated contracting actions shall utilize the Standard Contract Format.
- (b) Documents and templates will be identified at the operational level. Types of documents and templates, included but not limited to the list below;
  - (1) A Construction Solicitation and Award.
  - (2) A Services Materials Solicitation and Award.
  - (3) A Amendment Modification Continuation Sheet.
- (c) Contracting solicitations, amendments, awards and modifications, and associated contracting actions may utilize provisions and clauses by reference with the full text accessible via the BPI posted online and available on BPA's external and internal websites.

#### 4.4.4 Close-out of Contracts

- (a) Commercial transactions shall be considered completed and closed upon final receipt of supplies or services and final payment. The CO shall not need to further document the file for this process.
- (b) All other contracts and agreements files must be closed as soon as practicable, and no later than 12 months from when the performance period expires, with exception to Interagency Agreements (IAAs), see subpart 25.2.4 (d). These closeout actions may be modified to reflect the extent of administration that has been performed. The CO shall ensure that all contractual actions required have been completed and shall prepare a statement to that effect. This statement is authority to close the contract file and shall be made a part of the official contract file. The CO shall close the contract file upon issuance of the final payment voucher and verification that the contract file is complete.
- (c) A contract file shall not be closed if (1) the contract is in litigation or under appeal; or (2) in the case of a termination, all termination actions have not been completed.

#### 4.4.5 Disposal of Files

Files shall be determined on-site until closed. 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 Bonneville Policy 236-11. However, selected files may be retained on site longer if the CO deems it necessary.

#### 4.4.6 Records Management Obligations

When Federal agencies acquire goods or services, they need to determine what Federal records management requirements should be included in the contract. Federal contractors often create, send, or receive Federal records. Federal contracts should provide clear legal obligations describing how the contract employees must handle Federal records. The majority of contracts should include language on records management obligations, but each contract should be evaluated individually.

#### 4.4.7 Contract Clause

COs shall include clause 4-7, Records Management Obligations, in all contracts when the contractor and/or its employees create, work with, or otherwise handle Federal records.

### 4.5 TAXPAYER IDENTIFICATION NUMBER

This subpart prescribes policies and procedures for acquiring taxpayer identification for disbursement and/or payment purposes.

#### 4.5.1 Policy

- (a) Accounts Payable 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; and
  - (2) Payments or purchase transactions made using imprest fund, third-party draft, or credit card (Purchase Card).
- (b) A TIN is required for payment to a:
  - (1) United States business or individual operating within the United States or a foreign country,
  - (2) Foreign business engaged in business or trade with an agent capable of receiving payment within the United States, or
  - (3) Tribe, State or Local government agency that has a TIN for IRS reporting purposes.
- (c) 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) The TIN for Bonneville is 93-0334712.

#### 4.5.2 Solicitation Provision

The CO shall include a provision similar to 4-1, Taxpayer Identification Number, in all solicitations, unless the contractor's TIN was previously obtained and made available to Accounts Payable.

### 4.6 CONTRACT LINE ITEMS

This subpart prescribes policies for creating line items within contracts to assist with tracking deliverables, performance and payments.

#### 4.6.1 Policy

- (a) Contracts may identify the items or services to be acquired as separately identified line items. Contract line items should provide unit prices or lump sum prices for separately identifiable contract deliverables, and associated delivery schedules or performance periods.
- (b) Line items may be further subdivided or stratified for administrative purposes.

### 4.7 SYSTEM FOR AWARD MANAGEMENT

This subpart prescribes policies and procedures for contract registration in the System for Award Management (SAM).

#### 4.7.1 Policy

Prospective contractors are encouraged to register in the SAM database prior to award of a contract or agreement. SAM provides for –

- (a) Increased visibility of vendor sources (including their geographical locations) for specific supplies and services;
- (b) A common source of established vendor data for the Government; and
- (c) Notice of delinquent debts subject to collection of a contractor under the Treasury Offset Program (TOP).

### 4.8 REPRESENTATIONS AND CERTIFICATIONS

This subpart prescribes policies and procedures for the submission and maintenance of representations and certifications.

#### 4.8.1 General

The System for Award Management (SAM) supports the following initiatives –

- (a) Eliminate the administrative burden for contractors of submitting the same information to various contracting offices;
- (b) Establish a common source of contractor information to procurement offices across the Government; and
- (c) Incorporate by reference the contractor's representations and certifications in the awarded contract.

#### 4.8.2 Policy

- (a) Prospective contractors are encouraged to complete an electronic annual representations and certifications in SAM.
- (b) Prospective contractors may update the representations and certifications submitted to SAM as necessary, to ensure they are kept current, accurate, and complete. The representations and certifications are effective for one year from the date of the original or updated submission in SAM.
- (c) Data in SAM is archived and is retrievable electronically. Therefore, when a prospective contractor has completed representations and certifications electronically via SAM, the CO may reference the date of SAM verification in the contract file, or include a paper copy of the electronically-submitted representations and certifications in the file.

### 4.9 LEGAL SUFFICIENCY REVIEWS

This subpart prescribes policy and procedures for procurement actions that require review for legal sufficiency.

#### 4.9.1 Policy

The following types of purchasing actions shall be reviewed by the Office of General Counsel for legal sufficiency prior to the establishment of a binding commitment –

- (a) Final decisions under the Disputes clause;
- (b) Terminations;
- (c) Responses to protests filed outside Bonneville;
- (d) 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 Information Technology (IT) procurements if Bonneville’s indemnification is capped at an amount not to exceed the license fee or support/maintenance fee;
- (e) Purchasing actions for Research and Development (including Fish and Wildlife R&D contracts);
- (f) Purchase of noncommercial IT products or services;
- (g) Purchase of commercial software that is significantly modified for Bonneville use, or is custom developed for Bonneville; and
- (h) All purchasing actions that are likely to provoke unusual public interest, are highly critical to Bonneville’s mission, or that are highly unique or of an unusual nature.

#### 4.9.2 Procedures

The request for review should be made in writing to OGC, but may be oral where there is an exigency. The CO shall document relevant discussions with OGC in the official file. The request shall conclude with a signature line after the following sentence, “Subject purchase action is legally sufficient as per General Counsel Review.” The request may be transmitted on paper or electronically.

### **4.10 PROHIBITION ON CONTRACTING FOR HARDWARE, SOFTWARE, AND SERVICES DEVELOPED OR PROVIDED BY KASPERSKY LAB**

#### 4.10.1 Definitions

*Covered article* means any hardware, software, or service that--

- (1) Is developed or provided by a covered entity;
- (2) Includes any hardware, software, or service developed or provided in whole or in part by a covered entity; or
- (3) Contains components using any hardware or software developed in whole or in part by a covered entity.

*Covered entity* means--

- (1) Kaspersky Lab;
- (2) Any successor entity to Kaspersky Lab;
- (3) Any entity that controls, is controlled by, or is under common control with Kaspersky Lab; or
- (4) Any entity of which Kaspersky Lab has a majority ownership.

#### 4.10.2 Prohibition

- (a) Section 1634 of Division A of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91) prohibits Government use on or after October 1, 2018, of any hardware, software, or services developed or provided, in whole or in part, by a covered entity.
- (b) Contractors are prohibited from--
  - (1) Providing any covered article that the Government will use on or after October 1, 2018; and
  - (2) Using any covered article on or after October 1, 2018, in the development of data or deliverables first produced in the performance of the contract.

#### 4.10.3 Procedures

The contracting officer shall insert the clause at 4-2, Prohibition on Contracting for Hardware, Software, and Services developed or provided by Kaspersky Lab and Other Covered Entities, in all solicitations and contracts issued after January 1, 2020.

### **4.11 PROHIBITION ON CONTRACTING FOR CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT**

This subpart implements paragraph (a)(1)(A) and (a)(1)(B) of section 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232).

#### 4.11.1 Definitions

*Backhaul* means intermediate links between the core network or backbone network, and the small subnetworks at the edge of the network (e.g. connecting cell phones/towers to the core telephone network). Backhaul can be wireless (e.g. microwave) or wired (e.g. fiber, optic, coaxial cable, Ethernet).

*Covered foreign country* means The People's Republic of China.

*Covered telecommunications equipment or services* means--

- (1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation, (or any subsidiary or affiliate of such entities);
- (2) For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);
- (3) Telecommunications or video surveillance services provided by such entities or using such equipment; or
- (4) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

*Critical technology* means--

- (1) Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled-
  - (a) Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or
  - (b) For reasons relating to regional stability or surreptitious listening;
- (2) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (50 U.S.C. 4817).

*Interconnection arrangements means* arrangements governing the physical connection of two or more networks to allow the use of another's network to hand off traffic where it is ultimately delivered (e.g., connection of a customer of telephone provider A to a customer of telephone company B or sharing data and other information resources).

*Reasonable inquiry means* an inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include and internal or third-party audit.

*Roaming means* cellular communications services (e.g., voice, video, data) received from a visited network when unable to connect to the facilities of the home network either because the signal coverage is too weak or because the traffic is too high.

*Substantial or essential component means* any component necessary for the proper function or performance of a piece of equipment, system, or service.

#### 4.11.2 Policy

- (a) Bonneville is prohibited from contracting with any entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless paragraph (b) of this section applies or the covered telecommunications equipment or services are covered by a waiver described in 1.7. The purpose of this prohibition is to prevent contract awards not only for covered equipment or services, but also to any entity using covered equipment and services.
- (b) *Exceptions.* This subpart does not prohibit Bonneville from procuring or contractors from providing-
  - (1) A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or
  - (2) Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.
- (c) *Contracting Officers.* Contracting officers shall not procure or obtain, or extend or renew a contract (e.g., exercise an option) to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (b) of this section applies or the covered telecommunications equipment or services are covered by a waiver described in 1.7.



#### 4.11.3 Procedures

- (a) *Representations*. If an offeror provides an affirmative response to the representations or discloses information in accordance with paragraphs (c) and (d) of the provision at 4-3, follow Bonneville procedures.
- (b) *Reporting*. If a contractor provides a report pursuant to paragraph (d) of the clause at 4-4, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, follow Bonneville procedures.

#### 4.11.4 Waivers

- (a) The Head of the Contracting Activity may, on a one-time basis, waive the prohibition at 4.11.2(a) with respect to a Government entity (e.g., requirements office, contracting office) that requests such a waiver.
  - (1) The waiver may be provided, for a period not to extend beyond October 1, 2022, if the requester seeking the waiver submits to the Head of the Contracting Activity –
    - (a) A compelling justification for the additional time to implement the requirements under 4.11.2(a), as determined by the Head of the Contracting Activity; and
    - (b) A full and complete laydown or description of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain and a phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.
  - (2) The Head of the Contracting Activity shall, not later than 30 days after approval, submit to the appropriate congressional committees the full and complete laydown or description of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain and the phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.
- (b) *Director of National Intelligence*. The Director of National Intelligence may provide a waiver if the Director determines the waiver is in the national security interests of the United States.

#### 4.11.5 Solicitation provision and contract clause

- (a) The contracting officer shall insert the provision at 4-3, Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment–
  - (1) In all solicitations for contracts; or
  - (2) Under indefinite delivery contracts, in all notices to place an order, or solicitations for an order.
- (b) The contracting officer shall insert the clause at 4-4, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment, in all solicitations and contracts.

### 4.12 PROHIBITION ON A BYTEDANCE COVERED APPLICATION

#### 4.12.1 DEFINITIONS

As used in this subpart—

*Covered application* means the social networking service TikTok or any successor application or service developed or provided by ByteDance Limited or an entity owned by ByteDance Limited.

*Information technology*, as defined in [40 U.S.C. 11101\(6\)](#) means

(1) Any equipment or interconnected system or subsystem of equipment, used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency, if the equipment is used by the agency directly or is used by a contractor under a contract with the agency that requires the use—

(i) Of that equipment; or

(ii) Of that equipment to a significant extent in the performance of a service or the furnishing of a product;

(2) Includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources; but

(3) Does not include any equipment acquired by a Federal contractor incidental to a Federal contract.

#### 4.12.2 Prohibition

(a) Section 102 of Division R of the Consolidated Appropriations Act, 2023 (Pub. L. 117–328), the No TikTok on Government Devices Act, and its implementing guidance under Office of Management and Budget (OMB) Memorandum M–23–13, dated February 27, 2023, “No TikTok on Government Devices” Implementation Guidance, collectively prohibit the presence or use of a covered application on information technology, including certain equipment used by Federal contractors.

(b) This prohibition applies to the presence or use of a covered application on any information technology owned or managed by the Government, or on any information technology used or provided by the contractor under a contract, including equipment provided by the contractor's employees, unless an exception is granted in accordance with OMB Memorandum M–23–13.

#### 4.12.3 Contract Clause

The Contracting Officer shall insert the clause 4-5, Prohibition on a ByteDance Covered Application, in all solicitations and contracts, unless an exception is granted in accordance with OMB Memorandum M-23-13.

### **4.13 PROHIBITION ON UNMANNED AIRCRAFT SYSTEMS (UAS) SERVICES**

#### 4.13.1 Definitions

As used in this subpart—

*"Adversary country"*, as defined in *Executive Order 13981*, means the Democratic People's Republic of Korea, the Islamic Republic of Iran, the People's Republic of China, the Russian

Federation, or, as determined by the Secretary of Commerce, any other foreign nation, foreign area, or foreign non-government entity engaging in long-term patterns or serious instances of conduct significantly adverse to the national or economic security of the United States.

*"Drones"*, terminology commonly used to refer to unmanned aircraft, unmanned aircraft system, or covered unmanned aircraft system—

(a) *"Unmanned Aircraft"*, as defined in 14 CFR Part 1, means an aircraft operated without the possibility of direct human intervention from within or on the aircraft. Unmanned Aircraft is synonymous with UAS.

(b) *"Unmanned Aircraft System"*, as defined in 14 CFR Part 1, means an unmanned aircraft and its associated elements (including communication links and the components that control the unmanned aircraft) that are required for the safe and efficient operation of the unmanned aircraft in the airspace of the United States. UAS is commonly referred to as "drones".

(c) *"Covered Unmanned Aircraft System (UAS)"*, as defined in Executive Order 13981, means any UAS that:

(1) is manufactured, in whole or in part, by an entity domiciled in an adversary country;

(2) uses critical electronic components installed in flight controllers, ground control system processors, radios, digital transmission devices, cameras, or gimbals manufactured, in whole or in part, in an adversary country;

(3) uses operating software (including cell phone or tablet applications, but not cell phone or tablet operating systems) developed, in whole or in part, by an entity domiciled in an adversary country;

(4) uses network connectivity or data storage located outside the United States, or administered by any entity domiciled in an adversary country; or

(5) contains hardware and software components used for transmitting photographs, videos, location information, flight paths, or any other data collected by the UAS manufactured by an entity domiciled in an adversary country.

#### 4.13.2 Policy

Executive Order (E.O.) 13981, "Protecting the United States From Certain Unmanned Aircraft Systems", states that it is the policy of the United States to prevent the use of federal dollars to procure UAS that present unacceptable risks and are manufactured by, or contain software or critical electronic components from, foreign adversaries.

#### 4.13.3 Procedure

For acquisitions that use ancillary UAS services, the CO must specify in the contract language that;

(1) The contractor will comply with the requirements of all applicable FAA regulations including but not limited to 14 CFR Part 107 “Small Unmanned Aircraft Systems” (<https://www.ecfr.gov/current/title-14/chapter-I/subchapter-F/part-107>).

(2) Ensure that the UAS is not a covered UAS.

(4) Coordinate pre-award solicitations with the CO for review and approval.

#### 4.13.4 Contract Clause

The Contracting Officer shall insert the clause 4-6, Prohibition in solicitations and contracts, when the use of UAS services is contemplated.

## 5 PRIVACY AND FREEDOM OF INFORMATION

This part prescribes policies and procedures that apply privacy best practices and the requirements of the Privacy Act of 1974 (5 U.S.C. § 552a) (the Act) to Government contracts. It also prescribes the procedures for complying with the Freedom of Information Act (5 U.S.C. § 552, as amended).

### 5.1 PROTECTION OF INDIVIDUAL PRIVACY

#### 5.1.1 Definitions

As used in this subpart –

*Improper disclosure* includes loss, theft, and unauthorized release or sharing of PII.

*Maintain* means maintain, collect, use or disseminate.

*Operation of a Privacy Act system of records* means performance of any of the activities associated with maintaining the system of records, including the collection, use, and dissemination of records.

*Personally identifiable information (PII)* means any information collected or maintained by Bonneville about any individual. This includes information that can be used to distinguish or trace an individual, and information about a person’s past or present status or activities.

*Privacy Act system of records* means a group of any records, under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual.

*Record* means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, education, criminal or employment history, and that contains the individual’s name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a fingerprint or photograph.

*Safeguards* means the physical, operational, and technical controls or countermeasures put in place to protect the confidentiality, integrity, and availability of information.

*Security breach* means any act or omission that compromises the security, confidentiality, or integrity of PII, or the safeguards put in place by the contract for the protection of PII.

*Sensitive PII* means PII that must be protected against loss because improper disclosure could result in substantial harm, embarrassment, inconvenience, or unfairness to an individual. This includes, among other things, medical history and conditions, workplace performance and discipline history, and financial information.

#### 5.1.2 General

- (a) The Privacy Act provides safeguards for individual privacy of citizens and lawfully admitted aliens when Bonneville contracts for the design, development, or operation of a system that will contain Privacy Act records on behalf of Bonneville. The Act requires that the contractor and its employees comply with the Privacy Act when handling Bonneville Privacy Act records.
- (b) A Bonneville employee may be criminally and/or civilly liable for violations of the Privacy Act. When a contract provides for operation of a Privacy Act system of records, contractors and

their employees are considered agents of Bonneville, and are subject to the criminal penalties of the Act.

- (c) If a contract specifically provides for the design, development, or operation of a Privacy Act system of records on individuals on behalf of Bonneville, Bonneville must apply the requirements of the Act to the contractor and its employees for work on the contract. The system of records operated under the contract is deemed to be maintained by Bonneville and is subject to the Act.

### 5.1.3 Procedures

- (a) The CO shall review requirements to determine whether, the contract –
  - (1) May involve the contractor receiving or accessing limited amounts of non-sensitive PII from Bonneville; and/or
  - (2) Will involve the contractor receiving or accessing any sensitive PII or significant amounts of non-sensitive PII from Bonneville; and/or
  - (3) Will involve the contractor designing, developing, or operating a system that will maintain Bonneville Privacy Act records.

If it is unclear whether the contract requirements may involve PII, the CO should seek clarification from the requisitioner and the Bonneville Privacy Officer.
- (b) If the contract requires designing, developing, or operating a system that will maintain Bonneville Privacy Act records, the CO shall ensure that in the contract documents the relevant Privacy Act System of Records identification number, as well as the design, development, or operation work to be performed are identified. The CO shall also make available Bonneville policies and procedures implementing the Privacy Act.

### 5.1.4 Contract Clauses

- (a) The CO shall insert the clause 5-1, Privacy Assurance, in all solicitations and contracts, except for commercial supplies when no exchange of PII from Bonneville occurs (see 5.1.3) or when Clause 5-2 is used.
- (b) If the work of the contract requires the contractor to receive or access sensitive PII or significant amounts of non-sensitive PII from Bonneville, the CO shall insert the clause 5-2, Privacy Protection, in the solicitation and contract.
- (c) If the work of the contract requires designing, developing, or operating a system that will maintain Bonneville Privacy Act records, the CO shall insert in all solicitations and contracts, both the clause 5-2, Privacy Protection, and 5-3, Privacy Act.

## 5.2 FREEDOM OF INFORMATION ACT

The Freedom of Information Act (5 U.S.C. § 552, as amended) provides that, subject to nine categorical exemptions, Bonneville records must be made available to the public upon request.

### 5.2.1 Policy

- (a) COs may provide information to members of the public about Bonneville's general procurement process or the status of a solicitation.
- (b) COs may provide information and records to contractors under the terms of the relevant contract, including information about contract performance.
- (c) Other requests for information and records received by COs shall be forwarded to the Bonneville FOIA Officer for response. COs shall not respond to FOIA requests individually.
- (d) The FOIA Officer may ask COs to provide background information and facts on requests records related to contracts.

## 6 ACQUISITION PLANNING, STRATEGY, AND REQUISITIONING

### 6.1 SCOPE OF PART

This part prescribes policies and procedures for acquisition planning, strategy and requisitioning. Successful acquisition planning, strategy and requisitioning is dependent upon a close working relationship between management, technical experts, finance personnel, legal personnel, the requisitioner, the COR and the CO.

### 6.2 ACQUISITION PLANNING

This subpart prescribes policies and procedures for performing acquisition planning.

#### 6.2.1 General

- (a) Bonneville shall perform acquisition planning. The purpose of acquisition planning is to ensure that Bonneville meets its needs in the most effective, economical, and timely manner.
- (b) Acquisition planning is to promote and provide for –
  - (1) The acquisition of commercial items or, to the extent that commercial items suitable to meet Bonneville’s needs are not available, nondevelopmental items, to the extent practicable;
  - (2) To obtain meaningful competition, with regard to the nature of the supplies or services to be acquired;
  - (3) Selection, by the CO, of the appropriate contract type in accordance with Part 7.
  - (4) The consideration of the use of pre-existing contracts, including interagency contracts, to fulfill the requirement, before awarding new contracts.
- (c) Acquisition planning should begin as soon as the need is identified, preferably well in advance of the fiscal year in which contract award or order placement is anticipated.
- (d) Acquisition planning shall integrate the efforts of all personnel responsible for significant aspects of the acquisition and include comprehensively defining all contract deliverables prior to solicitation.
- (e) Acquisition planning shall ensure sufficient lead and cycle times for required contracting and contracting administration steps necessary to meet this policy including strategy panels and integrated product team panels and methods.

#### 6.2.2 Initial Acquisition Risk Assessment

- (a) The CO is responsible for conducting an initial acquisition risk assessment when considering and developing an acquisition strategy. The level of effort of a risk assessment shall be appropriate based on the procurement method, expected value, and the risks to Bonneville the procurement may present. A formal initial risk assessment per Appendix 6, Attachment 6O, shall be completed for:
  - (1) Commercial and non-commercial service or supply contracts equal to greater than \$5,000,000 (including priced options) or with a maximum spend limit equal to or greater than \$5,000,000;
  - (2) Construction contracts equal to greater than \$7,000,000 (including priced options) or with maximum spend limits equal to or greater than \$7,000,000.

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 do not require the completion of a formal initial risk assessment.

- (b) For any procurement that is determined to be high risk via the completion of an initial risk analysis worksheet per Appendix 6, Attachment 6-O the acquisition shall be subject to either;
  - (1) An Integrated Product Team (IPT) Panel for acquisitions as classified under 6.16.
  - (2) A strategy panel for acquisitions as classified under 6.9.
- (c) Task, or delivery orders issued under preexisting IDIQ or IDDQ:
  - (1) Are exempted from requiring a formal initial risk assessment per Appendix 6, Attachment 6-O.
  - (2) Do not need to follow strategy panel or IPT requirements.

### **6.3 INHERENTLY GOVERNMENTAL FUNCTIONS**

This subpart provides guidance to identify if the government need is an inherently governmental function.

#### **6.3.1 General**

Inherently governmental 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, as outlined in Part 23. If the requirement is an inherently governmental function, the acquisition planning ends and the requirement needs to be re-evaluated. This evaluation may include consulting with HCM and other organizations as applicable.

#### **6.3.2 Policy**

- (a) Contracts shall not be awarded for the performance of inherently governmental functions.
- (b) The program office shall provide the Contracting Office, concurrent with transmittal of the Statement of Work (or any modification thereof), attestation that none of the functions are inherently governmental.
  - (1) Attestations shall be performed at the time of award or when the contract scope is modified.
  - (2) The attestation should include the rationale used to determine how the requirement is not an inherently governmental function or personal service.
  - (3) CO's shall document in the Document of Award Decision (DAD) or Record of Modification (ROM) the receipt and concurrence of the required attestation and file the attestation in the official contract file.
- (c) If there is a disagreement about whether or not a function is inherently governmental, the CO shall resolve the matter in coordination with HCM and HCA, with the HCA making the final determination.
- (d) For additional guidance on management of personal service requirements refer to Part 23 and Appendix 14, Section M, which requires CORs to review and provide an attestation validating the contractor is not performing inherently governmental functions or performing personal service contracts.

### **6.4 CONTRACTOR PERFORMANCE VERSUS GOVERNMENT PERFORMANCE**

This subpart provides guidance when determining whether the government or a contractor may fulfil the government requirement. The evaluation should be based on fulfilling the requirement in the most effective, economical, and timely manner.

#### **6.4.1 Policy**



- (a) In acquisition planning, the analysis of who (i.e., the government or a contractor) performs the requirement is critical to the successes of the acquisition.
- (b) When the CO considers contracting a government function(s) to the private sector, analysis should generally include;
  - (1) Total costs;
  - (2) Risk;
  - (3) Feasibility;
  - (4) Compliance; and
  - (5) Benefits.

## **6.5 CURRENT AND FORMER FEDERAL EMPLOYEES**

This subpart provides guidance for contracting with current and former federal employees and annuitants.

### **6.5.1 Policy**

- (a) Bonneville shall not award a contract to a current federal employee, or to a business entity owned or substantially controlled by one or more current federal employees.
- (b) Bonneville shall not enter into contracts directly with a former federal employee for consultant support unless the exception(s) listed in subpart 11.9 apply. This exemption shall only be processed and awarded through the Supplemental Labor Management Office.

## **6.6 PURCHASE OR LEASE**

This subpart provides guidance pertaining to the decision to acquire supply/equipment by lease or purchase. It applies to both the initial acquisition of equipment or technology and the renewal or extension of existing equipment leases.

### **6.6.1 Acquisition considerations**

- (a) Bonneville should consider whether to lease or purchase equipment based on a case-by-case evaluation of comparative costs and other factors. The following factors should be considered –
  - (1) Estimated length of the period the equipment is to be used and the extent of use within that period;
  - (2) Financial advantages – e.g. reducing Bonneville’s debt to asset ratio by leasing;
  - (3) Operating advantages of alternative types and makes of equipment;
  - (4) Cumulative rental payments for the estimated period of use;
  - (5) Net purchase price;
  - (6) Transportation and installation costs;
  - (7) Maintenance and other service costs; and
  - (8) Potential obsolescence of the equipment because of imminent technological improvements.
- (b) The following additional factors should be considered, as appropriate, depending on the type, cost, complexity, and estimated period of use of the equipment –
  - (1) Availability of purchase options;
  - (2) Potential for use of the equipment by other organizations after its use by the acquiring organization is ended;
  - (3) Trade-in or salvage value;
  - (4) Imputed interest; and
  - (5) Availability of a servicing capability, especially for high complex equipment; e.g., can the equipment be serviced by Bonneville or other sources if it is purchased.

## 6.6.2 Acquisition methods

### (a) *Purchase method.*

- (1) Generally, the purchase method is appropriate if the equipment will be used beyond the point in time when cumulative leasing costs exceed the purchase costs.
- (2) Bonneville should not rule out the purchase method of equipment acquisition in favor of leasing merely because of the possibility that future technological advances might make the selected equipment less desirable.

### (b) *Lease method.*

- (1) The lease method is appropriate if it is to Bonneville's advantage under the circumstances. The lease method may also service as an interim measure when the circumstances –
  - (i) Require immediate use of equipment to meet program or system goals; but
  - (ii) Do not currently support acquisition by purchase.
- (2) If a lease is justified, a lease with option to purchase is preferable.
- (3) Generally, a long term lease should be avoided, but may be appropriate if an option to purchase or other favorable terms are included.
- (4) If a lease with option to purchase is used, the contract shall state the purchase price or provide a formula which shows how the purchase price will be established at the time of purchase.

## 6.7 BUNDLING OF REQUIREMENTS

This subpart provides guidance for streamlining acquisitions by bundling or consolidating requirements.

### 6.7.1 Bundling/Consolidation

Bundling or consolidation of supplies, services or construction across project scope, phases or asset systems may provide substantial benefits to Bonneville. When conducting an acquisition through bundling/consolidation, the CO shall ensure that –

- (a) Market research has been conducted to justify bundling or consolidation opportunities;
- (b) Impacts and opportunities related to small business consideration in the acquisition strategy, when practical; and
- (c) Identify benefits such as cost savings, price reduction, time savings, and /or improved efficiencies and improved acquisition cycle times.

## 6.8 PERSONAL PROPERTY

This subpart prescribes policies and procedures relating to the preference of personal property use.

### 6.8.1 Excess of Personal Property

- (a) When practical, Bonneville must use existing inventory as the first source of supply with the objective of reducing inventory.
- (b) Bonneville personnel must make positive efforts to satisfy agency requirements by obtaining and using excess personal property (including that suitable for adaptation or substitution) before initiating a contract action.

### 6.8.2 Trade-In of Personal Property

- (a) Bonneville 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) Bonneville 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 policy. See Bonneville's Asset Management Instructions (AMI), Section 1 Part 5 and Section 1 Appendix 5.

#### 6.8.2.1 Procedures

- (a) Bonneville shall seek the maximum return for any item of property to be traded, when compared to the effective amount of credit Bonneville would otherwise receive against its U.S. Treasury debt if the property is transferred to another Federal agency.
- (b) The 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.
- (c) The Property Disposal Officer (PDO) or Property Disposal Specialist (PDS) will provide information regarding transfer value and estimated sale or trade-in value. The PDO or PDS will concur or decline to concur with the proposed trade-in.
- (d) 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, does not require 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 Section 1, Part 5 of the AMI have been met.
- (e) All categories of non-excess personal property (except high-risk items as defined in the AMI, Section 1, Part 5) are eligible for trade-in consistent with good business practice and program requirements.
- (f) 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 (ACR) approved Trade-in Cost Benefit Analysis Form (F4430.09) and any restrictions or limitations that apply to the solicitation exchange.

#### 6.8.2.2 Contract Clause

COs shall include a clause similar to 6-1, Trade-in of Personal Property, in solicitations and contracts that include trade-in of personal property.

## 6.9 STRATEGY PANELS

This subpart prescribes policies and procedures for Strategy Panels.

#### 6.9.1 Policy

- (a) Purchases or groups of related purchases, other than those purchases or groups of purchases classified in section 6.16.1. Integrated Product Teams (a) through (f), in excess of \$5,000,000 or if construction \$7,000,000 and determined high risk or critical by the CO, CO's Supervisor, Program/Project Manager, Senior Level VP, Director of Contracts and Strategic Sourcing, Chief Supply Chain Officer, HCA, or Administrator, 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) The purpose of the panel is to assist the CO and other purchasing team members by ensuring that all risk factors relevant to the procurement have been identified and analyzed to develop an acquisition strategy that mitigates or eliminates high-probability and high-consequence risks.
- (c) Such panels may be used for specific contracts (contract strategy panels) or for programs and projects that will require multiple contracts that could impact each other (business strategy panels).

#### 6.9.2 Designation of Strategy Panel Members

- (a) A Strategy Panel is a higher-level approval of the risk mitigation and acquisition strategy for sensitive and mission critical acquisitions that maximizes the probability of a successful procurement through identification and mitigation of high-probability and high-consequence risks.
- (b) The Director of Contracts and Strategic Sourcing (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 HCA (HCA) or designee. Office of Legal Counsel and Risk Management staff shall be invited to participate.

#### 6.9.3 Selection of Program/Purchase Actions for Review

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

- (a) Dollar value of the proposed acquisition;
- (b) Dollar value of the total project;
- (c) Contract/project complexity and financial risk;
- (d) Contract/project uniqueness;
- (e) Sensitivity of the contract/project;
- (f) Public impact of the contract/project;
- (g) Other unusual or nonstandard characteristics;
- (h) Transactions which contemplate the use of multiple contracts constituting a “pool” of contractors available for the same type of work;
- (i) Unique or high safety or work practice hazards; and
- (j) Acquisitions with a high risk have a probability of becoming protested upon award.

#### 6.9.4 Operation of the Strategy Panel

- (a) The panel shall be convened prior to finalization of the specifications or work statement and early enough in the process so that Bonneville 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 acquisition strategy to purchase the requirement as specified, on schedule, and within budget. The program office and the CO jointly prepare and deliver this presentation. This presentation must describe their assessment of the critical risks associated with the acquisition and explain how the recommended acquisition 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 that are appropriate to the proposed project or contract. The panel will also review the acquisition 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 minutes shall be documented in the official file.
- (e) The Strategy Panel Chairperson has final authority regarding whether the acquisition strategy is sufficient to authorize the CO to move forward with solicitation and award phases.

## 6.10 REQUISITION TRAINING PROGRAM

This subpart prescribes policies and procedures for a requisition training program to train requisitioners to streamline procurement acquisitions.

### 6.10.1 Policy

The Contracting Office shall establish and administer a requisitioner training program and develop and maintain resources for requisitioners. The purposes of the training and resources are to equip requisitioners to submit requisition packages.

### 6.10.2 Procedures

- (a) The training program shall deliver and maintain the following –
  - (1) Guidance on requisition training and requirements to include initial training and refresher training.
  - (2) Process to verify the requisitioner has completed the training;
  - (3) Management of a requisitioner database or comparable tracking tool;
  - (4) Initiatives as necessary to ensure requisitioners maintain skills in requisition development, requisition approvals and submission of requisition packages; and
  - (5) Coordinate permissions and access to the requisition system.
- (b) The training program shall define training and frequency requirements.
- (c) The training delivered at minimum shall include the following topics;
  - (1) General requisition requirements.
    - (i) Determine if a requirement is an Inherently Governmental Function.
    - (ii) Describe the requirement and government need.
    - (iii) Describe the market research performed.
    - (iv) Develop an Independent Government Estimate (IGE).
  - (2) Specific requirements for a requisition request.
    - (i) Identify critical and/or sensitive information contained in any specifications or drawings.
    - (ii) Identify any cyber security characteristics and approval obtained
    - (iii) Identify any contractor safety characteristics and approval obtained.
    - (iv) Identify contractor physical access requirement to government property and approval obtained.
    - (v) Identify permitting, clearances and right-of-way authorizations and approval obtained.
  - (3) Administration for a requisition request.
    - (i) Forms and/or documentation required.
    - (ii) Approvals for requisition request.
    - (iii) Coordination for requisition request.
    - (iv) Submission of requisition request.
    - (v) Modification of a requisition request.
    - (vi) Rejection of a requisition request.
    - (vii) Resubmit a requisition request.

## 6.11 REQUISITION DEVELOPMENT

This subpart provides policies and procedures for developing a requisition and what areas to consider when drafting the government requirement.

#### 6.11.1 Policy

- (a) Bonneville shall acquire commercial products and services and use commercial distribution systems whenever these products, services, or distribution systems fully satisfy Bonneville's needs. See Part 28, Acquisition of Commercial Items and Services.
- (b) The success of the acquisition is dependent upon involvement from planners, management, technical experts and finally the requisitioner. It is critical that the requisitioner can adequately address the government requirement to ensure the government receives what is required.

#### 6.11.2 Procedures

The requisitioner should consider the following items that are applicable to the acquisition.

##### 6.11.2.1 General Considerations

- (a) Identify the participants necessary for acquisition planning.
- (b) Describe the government need.
- (c) Confirm the government need is NOT an Inherently Governmental Function. If the government need is an inherently governmental function, the requisitioner shall notify his/her manager and end the transaction. See Part 23.
- (d) Compatibility with existing or future systems, schedule, and capability or performance constraints.
- (e) Independent Government Estimate (IGE), consider the total costs including life cycle and design. Several methods are used to determine IGEs. The IGE is one of many tools used by the CO in the evaluation of proposals and determination of whether price or expected cost is fair and reasonable. The quality and price of an acquisition may be solely dependent on the accuracy and reliability of the IGE.
- (f) Confirm funding is available for the requirement.
- (g) Specify the required capabilities or performance characteristics of the supplies or the performance standards of the services being acquired and determine how they will be used to evaluate quality.
- (h) Describe the basis for establishing delivery or performance-period requirements.
- (i) Describe the length of time the requirement will be needed and any potential changes or add-ons to the requirement over time.
- (j) Explain and provide reasons for any urgency if it results in concurrency of development and production or constitutes justification for not providing for competition.
- (k) Discuss technical, cost and schedule risks and describe what efforts are planned or underway to reduce risk and the consequences of failure to achieve goals.
- (l) Recommend potential sources that will generate meaningful competition and can meet the government need.
- (m) When recommending a non-competitive acquisition address the extent and results of the market research and indicate their impact on the various elements of the plan.
- (n) When recommending a trade-off acquisition, identify evaluation factors and definitions relevant to the buy.

##### 6.11.2.2 Information Technology Considerations

- (a) For information technology acquisitions, how the capital planning and investment control requirements of 40 U.S.C. § 11312 and OMB Circular A-130 will be met, see Part 17.

- (b) For information technology acquisitions using Internet Protocol, discuss whether the requirements documents include the Internet Protocol compliance requirements specified in or a waiver of these requirements has been granted by Bonneville's Chief Information Officer.
- (c) *Federal Information Processing Resources.*
- (1) 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 Bonneville or a contractor of Bonneville, or other organization that processes information on behalf of Bonneville to accomplish a Bonneville function, regardless of the technology involved. The Bonneville 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.
  - (2) Bonneville 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.
  - (3) 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 Bonneville's transmission system, or used to develop the systems to control or monitor the transmission grid.
  - (4) 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 Bonneville'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 of Bonneville, per the Bonneville 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 data-time compliance).
  - (5) COs 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 Bonneville IT system architecture, platforms, operating systems, specific software applications, hardware, or any portion of the general Bonneville 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) The purchase of IT hardware and software by P-Card shall be made only by those with delegated authority and in accordance with policies of the CIO (see Bonneville Policy 473-1) and HCA (also see the AMI).

#### 6.11.2.2.1 Electronic and Information Technology

- (a) This section implements Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. § 794d), and the Architectural and Transportation Barriers Compliance Board Electronic and Information Technology (EIT) Accessibility Standards (36 CFR part 1194).
- (b) Further information on Section 508 is available via the internet at <http://www.section508.gov>.

- (c) When acquiring EIT, Bonneville must ensure that –
  - (1) Federal employees with disabilities have access to and use of information and data that is comparable to the access and use by Federal employees who are not individuals with disabilities; and
  - (2) Members of the public with disabilities seeking information or services from an agency have access to and use of information and data that is comparable to the access and use to information and data by members of the public who are not individuals with disabilities.
- (d) For all procurements of Electronic and Information Technology (EIT), the program office is responsible for market research as well as preparing, documenting, and obtaining approval for all determinations of compliance, non-compliance, and partial compliance; commercial nonavailability determinations; and undue burden exceptions. Contracting officers should provide appropriate assistance to the requirements office. For micro-purchases, market research documentation for EIT should be maintained with purchase documents or within supporting files. For other than micro-purchases, the market research shall be provided to the contracting officer for inclusion in the contract file and should be substantially the same as the following format:

<p>Compliance with Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. § 794d) and the Architectural and Transportation Barriers Compliance Board Electronic and Information Technology (EIT) Accessibility Standards (36 CFR 1194)</p>
<p>Purchase Request:</p>
<p>Contract:</p>
<p>Delivery Order:</p>
<p>Task Order:</p>
<p>The supply and/or service required:</p>
<p><input type="checkbox"/> Meet the applicable accessibility standards.</p>
<p><input type="checkbox"/> Is a commercial supply or service and market research has determined that some or all of the applicable Access Board standards cannot be met by supplies or services available in the commercial marketplace in time to satisfy agency delivery requirements. (See attached EIT Commercial Non-Availability Determination)</p>
<p><input type="checkbox"/> Is exempt from compliance with applicable accessibility standards based on the following exception:</p>
<p><input type="checkbox"/> The item will be located in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment.</p>
<p><input type="checkbox"/> Would impose an undue burden on the agency. (See attached Undue Burden Determination)</p>
<p>(Signature) _____</p>
<p>Printed Name of Requiring Official(Date)</p>



#### 6.11.2.2.2 Applicability

- (a) Unless an exception at 6.11.2.2.1(d) applies, acquisitions of EIT supplies and services must meet the applicable accessibility standards at 36 CFR part 1194.
- (b) (1) Exception determinations are required prior to contract award, except for indefinite-quantity contracts (see paragraph (b)(2) of this section).
  - (2) Exception determinations are not required prior to award of indefinite-quantity contracts, except for requirements that are to be satisfied by initial award. Contracting officers that award indefinite-quantity contracts must indicate to requiring and ordering activities which supplies and services the contractor indicates as compliant, and show where full details of compliance can be found (e.g., vendor's or other exact website location).
  - (3) Requisitioners and contracting officers must ensure supplies or services meet the applicable accessibility standards at 36 CFR part 1194, unless an exception applies, at the time of issuance of task or delivery orders. Accordingly, indefinite-quantity contracts may include noncompliant items; however, any task or delivery order issued for noncompliant items must meet an applicable exception.
- (c) When acquiring commercial items, Bonneville must comply with those accessibility standards that can be met with supplies or services that are available in the commercial marketplace in time to meet the agency's delivery requirements.
  - (1) The requisitioner must document in writing the nonavailability, including a description of market research performed and which standards cannot be met, and provide documentation to the contracting officer for inclusion in the contract file.

#### 6.11.2.2.3 Exceptions

The requirements in 6.11.2.2.1(d) do not apply to EIT that –

- (a) Is acquired by a contractor incidental to a contract;
- (b) Is located in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment; or
- (c) Would impose undue burden on the agency.
  - (1) Basis. In determining whether compliance with all or part of the applicable accessibility standards in 36 CFR part 1194 would be an undue burden, Bonneville must consider –
    - (i) The difficulty or expense of compliance; and
    - (ii) Bonneville resources available to its program or component for which the supply or service is being acquired.
  - (2) Documentation.
    - (i) The requisitioner must document in writing the basis for an undue burden decision and provide the documentation to the contracting officer for inclusion in the contract file.
    - (ii) When acquiring commercial items, an undue burden determination is not required to address individual standards that cannot be met with supplies or services available in the commercial marketplace in time to meet the agency delivery requirements (see 6.11.2.2.1(d) regarding documentation of nonavailability).

#### 6.11.2.3 Logistics Considerations

- (a) The assumptions determining contractor or Bonneville support, both initially and over the life of the acquisition, including consideration of contractor or Bonneville maintenance and servicing.
- (b) The reliability, maintainability, and quality assurance requirements, including any planned use of warranties.

- (c) The requirements for contractor data (including repurchase data) and data rights, their estimated cost, and the use to be made of the data.
- (d) Standardization concepts, including the necessity to designate, in accordance with Bonneville procedures, technical equipment as “standard” so that future purchases of the equipment may be made from the same manufacturing source without competition.
- (e) Indicate any Bonneville property to be furnished to contractors, and discuss any associated considerations, such as its availability or the schedule for its acquisition.
- (f) Discuss and government information, such as manuals, drawing and test data, to be provided to prospective offerors and contractors, Indicate which information that requires additional controls to monitor access and distribution (e.g., technical specifications, maps, building designs, schedules, etc.)
- (g) Discuss all applicable environmental and energy conservation objectives associated with the acquisition, the applicability of an environmental assessment or environmental impact statement (see 40 CFR 1502), the proposed resolution of environmental issues, and any environmentally-related requirements to be included in solicitations and contracts.

#### 6.11.2.4 Safety and Security Considerations

- (a) For acquisitions dealing with safety matters, discuss how there may be safety or work practice hazards during the performance of the contract. Require the contractor to complete a safety plan and if necessary a site-specific safety plan to mitigate safety and work practice hazards.
- (b) For acquisitions dealing with controlled unclassified information (CUI) matters, discuss how adequate security will be established, maintained and monitored.
- (c) For information technology acquisitions, discuss how agency information security requirements will be met.
- (d) For acquisitions requiring routine contractor physical access to a Federally-controlled facility and/or routine access to a Federally-controlled information system, discuss how Bonneville requirements for personal identity verification of contractors will be met.
- (e) For acquisitions that may require Federal contract information to reside in or transit through contractor information systems, discuss compliance.

## 6.12 REQUIREMENT DESCRIPTION

This subpart provides policies and procedures for describing the government requirements.

### 6.12.1 Policy

There are different ways to describe the government requirement. Specifications, Statements of Work, Performance Work Statements and Statements of Objectives are generally the formats used to describe the government requirement.

### 6.12.2 Specifications

A specification describes essential and technical requirements for items, materials or services.

### 6.12.3 Statements of Work

- (a) A Statement of Work (SOW) describes services that are needed to satisfy a particular requirement and an ability to define what is required in specific, performance-based, quantitative terms.
- (b) The SOW should specify in clear, understandable terms the work to be done in developing or producing the goods to be delivered or services to be performed by a contractor.

#### 6.12.4 Performance Work Statement

- (a) A Performance Work Statement (PWS) describes statement of work for performance-based acquisitions that describes the required results in clear, specific and objective terms with measurable outcomes.
- (b) The PWS gives the contractor maximum flexibility to devise the best method to accomplish the required result. The clarity and explicitness of the requirements in the PWS will invariably enhance the quality of the proposal submitted. A definitive PWS is likely to produce definitive proposals, thus reducing the time needed for proposal evaluation.

#### 6.12.5 Statement of Objectives

- (a) A Statement of Objectives (SOO) is used as a description that states the overall performance objectives in broad terms.
- (b) The SOO is used in solicitations in lieu of a PWS or SOW. It is a summary of key agency goals, outcomes, or both, for performance-based service acquisitions in order that offerors may propose their solutions, including a technical approach, performance standards, and a quality assurance surveillance plan based upon commercial business practices. The successful offeror's approach to achieving these goals will then be incorporated into the PWS and become part of the official file.

### 6.13 REQUISITION SUBMISSION

This subpart prescribes the policies and procedures for submitting a complete and actionable requisition request through the electronic system.

#### 6.13.1 Policy

- (a) The accepted method for submitting a procurement requirement is an electronic Material Request, Purchase Requisition, Contract Requisition, and Contract Change Request. For Emergency requisitions, see Part 27.
- (b) The approval of the electronic requisition constitutes a certification that all required management approvals and other approvals specific to the acquisition have been obtained.
- (c) The approval of the electronic requisition constitutes a certification that all required funding is approved and authorized.

#### 6.13.2 Procedures

- (a) The requisitioner must submit the complete requisition package electronically through the ERP system.
- (b) The requisitioner is responsible for ensuring the requisition package at minimum includes the following –
  - (1) Confirm the requirement is not an Inherently Governmental Function;
  - (2) Describe requirement and government need (i.e. Statement of Work or Specification);
  - (3) Describe the market research performed;
  - (4) Develop an Independent Government Estimate (IGE), and identify method used to reach the IGE;
  - (5) Identify sensitive and/or critical uncontrolled information contained in any specifications or drawings;
  - (6) Identify any cyber security characteristics and approval obtained, see Part 15;
  - (7) Identify any contractor safety characteristics and approvals that need to be obtained, see Part 15;
  - (8) Identify contractor physical access requirement to government property and approval obtained, see Part 15;

- (9) Identify environmental clearances, permitting and right-of-way authorizations and approvals;
- (10) Consideration for inclusion of Liquidated Damages; and
- (11) Additional approvals may be required, depending on the type of service requested.
- (c) The requisitioner is responsible for ensuring approvals through the appropriate program office when requesting goods and services that are listed below. These additional approvals are found in the Bonneville Internal Policies Library and are located at <https://portal.bud.bpa.gov/sites/BPAInternalPolicy/SitePages/Home.aspx>.
  - (1) Telecommunications service and equipment;
  - (2) Airplane or helicopter equipment and services;
  - (3) Appliances;
  - (4) Audio visual equipment;;
  - (5) Audit services;
  - (6) Digital cameras;
  - (7) Ergonomic assessments;
  - (8) Hazard waste disposal;
  - (9) Herbicides and pesticides;
  - (10) Interior design;
  - (11) IT equipment, supplies and services;
  - (12) Motor vehicle and heavy equipment, and on equipment and repairs;
  - (13) Memberships;
  - (14) Office furniture;
  - (15) Office equipment;
  - (16) Operational telecommunications;
  - (17) Personal use Items;
  - (18) Printing Services;
  - (19) Products containing hazards waste;
  - (20) Professional licenses and certification;
  - (21) Real property leases;
  - (22) Records systems of individuals;
  - (23) Rental of motor vehicles;
  - (24) Sponsoring and participating in public events; and
  - (25) Transmission field test equipment
- (d) The CO is responsible for the following, in response to the requisition request.
  - (1) Promptly contacting the requisitioner to acknowledge receipt and confirm any requirements, if necessary, including the required delivery timeframe.
  - (2) In the event the requisition package is not actionable, the CO should notify the requisitioner and identify the gaps and or missing requirements. The CO may reject the package and request the requisitioner to complete the missing requirements and re-submit.
  - (3) Make a reasonable effort to ensure that the requisitioner is aware of any special requirements or approvals that may be applicable to the acquisition.
  - (4) 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.
  - (5) 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.

## 6.14 PURCHASE OF PERSONAL USE ITEMS

### 6.14.1 General

- (a) In the absence of specific statutory authority, Bonneville funds may not be used to acquire items that are solely of benefit to individual Bonneville employees. An expenditure made primarily for the benefit of Bonneville is permissible, 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 HR Directive 410-8 regarding policy and procedures for purchase of employee recognition and incentive items.
- (b) 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 Bonneville's programs and mission. Examples of potentially improper items include entertainment and recreational expenses, food for Bonneville employees, food and beverage preparation equipment, gifts, lobbying and related matters, personal/special use clothing, personal expenses and furnishings, etc.

### 6.14.2 Special Circumstances

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 6.8 are subject to the procedures described below.

### 6.14.3 Procedures

- (a) When potentially improper items or items which may be construed as being for the personal benefit of individual employees are required for Bonneville's program purposes, the following procedures will apply. These procedures are required each time such an item is acquired.
- (b) If the requisitioner 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.
- (c) Items that are determined to be potentially improper will be processed as follows:
  - (1) Requisitioners 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 Bonneville 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 Office of General Counsel. The Chief Certifying Officer will approve or decline payment based on available legal and policy guidance.

- (3) The approved memorandum will be attached to the requisition package when it is sent to the CO for action. If the CO receives a requisition package for an item as described in this subsection without the memorandum indicating that payment will be made, the requisition shall be returned to the requisitioner with a memorandum stating that the procedures described in this subpart must be followed.
- (4) 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 Accounts Payable with the contract/purchase order attached.

## **6.15 LIQUIDATED DAMAGES**

### **6.15.1 Scope**

- (a) This subpart prescribes policies and procedures for using liquidated damages clauses in solicitations and contracts for supplies, services, research and development, and construction.
- (b) This subpart does not apply to liquidated damages—
  - (1) For subcontracting plans (see 8.3.4);
  - (2) Related to the Contract Work Hours and Safety Standards statute (see 10.2.3.2 and 10.3.4.2); or
  - (3) Related to paid sick leave for Federal contractors (see 10.1.12)

### **6.15.2 Policy**

- (a) The contracting officer must consider the potential impact on pricing, competition, and contract administration before using a liquidated damages clause. Use liquidated damages clauses only when—
  - (1) The time of delivery or timely performance is so important that Bonneville may reasonably expect to suffer damage if the delivery or performance is delinquent; and
  - (2) The extent or amount of such damage would be difficult or impossible to estimate accurately or prove.
- (b) Liquidated damages are not punitive and are not negative performance incentives (see part 7 contract type – incentive contracts). Liquidated damages are used to compensate Bonneville for probable damages. Therefore, the liquidated damages rate must be a reasonable forecast of just compensation for the harm that is caused by late delivery or untimely performance of the particular contract. Use a maximum amount or a maximum period for assessing liquidated damages if these limits reflect the maximum probable damage to Bonneville. Also, the CO may use more than one liquidated damages rate when the contracting officer expects the probable damage to Bonneville to change over the contract period of performance.
- (c) The CO must take all reasonable steps to mitigate liquidated damages. If the contract contains a liquidated damages clause and the contracting officer is considering terminating the contract for default, the CO should seek expeditiously to obtain performance by the contractor or terminate the contract and repurchase (see subpart 20.5). Prompt contracting officer action will prevent excessive loss to defaulting contractors and protect the interests of Bonneville.
- (d) The HCA may reduce or waive the amount of liquidated damages assessed under a contract.

### **6.15.3 Procedures**

- (a) Include the applicable liquidated damages clause and liquidated damages rates in solicitations when the contract will contain liquidated damages provisions.

- (b) Construction contracts with liquidated damages provisions must describe the rate(s) of liquidated damages assessed per day of delay. The rate(s) should include the estimated daily cost of Government inspection and superintendence. The rate(s) should also include an amount for other expected expenses associated with delayed completion such as—
- (1) Renting substitute property; or
  - (2) Paying additional allowance for per diem.

#### 6.15.4 Contract Clauses

- (a) Use the clause 6-2, Liquidated Damages—Supplies, Services, or Research and Development, in fixed-price solicitations and contracts for supplies, services, or research and development when the contracting officer determines that liquidated damages are appropriate.
- (b) Use the clause 24-2, Liquidated Damages—Construction, in solicitations and contracts for construction, other than cost-plus-fixed-fee, when the contracting officer determines that liquidated damages are appropriate (see subsection 24.4.5).

### 6.16 INTEGRATED PRODUCT TEAMS (IPT), METHODS AND PANELS

This subpart provides requirements for Integrated Product Teams, Integrated Product Team Methods and Integrated Product Team Panels.

#### 6.16.1 Policy

Integrated Product Team methodologies have a proven track record of reducing risk and increasing success on projects, programs of projects (collectively projects) and their associated acquisitions and contracts. This is especially true for larger, more complex, technically challenging or high risk projects, with multiple stakeholders, involved performance requirements, tight budgets or demanding schedules.

An Integrated Product Team is the primary entity that brings together for a project and associated contract(s) the organizations various, disciplines, professions, subject matter experts and levels of management that can assist the Contracting Officer and Project/Program Manager in defining and delivering complete project and lifecycle contract outcomes within preset timelines and financial constraints.

##### 6.16.1.1 Integrated Product Teams

Integrated Product Teams (IPT's), Methods and Panels shall be established and employed on all capital or operations and maintenance projects or programs of projects acquisitions or contracts that meet the following minimum criteria;

- (a) Information technology or operational technology project, or program acquisitions substantially delivered by; contract or contracts which in aggregate are equal to or greater than \$5,000,000 (including priced options) or have a maximum order limit equal to, or greater than \$5,000,000, and where one or more of the following applies:
  - (1) The acquisition is determined to be complex, technically challenging or high risk (per the formal initial risk assessment - Appendix 6, Attachment 6-O).
  - (2) Includes Data, Critical Information, Critical Infrastructure Information, Security or Cyber Security requirements. [Classifications defined in Part 15.10.1]
  - (3) The acquisition is determined by the CO, Supervisory CO, Program/Project Manager, Chief Information Officer, Director of Contracts and Strategic Sourcing,

Chief Supply Chain Officer, HCA, or Administrator to be mission critical or necessary for the purpose of ensuring disciplined Agency cost and risk management.

- (b) Information technology or operational technology project, or program acquisitions substantially delivered by; contract or contracts which in aggregate are equal to or greater than \$10,000,000 (including priced options) or have a maximum order limit equal to, or greater than \$10,000,000.
- (c) Construction project or, program acquisitions substantially delivered by; contract or contracts which in aggregate are equal to or greater than \$10,000,000 (including priced options) or have a maximum order limit equal to, or greater than \$10,000,000 and where one or more of the following applies;
  - (1) Includes, affects or integrates with information technology (IT), operational technology (OT) or cyber systems.
  - (2) Includes Data, Critical Information, Critical Infrastructure Information, Security or Cyber Security requirements.

Additionally:

- (d) IPT, Methods and Panels or Sections of the IPT, as useful, may be used on any contracting effort at the discretion of a Project Manager, the Project Management Office, Manager, Directors, or CO if they determine it beneficial to the project or program contracting success and the additional cost does not outweigh the benefits.
- (e) IPT, Methods and Panels or Sections of the IPT, as useful, may be used for specific, programs or acquisitions that will require multiple contracts that could impact each other.

The following are exempt from the IPT's, IPT methodology and IPT review panel requirements:

- (f) Orders issued under an IDIQ or IDDQ.
- (g) Non-complex, straight forward, routine or low risk information technology or operational technology solicitations and contracts.
- (h) Where the IPT methodology does not add value, such as; i) maintenance (including hardware replacement, routine software updates, standard upgrades from original source etcetera), repair, of existing IT and OT, software, systems and equipment etcetera, and ii), enlargements/expansions to existing IT and OT, software, systems and equipment.

#### 6.16.1.2 Integrated Product Team Methodology

Procurements per; 6.16.1. (a),(b),(c),(d),(e),(f); shall follow an Integrated Product Team Methodology that is substantially in accordance with Appendix 6- Integrated Product Teams Policy Implementation Guide.

#### 6.16.1.3 Integrated Product Team Panel

Procurements per; 6.16.1. (a),(b),(c),(d),(e),(f); shall be subject to an Integrated Product Team (IPT) Panel review. IPT Panel reviews 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. The purpose of the Integrated Product Team Panel review is to assist the CO, PM, IPT and other purchasing team members to ensure; that risk factors relevant to the procurement are identified and managed, the optimum



acquisition strategy is utilized, requirements are comprehensively defined, clauses necessary to protect Bonneville from property and cyber security risks are incorporated, and both project and operations price elements (total cost of ownership) are considered in award selection determinations.

#### 6.16.1.3.1 Designation of Integrated Product Team Panel Members

An Integrated Product Team Panel review is a higher-level approval of the risk mitigation and acquisition strategy for sensitive and mission critical acquisitions that maximize the probability of a successful procurement through identification and mitigation of high-probability and high-consequence risks. The Director of Contracts and Strategic Sourcing (or designee) shall chair the Integrated Product Team Panel for purchasing activities. The Integrated Product Team Panel chairperson will designate members of the panel as necessary for a specific contract (CO, COR, PM, Key IPT members etc.), and including invites to:

- (a) Office of Legal Counsel
- (b) Head of the Contracting Activity (HCA) or designee
- (c) Risk Management
- (d) Finance
- (e) Director- Project Management Office

#### 6.16.1.3.2 Selection of Program/Purchase Actions for Review

In selecting purchasing actions for review, the CO and Chairperson shall include at a minimum those subjects contained and listed in Appendix 6, Section 4 and 5 and associated Attachments.

#### 6.16.2 Operation of the Integrated Product Team Panel

The CO prepares and gives the IPT Panel presentation in coordination with and supported by the Program Office. The presentation shall describe the factors listed under Appendix 6, Section 4 and 5 other relevant information, alternative courses of action and the recommended acquisition strategy to purchase the requirement as specified, on schedule, and within budget. The presentation must describe their assessment of the critical risks associated with the acquisition and explain how the recommended acquisition strategy will eliminate or mitigate the impact of those risks or alternatively acceptance of the risk. For any accepted risks, the potential schedule or price overrun and probability should be communicated and recorded in the official file.

The Integrated Product Team Panel will consider the overall business strategy for the program or projects, the management plan, purchasing, contractual, and related business approaches that are appropriate to the proposed project contract(s). The panel will also review the acquisition risk analysis conducted by the CO and Program/Project Manager (Appendix 6, Section 4 and 5) with necessary signatures identifying that pre solicitation requirements are complete.

Minutes of Integrated Product Team Panel meeting, including the advisory recommendations of the panel, shall be prepared but will be limited to documentation of major points and issues discussed. The minutes shall be documented in the official contracting file.

The Integrated Product Team Panel Chairperson has final authority regarding whether the acquisition strategy, and all requirements meet Section 6.16 and Appendices 6 and are sufficient enough to;

- (a) Authorize the CO to move forward with the solicitation; or
- (b) Require the Acquisition Strategy or any of the requirements per Section 6.16.3. be revised to meet the minimum requirements of Appendices 6; or
- (c) In coordination with the Director- Project Management Office require the solicitation and subsequent contracts be canceled, due to an unreasonable level of financial, business, technical or contracting risk.

The Integrated Product Team Panel Chairperson's final decision shall be recorded and filed in the official contracting file.

Solicitations for purchases subject to IPT's shall not proceed until:

- (a) The CO has received a completed Appendix 6, Attachment 6M with required signatures.
- (b) The IPT Review Panel Chair has determined that requirements per Appendix 6, Section 5 and Attachment 6M are sufficient enough to authorize the CO to proceed.

## 7 CONTRACT TYPES

### 7.1 SCOPE OF PART

This part describes types of contracts that may be used in acquisitions. It prescribes policies and procedures, and guidance for selecting a contract type appropriate to the circumstances of the acquisition.

#### 7.1.1 Definitions

As used in this part—

*Fee-Determining Official (FDO)* means the designated official(s) who reviews the recommendations of the CO in determining the amount of award fee to be earned by the contractor for each evaluation period. The Director of Contracts or his/her acting Tier 4 Manager and Strategic Sourcing is the designated official for Bonneville.

*Rollover of unearned award fee* means the process of transferring unearned award fee, which the contractor had an opportunity to earn, from one evaluation period to a subsequent evaluation period, thus allowing the contractor an additional opportunity to earn that previously unearned award fee.

### 7.2 SELECTING CONTRACT TYPES

#### 7.2.1 General

- (a) A wide selection of contract types is available to the Government and contractors in order to provide needed flexibility in acquiring the large variety and volume of supplies and services required by the Bonneville Power Administration. Contract types vary according to --
  - (1) The degree and timing of the responsibility assumed by the contractor for the costs of performance; and
  - (2) The amount and nature of the profit incentive offered to the contractor for achieving or exceeding specified standards or goals.
- (b) The contract types are grouped into two broad categories: fixed-price contracts (see subpart 7.3) and cost-reimbursement contracts (see subpart 7.5). The specific contract types range from firm fixed-price, in which the contractor has full responsibility for the performance costs and resulting profit (or loss), to cost-plus-fixed-fee, in which the contractor has minimal responsibility for the performance costs and the negotiated fee (profit) is fixed. In between are the various incentive contracts (see subpart 7.6), in which the contractor's responsibility for the performance costs and the profit or fee incentives offered are tailored to the uncertainties involved in contract performance.
- (c) 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 Bonneville considering contractor risk and incentives for high performance. The CO shall consider the administrative costs to both Bonneville and the contractor when selecting the contract type.

#### 7.2.2 Negotiating Contract Type

- (a) It is the CO's ultimate responsibility for selecting the contract type.
- (b) A firm-fixed-price contract, which best utilizes the basic profit motive of business enterprise, shall be used when the risk involved is minimal or can be predicted with an acceptable degree of certainty. However, when a reasonable basis for firm pricing does not exist, other

contract types should be considered, and negotiations should be directed toward selecting a contract type (or combination of types) that will appropriately tie profit to contractor performance.

- (c) In the course of an acquisition program, a series of contracts, or a single long-term contract (including options), changing circumstances may make a different contract type appropriate in later periods than that used at the outset. In particular, COs should avoid protracted use of a cost-reimbursement or time-and-materials contract after experience provides a basis for firmer pricing.
- (d) For other than firm fixed-price contracts, each contract file shall include documentation to show why the particular contract type was selected. Generally, the documentation should include –
  - (1) An analysis of why the use of other than firm-fixed-price contract (e.g., cost reimbursement, time and materials, labor hour) is appropriate;
  - (2) Rationale that detail the particular facts and circumstances (e.g., complexity of the requirements, uncertain duration of the work, contractor’s technical capability and financial responsibility, or adequacy of the contractor’s accounting system), and associated reasoning essential to support the contract type selection;
  - (3) An assessment regarding the adequacy of Bonneville resources that are necessary to properly plan for, award and administer other than firm fixed -price contracts; and
  - (4) A discussion of the actions planned to minimize the use of other than firm-fixed-price contracts on future acquisitions for the same requirement and to transition to firm-fixed-price contracts to the maximum extent practicable.

### 7.2.3 Factors in Selecting Contract Types

There are many factors that the CO should consider in selecting and negotiating the contract type. They include the following:

- (a) *Price competition.* Normally, effective price competition results in realistic pricing, and a fixed-price contract is ordinarily in Bonneville’s interest.
- (b) *Price analysis.* Price analysis, with or without competition, may provide a basis for selecting the contract type. The degree to which price analysis can provide a realistic pricing standard should be carefully considered (see subsection 12.5.2).
- (c) *Cost analysis.* In the absence of effective price competition and if price analysis is not sufficient, the cost estimates of the offeror and Bonneville provide the basis for negotiating contract pricing arrangements. It is essential that the uncertainties involved in performance and their possible impact upon costs be identified and evaluated, so that a contract type that places a reasonable degree of cost responsibility upon the contractor can be negotiated.
- (d) *Type and complexity of the requirement.* Complex requirements, particularly those unique to Bonneville, usually result in greater risk assumption by Bonneville. This is especially true for complex research and development contracts, when performance uncertainties or the likelihood of changes makes it difficult to estimate performance costs in advance. As a requirement recurs or as quantity production begins, the cost risk should shift to the contractor, and a fixed-price contract should be considered.
- (e) *Market conditions.* Market segments often have a general contract type that is used. Selecting a contract type to the type most commonly used in the industry will reduce the risk of performance and increase efficiencies for the contracts.
- (f) *Combining contract types.* If the entire contract cannot be firm-fixed-price, the CO shall consider whether or not a portion of the contract can be established on a firm fixed-price basis.

- (g) *Urgency of the requirement.* If urgency is a primary factor, Bonneville may choose to assume a greater proportion of risk or it may offer incentives tailored to performance outcomes to ensure timely contract performance.
- (h) *Period of performance or length of production run.* In times of economic uncertainty, contracts extending over a relatively long period may require economic price adjustment or price redetermination clauses.
- (i) *Concurrent contracts.* If performance under the proposed contract involves concurrent operations under other contracts, the impact of those contracts, including their pricing arrangements, should be considered.
- (j) *Extent and nature of proposed subcontracting.* If the contractor proposes extensive subcontracting, a contract type reflecting the actual risks to the prime contractor should be selected.
- (k) *Acquisition history.* Contractor risk usually decreases as the requirement is repetitively acquired. Also, product descriptions or descriptions of services to be performed can be defined more clearly.

#### 7.2.4 Solicitation Provision

The CO shall complete and insert the provision 7-1, Type of Contract, in a solicitation unless it is for a fixed-price acquisition made under commercial acquisition procedures under Part 28.

#### 7.2.5 Policies

- (a) The preferred contract type is firm fixed-price contracts or fixed-price contracts with economic price adjustment.
- (b) COs may use any type or combination of contract types that will promote Bonneville's interest with the following exceptions: (1) cost plus percentage of cost contracts may not be entered into (see 41 U.S.C. § 3905(a)); and (2) acquisitions of commercial items and services are subject to the restrictions identified in subsection 28.3.1.

### 7.3 FIXED-PRICE CONTRACTS

#### 7.3.1 General

- (a) Fixed-price types of contracts provide for a firm price or, in appropriate cases, an adjustable price. Fixed-price contracts providing for an adjustable price may include a ceiling price, a target price (including target cost), a combination of the two, or a guaranteed maximum price. Unless otherwise specified in the contract, the ceiling price, target price, or guaranteed maximum price is subject to adjustment only by operation of contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances. The CO shall use firm-fixed-price or fixed-price with economic price adjustment contracts when acquiring commercial items.
- (b) Time-and-materials contracts and labor-hour contracts are not fixed-price contracts.

#### 7.3.2 Firm Fixed-Price Contracts

##### 7.3.2.1 Description

- (a) A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden upon the

contracting parties. The CO should ensure that the price does not include excessive allowance for risk.

- (b) The CO may use a firm-fixed-price contract in conjunction with an award-fee incentive (see 7.6.4) and performance or delivery incentives (see 7.6.2.2 and 7.6.2.3) when the award fee or incentive is based solely on factors other than cost. The contract type remains firm-fixed-price when used with these incentives.

#### 7.3.2.2 Application

A firm-fixed-price contract is suitable for acquiring commercial items or for acquiring other supplies or services on the basis of reasonably definite functional or detailed specifications when the CO can establish fair and reasonable prices at the outset, such as when –

- (a) There is adequate price competition;
- (b) There are reasonable price comparisons with prior purchases of the same or similar supplies or services made on a competitive basis or supported by valid cost or pricing data, if required;
- (c) Available cost or pricing information permits realistic estimates of the probable price of performance; or
- (d) Performance uncertainties can be identified and reasonable estimates of their cost impact can be made, and the contractor is willing to accept a firm-fixed-price representing assumption of risks involved.

### 7.3.3 Fixed-Price Contracts with Economic Price Adjustment

#### 7.3.3.1 Description

- (a) A fixed-price contract with economic price adjustment provides for upward and downward revision of the stated contract price upon the occurrence of specified contingencies. Economic price adjustments are of three general types:
  - (1) *Adjustments based on established prices.* These price adjustments are based on increases or decreases from an agreed-upon level in published or otherwise established prices of specific items or the contract end items.
  - (2) *Adjustments based on actual costs of labor or material.* These price adjustments are based on increases or decreases in specified costs of labor or material that the contractor actually experiences during contract performance.
  - (3) *Adjustments based on cost indexes of labor or material.* These price adjustments are based on increases or decreases in labor or material cost standards or indexes that are specifically identified in the contract.
- (b) The CO may use a fixed-price contract with economic price adjustment in conjunction with an award-fee incentive (see 7.6.4) and performance or delivery incentives (see 7.6.2.2 and 7.6.2.3) when the award fee or incentive is based solely on factors other than cost. The contract type remains fixed-price with economic price adjustment when used with these incentives.

#### 7.3.3.2 Application

- (a) A fixed-price contract with economic price adjustment may be used when –
  - (1) There is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance; and
  - (2) Contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract. Price adjustments based on established prices should normally be restricted to industry-wide contingencies. Price adjustments based

on labor and material costs should be limited to contingencies beyond the contractor's control.

- (b) In establishing the base level from which adjustment will be made, the CO shall ensure that contingency allowances are not duplicated by inclusion in both the base price and the adjustment requested by the contractor under economic price adjustment clause.
- (c) In contracts that do not require submission of cost or pricing data, the CO shall obtain adequate data to establish the base.

#### 7.3.3.3 Limitations

A fixed-price contract with economic price adjustment shall only be used when the CO determines that it is necessary either to (1) protect the contractor and Bonneville against significant fluctuations in labor or material costs; or (2) to provide for contract price adjustment in the event of changes in the contractor's established prices.

#### 7.3.3.4 Contract Clauses

When the economic price adjustment method is used the CO shall select one of the following clauses listed herein:

- (a) *Adjustment based on established prices -- supplies.*
  - (1) The CO shall insert clause 7-2, Economic Price Adjustment -- Supplies, in solicitations and contracts when all of the following conditions apply:
    - (i) A fixed-price contract is contemplated.
    - (ii) The requirement is for supplies that have an established catalog or market price.
    - (iii) The CO has made the determination specified in 7.3.3.3.
  - (2) If the negotiated unit price reflects a net price after applying a trade discount from a catalog or list price, the CO shall document in the contract file both the catalog or list price and the discount. (This does not apply to prompt payment or cash discounts.)
- (b) *Adjustments based on actual cost of labor or material.*
  - (1) The CO shall insert a clause that is substantially the same as clause 7-3, Economic Price Adjustment -- Labor and Material in solicitations and contracts when all of the following conditions apply:
    - (i) A fixed-price contract is contemplated;
    - (ii) There is no major element of design engineering or development work involved;
    - (iii) One or more identifiable labor or material cost factors are subject to change; and
    - (iv) The CO has made the determination specified in 7.3.3.3.
  - (2) The CO shall describe in detail in the contract Schedule --
    - (i) The types of labor and materials subject to adjustment under the clause;
    - (ii) The labor rates, including fringe benefits (if any) and unit prices of materials that may be increased or decreased; and
    - (iii) The quantities of the specified labor and materials allocable to each unit to be delivered under the contract.
  - (3) In negotiating adjustments under the clause, the CO shall --
    - (i) Consider work in process and materials on hand at the time of changes in labor rates, including fringe benefits (if any) or material prices;
    - (ii) Not include in adjustments any indirect cost (except fringe benefits) or profit; and
    - (iii) Consider only those fringe benefits specified in the contract Schedule.
- (c) *Adjustments based on cost indexes of labor or material.*
  - (1) The CO shall insert a clause that is substantially the same as clause 7-4, Price Adjustment, in solicitations and contracts when using an economic price adjustment

based on cost indexes of labor or material under the circumstances described in paragraph (c)(2) of this section.

- (2) A clause providing adjustment based on cost indexes of labor or materials may be appropriate when –
- (i) The contract involves an extended period of performance with significant costs to be incurred beyond one year after performance begins;
  - (ii) The contract amount subject to adjustment is substantial; and
  - (iii) The economic variables for labor and materials are too unstable to permit a reasonable division of risk between BPA and the contractor, without this type of clause.
  - (iv) The CO has made the determination specified in 7.3.3.3.

#### 7.3.4 Fixed-Price Incentive Contracts

A fixed-price incentive contract is a fixed-price contract that provides for adjusting profit and establishing the final contract price by a formula based on the relationship of final negotiated total cost to total target cost. Fixed-price incentive contracts are covered in subpart 7.6, Incentive Contracts. See 7.6.3 for more complete descriptions, application, and limitations for these contracts. Prescribed clauses are found at 7.6.6.

#### 7.3.5 Fixed-Price Contracts with Prospective Price Redetermination

##### 7.3.5.1 Description

A fixed-price contract with prospective price redetermination provides for --

- (a) A firm-fixed-price for an initial period of contract deliveries or performance; and
- (b) Prospective redetermination, at a stated time or times during performance, of the price for subsequent periods of performance.

##### 7.3.5.2 Application

A fixed-price contract with prospective price redetermination may be used in acquisitions of quantity production or services for which it is possible to negotiate a fair and reasonable firm-fixed-price for an initial period, but not for subsequent periods of contract performance.

- (a) The initial period should be the longest period for which it is possible to negotiate a fair and reasonable firm-fixed-price. Each subsequent pricing period should be at least 12 months.
- (b) The contract may provide for a ceiling price based on evaluation of the uncertainties involved in performance and their possible cost impact. This ceiling price should provide for assumption of a reasonable proportion of the risk by the contractor and, once established, may be adjusted only by operation of contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances.

##### 7.3.5.3 Limitations

This contract type shall not be used unless --

- (a) Negotiations have established that --
  - (1) The conditions for use of a firm-fixed-price contract are not present (see 7.3.2.2), and
  - (2) A fixed-price incentive contract would not be more appropriate;
- (b) The contractor's accounting system is adequate for price redetermination;
- (c) The prospective pricing periods can be made to conform with operation of the contractor's accounting system; and



- (d) There is reasonable assurance that price redetermination actions will take place promptly at the specified times.

#### 7.3.5.4 Contract Clause

The CO shall insert clause 7-5, Price Redetermination -- Prospective, in solicitations and contracts when a fixed-price contract is contemplated and the conditions specified in 7.3.5.2 and 7.3.5.3(a) through (d) apply.

#### 7.3.6 [Reserved]

#### 7.3.7 Firm-Fixed-Price, Level-of-Effort Term Research and Development Contracts

##### 7.3.7.1 Description

A firm-fixed-price, level-of-effort term contract requires –

- (a) The contractor to provide a specific level-of-effort, over a stated period of time, on work that can be stated only in general terms; and
- (b) Bonneville to pay the contractor a fixed dollar amount.

##### 7.3.7.2 Application

A firm-fixed-price, level-of-effort term contract is suitable for investigation or study in a specific research and development area. The product of the contract is usually a report showing the results achieved through application of the required level-of-effort. However, payment is based on the effort expended rather than on the results achieved.

##### 7.3.7.3 Limitations

This contract type shall only be used when –

- (a) Research and Development work is required and cannot otherwise be clearly defined;
- (b) The required level-of-effort is identified and agreed upon in advance; and
- (c) There is reasonable assurance that the intended result cannot be achieved by expending less than the stipulated effort.

## 7.4 GUARANTEED MAXIMUM PRICE (GMP)

### 7.4.1 General

A Guaranteed Maximum Price (GMP) contract type is a hybrid contract that combines the price certainty of a Firm Fixed Price (FFP) contract with cost reimbursement elements. The GMP encompasses all cost elements for which the design-builder is entitled to be reimbursed. All costs are capped within the GMP, which is the maximum amount that the design-builder may be compensated under the contract.

Through a collaborative exchange of pricing information, both Bonneville and the design-builder achieve a better understanding of risk, the assignment of risk, mitigation of risk, and costs associated with risk. The design-builder is contractually obligated to be transparent with pricing details while establishing a GMP. If the final price is less than the GMP, the unspent GMP is returned to Bonneville in the form of GMP Savings. Bonneville is not obliged to share savings with the design-builder unless shared savings is established in the contract.

The administration of a GMP contract is complex and resource-consuming for both Bonneville and the design-builder. As such, the use of a GMP contract is limited to Progressive Design-Build delivery method and is used when Bonneville would benefit from contractor input early in the process and/or when the program is not defined well enough in scope and/or functional or technical requirements to develop a budget. The requisitioner shall ensure that proper program resources, skillsets are available to administer a GMP contract (e.g program manager, project manager and relevant PDB training).

A GMP contract allows for conversion of all or portions of the project to a FFP. This would apply to individual fast-track procurement, design, or construction scope where negotiation to FFP would benefit the project and/or reduce contract administration. However, the design-builder is required to have an accounting system capable of segregating FFP and reimbursable cost allocations to avoid duplication or mixing cost pools and bases. Bonneville or the OC is responsible for validating the accounting system meets these requirements.

Bonneville and the design-builder should establish a GMP for the project when the program is sufficiently established to make the GMP number realistic and meaningful. Setting it too early may result in an unrealistic price and setting it too late might not allow Bonneville to have an early price guarantee for planning and financing purposes.

#### 7.4.2 Limitations

The contract type shall only be used in conjunction with the Progressive Design Build (PDB) delivery method.

#### 7.4.3 Contract Clause

The CO shall insert clause 24-43 Progressive Design Build and 24-44 Guaranteed Maximum Price Cost Principles for Progressive Design Build – in solicitations and contracts when using the Progressive Design Build delivery method.

## 7.5 COST REIMBURSEMENT CONTRACTS

### 7.5.1 General

#### 7.5.1.1 Description

Cost-reimbursement types of contracts provide for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the CO.

#### 7.5.1.2 Application

The CO shall use cost-reimbursement contracts only when—

- (a) Circumstances do not allow Bonneville to define its requirements sufficiently to allow for a fixed-price type contract; or
- (b) Uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.

#### 7.5.1.3 Limitations

- (a) A cost-reimbursement contract may be used only when --
  - (1) The factors in 7.2.3 have been considered;
  - (2) Approved by the Director of Contracts and Strategic Sourcing or their acting Tier 4 Manager in writing; and
  - (3) Prior to award of the contract, or order, adequate Bonneville resources are available to award and manage a contract other than firm-fixed-price. This includes appropriate Bonneville surveillance during performance to provide reasonable assurance that efficient methods and effective cost controls are used.
    - (i) Designation of at least one CO's representative (COR) has been made prior to award of the contract or order; and
    - (ii) Appropriate Bonneville surveillance during performance to provide reasonable assurance that efficient methods and effective cost controls are used.
- (b) The use of cost-reimbursement contracts is prohibited for the acquisition of commercial items.

#### 7.5.2 Cost Contracts

- (a) *Description.* A cost contract is a cost-reimbursement contract in which the contractor receives no fee.
- (b) *Application.* A cost contract may be appropriate for research and development work, particularly with nonprofit educational institutions or other nonprofit organizations.
- (c) *Limitations.* See 7.5.1.3.

#### 7.5.3 Cost-Sharing Contracts

- (a) *Description.* A cost-sharing contract is a cost-reimbursement contract in which the contractor receives no fee and is reimbursed only for an agreed-upon portion of its allowable costs.
- (b) *Application.* A cost-sharing contract may be used when the contractor agrees to absorb a portion of the costs, in the expectation of substantial compensating benefits.
- (c) *Limitations.* See 7.5.1.3.

#### 7.5.4 Cost-Plus-Incentive-Fee Contracts

A cost-plus-incentive-fee contract is a cost-reimbursement contract that provides for an initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs. Cost-plus-incentive-fee contracts are covered in subpart 7.5.4, Incentive Contracts. See 7.5.1.3 for limitations.

#### 7.5.5 Cost-Plus-Award-Fee Contracts

A cost-plus-award-fee contract is a cost-reimbursement contract that provides for a fee consisting of –

- (a) A base amount (which may be zero) fixed at inception of the contract; and
- (b) An award amount, based upon a judgmental evaluation by Bonneville, sufficient to provide motivation for excellence in contract performance. Cost-plus-award-fee contracts are covered in subpart 7.5.5, Award Fee Contracts. See 7.5.1.3 for limitations.

#### 7.5.6 Cost-Plus-Fixed-Fee Contracts

- (a) *Description.* A cost-plus-fixed-fee contract is 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 work to be performed under the contract. This contract type permits contracting for

efforts that might otherwise present too great a risk to contractors, but it provides the contractor only a minimum incentive to control costs.

- (b) *Application.* A cost-plus-fixed-fee contract is suitable for use when the conditions of 7.5.1.2 are present and, for example --
  - (1) The contract is for the performance of research or preliminary exploration or study, and the level of effort required is unknown; or
  - (2) The contract is for development and test, and using a cost-plus-incentive-fee contract is not practical.
- (c) *Limitations.* No cost-plus-fixed-fee contract shall be awarded unless the CO complies with all limitations in 7.5.1.3.
- (d) *Completion and term forms.* A cost-plus-fixed-fee contract may take one of two basic forms - completion or term.
  - (1) The completion form describes the scope of work by stating a definite goal or target and specifying an end product. This form of contract normally requires the contractor to complete and deliver the specified end product (e.g., a final report of research accomplishing the goal or target) within the estimated cost, if possible, as a condition for payment of the entire fixed fee. However, in the event the work cannot be completed within the estimated cost, Bonneville may require more effort without increase in fee, provided Bonneville increases the estimated cost.
  - (2) The term form describes the scope of work in general terms and obligates the contractor to devote a specified level of effort for a stated time period. Under this form, if the performance is considered satisfactory by Bonneville, the fixed fee is payable at the expiration of the agreed-upon period, upon contractor statement that the level of effort specified in the contract has been expended in performing the contract work. Renewal for further periods of performance is a new acquisition that involves new cost and fee arrangements.
  - (3) Because of the differences in obligation assumed by the contractor, the completion form is preferred over the term form whenever the work, or specific milestones for the work, can be defined well enough to permit development of estimates within which the contractor can be expected to complete the work.
  - (4) The term form shall not be used unless the contractor is obligated by the contract to provide a specific level of effort within a definite time period.

#### 7.5.7 Contract Clauses

- (a) The CO shall insert the clause 7-7, Allowable Cost and Payment, in solicitations and contracts when a cost-reimbursement or a time-and-materials contract is contemplated. The clause shall not be used in contracts for commercial acquisitions or in labor-hour contracts. However, --
  - (1) If the contract is a time-and-materials contract, the clause 7-7 shall be used in conjunction with the clause 22-4, Basis of Payment – Time-and-Materials/Labor-Hour Contracts, but only to the portion of the contract that provides for reimbursement of materials (as defined in the clause 22-4) at actual cost(s).
  - (2) If the contract is a construction contract and contains the clause 22-11, Prompt Payment for Construction Contracts, the CO shall use the clause 7-7 with its Alternate I.
  - (3) If the contract is with an educational institution, the CO shall use the clause 7-7 with its Alternate II.
  - (4) If the contract is with a State or local government, the CO shall use the clause 7-7 with its Alternate III.
- (b) The CO shall insert the clause 7-8, Fixed Fee, in solicitations and contracts when a cost-plus-fixed-fee contract (other than a construction contract) is contemplated.

- (c) The CO shall insert the clause 7-9, Fixed-Fee – Construction, in solicitations and contracts when a cost-plus-fixed-fee construction contract is contemplated.
- (d) The CO shall insert the clause 7-10, Incentive Fee, in solicitations and contracts when a cost-plus-incentive-fee contract is contemplated.
- (e) The CO shall insert the clause 7-11, Cost Contract – No Fee, in solicitations and contracts when a cost-reimbursement contract is contemplated that provides no fee and is not a cost-sharing contract. If a cost-reimbursement research and development contract with an educational institution or a nonprofit organization that provides no fee or other payment above cost is contemplated, and if the CO determines that withholding of a portion of allowable costs is not required, the CO shall use the clause with its Alternate I.
- (f) The CO shall insert the clause 7-12, Cost-Sharing Contract – No fee, in solicitations and contracts when a cost-sharing contract is contemplated. If a cost-sharing research and development contract with an educational institution or a nonprofit organization is contemplated, and if the CO determines that withholding of a portion of allowable costs is not required, the CO shall use the clause with its Alternate I.
- (g) The CO shall insert the clause 7-15, Predetermined Indirect Cost Rates, in solicitations and contracts when a cost-reimbursement research and development contract with an educational institution is contemplated and predetermined indirect cost rates are to be used.

## 7.6 INCENTIVE CONTRACTS

### 7.6.1 General

- (a) Incentive contracts as described in this subpart are appropriate when a firm-fixed-price contract is not appropriate and the required supplies or services can be acquired at lower costs and, in certain instances, with improved delivery or technical performance, by relating the amount of profit or fee payable under the contract to the contractor's performance. Incentive contracts are designed to obtain specific acquisition objectives by--
  - (1) Establishing reasonable and attainable targets that are clearly communicated to the contractor; and
  - (2) Including appropriate incentive arrangements designed to --
    - (i) Motivate contractor efforts that might not otherwise be emphasized and
    - (ii) Discourage contractor inefficiency and waste.
- (b) When predetermined, formula-type incentives on technical performance or delivery are included, increases in profit or fee are provided only for achievement that surpasses the targets, and decreases are provided for to the extent that such targets are not met. The incentive increases or decreases are applied to performance targets rather than minimum performance requirements.
- (c) The two basic categories of incentive contracts are fixed-price incentive contracts (see 7.6.3 and 7.6.4) and cost-reimbursement incentive contracts (see 7.6.5). Since it is usually to Bonneville's advantage for the contractor to assume substantial cost responsibility and an appropriate share of the cost risk, fixed-price incentive contracts are preferred when contract costs and performance requirements are reasonably certain. Cost-reimbursement incentive contracts are subject to the overall limitations in 7.5.1.3 that apply to all cost-reimbursement contracts.
- (d) The Director of Contracts and Strategic Sourcing shall approve use of all incentive- and award-fee contracts. This approval shall be documented in the contract file and, for award-fee contracts, shall address all of the suitability items in 7.6.1(e)(1).
- (e) Award-fee contracts are a type of incentive contract.
  - (1) Application. An award-fee contract is suitable for use when--

- (i) The work to be performed is such that it is neither feasible nor effective to devise predetermined objective incentive targets applicable to cost, schedule, and technical performance;
  - (ii) The likelihood of meeting acquisition objectives will be enhanced by using a contract that effectively motivates the contractor toward exceptional performance and provides Bonneville with the flexibility to evaluate both actual performance and the conditions under which it was achieved; and
  - (iii) Any additional administrative effort and cost required to monitor and evaluate performance are justified by the expected benefits as documented by a risk and cost benefit analysis to be included in the contract file.
- (2) Award-fee amount. The amount of award fee earned shall be commensurate with the contractor's overall cost, schedule, and technical performance as measured against contract requirements in accordance with the criteria stated in the award-fee plan. Award fee shall not be earned if the contractor's overall cost, schedule, and technical performance in the aggregate is below satisfactory. The basis for all award-fee determinations shall be documented in the contract file to include, at a minimum, a determination that overall cost, schedule and technical performance in the aggregate is or is not at a satisfactory level. This determination and the methodology for determining the award fee are unilateral decisions made solely at the discretion of Bonneville.
- (3) Award-fee plan. All contracts providing for award fees shall be supported by an award-fee plan that establishes the procedures for evaluating award fee and for conducting the award-fee evaluation. Award-fee plans shall--
- (i) Be approved by the FDO unless otherwise authorized by operational procedures;
  - (ii) Identify the award-fee evaluation criteria and how they are linked to acquisition objectives which shall be defined in terms of contract cost, schedule, and technical performance. Criteria should motivate the contractor to enhance performance in the areas rated, but not at the expense of at least minimum acceptable performance in all other areas;
  - (iii) Describe how the contractor's performance will be measured against the award-fee evaluation criteria;
  - (iv) Utilize the adjectival rating and associated description as well as the award-fee pool earned percentages shown below in Table 7-1. COs may supplement the adjectival rating description. The method used to determine the adjectival rating must be documented in the award-fee plan;

<b>Table 7-1 Award-Fee Pool Earned Percentage Rating Guidelines</b>		
<b>Award-Fee Adjectival Rating</b>	<b>Award-Fee Pool Available To Be Earned</b>	<b>Description</b>
Excellent	91%--100%	Contractor has exceeded almost all of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Very Good	76%--90%	Contractor has exceeded many of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Good	51%--75%	Contractor has exceeded some of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Satisfactory	No Greater Than 50%.	Contractor has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Unsatisfactory	0%	Contractor has failed to meet overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.

- (v) Prohibit earning any award fee when a contractor's overall cost, schedule, and technical performance in the aggregate is below satisfactory;
  - (vi) Provide for evaluation period(s) to be conducted at stated intervals during the contract period of performance so that the contractor will periodically be informed of the quality of its performance and the areas in which improvement is expected (e.g. six months, nine months, twelve months, or at specific milestones); and
  - (vii) Define the total award-fee pool amount and how this amount is allocated across each evaluation period.
- (4) Rollover of unearned award fee. The use of rollover of unearned award fee is prohibited.
- (5) Limitations. No award-fee contract shall be awarded unless--
- (i) All of the limitations in 7.5.1.3, that are applicable to cost-reimbursement contracts only, are complied with;
  - (ii) An award-fee plan is completed in accordance with the requirements in 7.6.1(e)(3); and
  - (iii) An approval is completed in accordance with 7.6.1(d) addressing all of the suitability items in 7.6.1(e)(1).

- (f) Incentive- and Award-Fee Data Collection and Analysis. Bonneville shall collect relevant data on award fee and incentive fees paid to contractors and include performance measures to evaluate such data on a regular basis to determine effectiveness of award and incentive fees as a tool for improving contractor performance and achieving desired program outcomes. This information should be considered as part of the acquisition planning process in determining the appropriate type of contract to be utilized for future acquisitions.

## 7.6.2 Application of Predetermined, Formula-Type Incentives

### 7.6.2.1 Cost Incentives

- (a) Most incentive contracts include only cost incentives, which take the form of a profit or fee adjustment formula and are intended to motivate the contractor to effectively manage costs. No incentive contract may provide for other incentives without also providing a cost incentive (or constraint).
- (b) Except for cost-plus-award-fee contracts (see 7.6.1(e)), incentive contracts include a target cost, a target profit or fee, and a profit or fee adjustment formula that (within the constraints of a price ceiling or minimum and maximum fee) provides that --
  - (1) Actual cost that meets the target will result in the target profit or fee;
  - (2) Actual cost that exceeds the target will result in downward adjustment of target profit or fee; and
  - (3) Actual cost that is below the target will result in upward adjustment of target profit or fee.

### 7.6.2.2 Performance Incentives

- (a) Performance incentives may be considered in connection with specific product characteristics (sound limitations, load loss, etc.) or other specific elements of the contractor's performance. These incentives should be designed to relate profit or fee to results achieved by the contractor, compared with specified targets.
- (b) To the maximum extent practicable, positive and negative performance incentives shall be considered in connection with service contracts for performance of objectively measurable tasks when quality of performance is critical and incentives are likely to motivate the contractor.
- (c) Technical performance incentives may involve a variety of specific characteristics that contribute to the overall performance of the end item. Accordingly, the incentives on individual technical characteristics must be balanced so that no one of them is exaggerated to the detriment of the overall performance of the end item.
- (d) Performance tests and/or assessments of work performance are generally essential in order to determine the degree of attainment of performance targets. Therefore, the contract must be as specific as possible in establishing test criteria (such as testing conditions, instrumentation precision, and data interpretation) and performance standards (such as the quality levels of services to be provided).
- (e) Because performance incentives present complex problems in contract administration, the CO should negotiate them in full coordination with Bonneville engineering and program offices.
- (f) It is essential that Bonneville and the contractor agree explicitly on the effect that contract changes (e.g., pursuant to the Changes clause) will have on performance incentives.
- (g) The CO must exercise care, in establishing performance criteria, to recognize that the contractor should not be rewarded or penalized for attainments of Government-furnished components.

### 7.6.2.3 Delivery Incentives



- (a) Delivery incentives should be considered when improvement from a required delivery schedule is a significant Bonneville objective. It is important to determine Bonneville's primary objectives in a given contract (e.g., earliest possible delivery or earliest possible quantity production).
- (b) Incentive arrangements on delivery should specify the application of the reward-penalty structure in the event of Bonneville-caused delays or other delays beyond the control, and without the fault or negligence, of the contractor or subcontractor.

#### 7.6.2.4 Structuring Multiple-Incentive Contracts

A properly structured multiple-incentive arrangement should -

- (a) Motivate the contractor to strive for outstanding results in all incentive areas; and
- (b) Compel trade-off decisions among the incentive areas, consistent with Bonneville's overall objectives for the acquisition. Because of the interdependency of Bonneville's cost, the technical performance, and the delivery goals, a contract that emphasizes only one of the goals may jeopardize control over the others. Because outstanding results may not be attainable for each of the incentive areas, all multiple-incentive contracts must include a cost incentive (or constraint) that operates to preclude rewarding a contractor for superior technical performance or delivery results when the cost of those results outweighs their value to Bonneville.

#### 7.6.3 Fixed-Price Incentive Contracts

- (a) *Description.* A fixed-price incentive contract is a fixed-price contract that provides for adjusting profit and establishing the final contract price by application of a formula based on the relationship of total final negotiated cost to total target cost. The final price is subject to a price ceiling, negotiated at the outset. The two forms of fixed-price incentive contracts, firm target and successive targets are further described in 7.6.3.1 and 7.6.3.2 below.
- (b) *Application.* A fixed-price incentive contract is appropriate when –
  - (1) A firm-fixed-price contract is not suitable;
  - (2) The nature of the supplies or services being acquired and other circumstances of the acquisition are such that the contractor's assumption of a degree of cost responsibility will provide a positive profit incentive for effective cost control and performance; and
  - (3) If the contract also includes incentives on technical performance and/or delivery, the performance requirements provide a reasonable opportunity for the incentives to have a meaningful impact on the contractor's management of the work.
- (c) *Billing prices.* In fixed-price contracts, billing prices are established as an interim basis for payment. These billing prices may be adjusted, within the ceiling limits, upon request of either party to the contract, when it becomes apparent that final negotiated cost will be substantially different from the target cost.

##### 7.6.3.1 Fixed-Price Incentive (Firm Target) Contracts

- (a) *Description.* A fixed-price incentive (firm target) contract specifies a target cost, a target profit, a price ceiling (but not a profit ceiling or floor), and a profit adjustment formula. These elements are all negotiated at the outset. The price ceiling is the maximum that may be paid to the contractor, except for any adjustment under other contract clauses. When the contractor completes performance, the parties negotiate the final cost, and the final price is established by applying the formula. When the final cost is less than the target cost, application of the formula results in a final profit greater than the target profit; conversely, when final cost is more than target cost, application of the formula results in a final profit less than the target profit, or even a net loss. If the final negotiated cost exceeds the price ceiling,

the contractor absorbs the difference as a loss. Because the profit varies inversely with the cost, this contract type provides a positive, calculable profit incentive for the contractor to control costs.

- (b) *Application.* A fixed-price incentive (firm target) contract is appropriate when the parties can negotiate at the outset a firm target cost, target profit, and profit adjustment formula that will provide a fair and reasonable incentive and a ceiling that provides for the contractor to assume an appropriate share of the risk. When the contractor assumes a considerable or major share of the cost responsibility under the adjustment formula, the target profit should reflect this responsibility.
- (c) *Limitations.* This contract type may be used only when –
  - (1) The contractor's accounting system is adequate for providing data to support negotiation of final cost and incentive price revisions; and
  - (2) Adequate cost or pricing information for establishing reasonable firm targets is available at the time of initial contract negotiation.
- (d) *Contract schedule.* The CO shall specify in the contract schedule the target cost, target profit, and target price for each item subject to incentive price revision.

#### 7.6.3.2 Fixed-Price Incentive (Successive Targets) Contracts

- (a) *Description.*
  - (1) A fixed-price incentive (successive targets) contract specifies the following elements, all of which are negotiated at the outset:
    - (i) An initial target cost.
    - (ii) An initial target profit.
    - (iii) An initial profit adjustment formula to be used for establishing the firm target profit, including a ceiling and floor for the firm target profit. (This formula normally provides for a lesser degree of contractor cost responsibility than would a formula for establishing final profit and price.)
    - (iv) The production point at which the firm target cost and firm target profit will be negotiated (usually before delivery or shop completion of the first item).
    - (v) A ceiling price that is the maximum that may be paid to the contractor, except for any adjustment under other contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances.
  - (2) When the production point specified in the contract is reached, the parties negotiate the firm target cost, giving consideration to cost experience under the contract and other pertinent factors. The firm target profit is established by the formula. At this point, the parties have two alternatives, as follows:
    - (i) They may negotiate a firm-fixed-price; using the firm target cost plus the firm target profit as a guide.
    - (ii) If negotiation of a firm-fixed-price is inappropriate, they may negotiate a formula for establishing the final price using the firm target cost and firm target profit. The final cost is then negotiated at completion and the final profit is established by formula, as under the fixed-price incentive (firm target) contract (see 7.6.3.1 above).
- (b) *Application.* A fixed-price incentive (successive targets) contract is appropriate when –
  - (1) Available cost or pricing information is not sufficient to permit the negotiation of a realistic firm target cost and profit before award;
  - (2) Sufficient information is available to permit negotiation of initial targets; and
  - (3) There is reasonable assurance that additional reliable information will be available at an early point in the contract performance so as to permit negotiation of either –
    - (i) A firm-fixed-price, or

- (ii) Firm targets and a formula for establishing final profit and price that will provide a fair and reasonable incentive. This additional information is not limited to experience under the contract itself, but may be drawn from other contracts for the same or similar items.
- (c) Limitations. This contract type may be used only when –
  - (1) The contractor’s accounting system is adequate for providing data for negotiating firm targets and a realistic profit adjustment formula, as well as later negotiations of final costs; and
  - (2) Cost or pricing information adequate for establishing a reasonable firm target cost is reasonably expected to be available at an early point in contract performance.
- (d) Contract schedule. The CO shall specify in the contract schedule the initial target cost, initial target profit, and initial target price for each item subject to incentive price revision.

#### 7.6.4 Fixed-Price Contracts with Award Fees

Award-fee provisions may be used in fixed-price contracts when Bonneville wishes to motivate a contractor and other incentives cannot be used because contractor performance cannot be measured objectively. Such contracts shall establish a fixed price (including normal profit) for the effort. This price will be paid for satisfactory contract performance. Award fee earned (if any) will be paid in addition to that fixed price. See 7.6.1(e) for the requirements relative to utilizing this contract type.

#### 7.6.5 Cost-Reimbursement Incentive Contracts

See 7.5.1 for requirements applicable to all cost-reimbursement contracts, for use in conjunction with the following subsections.

##### 7.6.5.1 Cost-Plus-Incentive-Fee Contracts

- (a) *Description.* The cost-plus-incentive-fee contract is a cost-reimbursement contract that provides for the initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs. This contract type specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula. After contract performance, the fee payable to the contractor is determined in accordance with the formula. The formula provides, within limits, for increases in fee above target fee when total allowable costs are less than target costs, and decreases in fee below target fee when total allowable costs exceed target costs. This increase or decrease is intended to provide an incentive for the contractor to manage the contract effectively. When total allowable cost is greater than or less than the range of costs within which the fee-adjustment formula operates, the contractor is paid total allowable costs, plus the minimum or maximum fee.
- (b) *Application.*
  - (1) A cost-plus-incentive-fee contract is appropriate for services or development and test programs when –
    - (i) A cost-reimbursement contract is necessary (see 7.5.1.2); and
    - (ii) A target cost and a fee adjustment formula can be negotiated that are likely to motivate the contractor to manage effectively.
  - (2) The contract may include technical performance incentives when it is highly probable that the required development of a system or product is feasible and Bonneville has established its performance objectives, at least in general terms. This approach also may apply to other acquisitions, if the use of both cost and technical performance incentives is desirable and administratively practical.
  - (3) The fee adjustment formula should provide an incentive that will be effective over the full range of reasonably foreseeable variations from target cost. If a high maximum fee is

negotiated, the contract shall also provide for a low minimum fee that may be a zero fee or, in rare cases, a negative fee.

- (c) *Limitations.* No cost-plus-incentive-fee contract shall be awarded unless all limitations in 7.5.1.3 are complied with.

#### 7.6.5.2 Cost-Plus-Award-Fee Contracts

A cost-plus-award-fee contract is a cost-reimbursement contract that provides for a fee consisting of (1) a base amount fixed at inception of the contract, if applicable and at the discretion of the CO, and (2) an award amount that the contractor may earn in whole or in part during performance and that is sufficient to provide motivation for excellence in the areas of cost, schedule, and technical performance. See 7.6.1(e) for the requirements relative to utilizing this contract type.

#### 7.6.6 Contract Clauses

- (a) Insert the clause at 7-16, Incentive Price Revision -- Firm Target, in solicitations and contracts when a fixed-price incentive (firm target) contract is contemplated. If the contract calls for supplies or services to be ordered under a Government option and the prices are to be subject to the incentive price revision under the clause, the CO shall use the clause with its Alternate I.
- (b) The clause at 7-7, Allowable Cost and Payment, is prescribed in 7.5.7(a) for insertion in solicitations and contracts when a cost-plus-incentive-fee contract or a cost-plus-award-fee contract is contemplated.
- (c) The clause 7-10, Incentive Fee, is prescribed in 7.5.7(d) for insertion in solicitations and contracts when a cost-plus-incentive-fee contract is contemplated.
- (d) Insert an appropriate award-fee clause in solicitations and contracts when an award-fee contract is contemplated, provided that the clause –
- (1) Is prescribed by the BPI;
  - (2) Is compatible with clause 7-7, Allowable Cost and Payment; and
  - (3) Expressly provides that the award amount and the award-fee determination methodology are unilateral decisions made solely at the discretion of Bonneville.

## 7.7 INDEFINITE-DELIVERY CONTRACTS

### 7.7.1 Scope of subpart

- (a) This subpart prescribes policies and procedures for making awards of indefinite-delivery contracts and establishes a preference for making multiple awards of indefinite-quantity contracts.
- (b) This subpart does not limit the use of other than competitive procedures authorized by subpart 11.9.

#### 7.7.1.1 Definitions

As used in this subpart --

*Delivery-order contract* means a contract for supplies that does not procure or specify a firm quantity of supplies (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies during the period of the contract.

*Task-order contract* means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

### 7.7.1.2 General

- (a) There are two types of indefinite-delivery contracts used at Bonneville: definite-quantity contracts and indefinite-quantity contracts. The appropriate type of indefinite-delivery contract may be used to acquire supplies and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award. Indefinite-quantity contracts are also known as delivery-order contracts or task-order contracts.
- (b) The various types of indefinite-delivery contracts offer the following advantages:
  - (1) Both types permit --
    - (i) Bonneville stocks to be maintained at minimum levels; and
    - (ii) Direct shipment to users.
  - (2) Indefinite-quantity contracts also permit --
    - (i) Flexibility in both quantities and delivery scheduling; and
    - (ii) Ordering of supplies or services after requirements materialize.
  - (3) Indefinite-quantity contracts limit Bonneville's obligation to the minimum quantity specified in the contract.
- (c) Indefinite-delivery contracts may provide for any appropriate cost or pricing arrangement. Cost or pricing arrangements that provide for an estimated quantity of supplies or services (e.g., estimated number of labor hours) must comply with the appropriate procedures of this subpart.

### 7.7.2 Definite-Quantity Contracts

- (a) *Description.* A definite-quantity contract provides for delivery of a definite quantity of specific supplies or services for a fixed period, with deliveries or performance to be scheduled at designated locations upon order.
- (b) *Application.* A definite-quantity contract may be used when it can be determined in advance that --
  - (1) A definite quantity of supplies or services will be required during the contract period and
  - (2) The supplies or services are regularly available or will be available after a short lead time.

### 7.7.3 [Reserved]

### 7.7.4 Indefinite-Quantity Contracts

- (a) *Description.* An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. Bonneville places orders for individual requirements. Quantity limits may be stated as number of units or as dollar values.
  - (1) The contract must require Bonneville to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor must furnish any additional quantities, not to exceed the stated maximum. The CO should establish a reasonable maximum quantity based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis.
  - (2) To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that Bonneville is fairly certain to order.
  - (3) The contract may also specify maximum or minimum quantities that Bonneville may order under each task or delivery order and the maximum that it may order during a specific period of time.
  - (4) A solicitation and contract for an indefinite quantity must—

- (i) Specify the period of the contract, including the number of options and the period for which Bonneville may extend the contract under each option;
  - (ii) Specify the total minimum and maximum quantity of supplies or services Bonneville will acquire under the contract;
  - (iii) Include a statement of work, specifications, or other description, that reasonably describes the general scope, nature, complexity, and purpose of the supplies or services Bonneville will acquire under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer;
  - (iv) State the procedures that Bonneville will use in issuing orders, and, if multiple awards may be made, state the procedures and selection criteria that Bonneville will use to provide awardees a fair opportunity to be considered for each order (see 7.7.5(b)(1));
  - (v) Include a description of the activities authorized to issue orders; and
  - (vi) Include authorization for placing oral orders, if appropriate, provided that Bonneville has established procedures for obligating funds and that oral orders are confirmed in writing within 30 calendar days.
- (b) *Application.* COs may use an indefinite-quantity contract when Bonneville cannot predetermine, above a specified minimum, the precise quantities of supplies or services that Bonneville will require during the contract period, and it is inadvisable for Bonneville to commit itself for more than a minimum quantity. The CO should use an indefinite-quantity contract only when a recurring need is anticipated.
- (c) *Multiple award preference—*
- (1) *Planning the acquisition.*
    - (i) Except for indefinite-quantity contracts for advisory and assistance services as provided in paragraph (c)(2) of this section, the CO must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources.
    - (ii) (A) The CO must determine whether multiple awards are appropriate as part of acquisition planning. The CO must avoid situations in which awardees specialize exclusively in one or a few areas within the statement of work, thus creating the likelihood that orders in those areas will be awarded on a sole-source basis; however, each awardee need not be capable of performing every requirement as well as any other awardee under the contracts. The CO should consider the following when determining the number of contracts to be awarded:
      - (1) The scope and complexity of the contract requirement.
      - (2) The expected duration and frequency of task or delivery orders.
      - (3) The mix of resources a contractor must have to perform expected task or delivery order requirements.
      - (4) The ability to maintain competition among the awardees throughout the contracts' period of performance.
    - (B) The CO must not use the multiple award approach if--
      - (1) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;
      - (2) Based on the CO's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;
      - (3) The expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards;

- (4) The projected orders are so integrally related that only a single contractor can reasonably perform the work;
  - (5) The total estimated value of the contract is less than \$150,000; or
  - (6) Multiple awards would not be in the best interests of Bonneville.
- (C) The CO must document the decision whether or not to use multiple awards in the contract file. The CO may determine that a class of acquisitions is not appropriate for multiple awards.
- (D) When awarding multiple task or delivery order contracts, cost or price need not be included as an evaluation factor. Cost or price shall be considered at the task order and delivery order level (7.7.5(b)(1)).
- (E) The CO shall describe and include the process to be used in awarding task or delivery orders in the solicitation and the contract.
- (F) No task or delivery order contract in an amount estimated to exceed \$100 million (including all options) may be awarded to a single source unless the Director of Contracts and Strategic Sourcing or his/her acting Tier 4 Manager approves in writing that—
- (1) The task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work; or
  - (2) The contract provides only for firm-fixed-price (see 7.3.2) task or delivery orders for—
    - (i) Products for which unit prices are established in the contract; or
    - (ii) Services for which prices are established in the contract for the specific tasks to be performed.
- or;
- (3) Only one source is qualified and capable of performing the work at a reasonable price to Bonneville.
- (2) *Contracts for advisory and assistance services.*
- (i) Except as provided in paragraph (c)(2)(ii) of this section, if an indefinite-quantity contract for advisory and assistance services exceeds 3 years including all options the CO must make multiple awards unless--
    - (A) The CO determines in writing, and the HCA approves, that multiple awards are not practicable, and determines that only one contractor can reasonably perform the work because either the scope of work is unique or highly specialized or the tasks so integrally related;
    - (B) The CO determines in writing, after the evaluation of offers, that only one offeror is capable of providing the services required at the level of quality required; or
    - (C) Only one offer is received.
  - (ii) The requirements of paragraph (c)(2)(i) of this section do not apply if the CO determines that the advisory and assistance services are incidental and not a significant component of the contract.

#### 7.7.5 Ordering

##### (a) *General.*

- (1) Individual orders shall clearly describe all services to be performed or supplies to be delivered so the full cost or price for the performance of the work can be established

when the order is placed. Orders shall be within the scope, issued within the period of performance, and be within the maximum value of the contract,

- (2) No protest is authorized in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except—

(A) A protest on the grounds that the order increases the scope, period, or maximum value of the contract; or

(B) A protest of an order valued in excess of \$10 million.

- (3) Performance-based acquisition methods must be used to the maximum extent practicable, if the contract or order is for services.

- (4) When procuring items peculiar to one manufacturer the CO shall follow the requirements at subpart 11.9.

- (5) Orders may be placed by using any medium specified in the contract.

- (6) Orders placed under indefinite-delivery contracts must contain the following information:

- (i) Date of order;
- (ii) Contract number and order number;
- (iii) For supplies and services, contract line item number, description, quantity, and unit price or estimated cost and fee (as applicable);
- (iv) Delivery or performance schedule;
- (v) Place of delivery or performance schedule;
- (vi) Any packaging, packing and shipping instructions; and
- (vii) Method of payment and payment office.

- (b) *Orders under multiple-award contracts –*

- (1) *Fair opportunity.*

- (i) The CO must provide each awardee a fair opportunity to be considered for each order issued under multiple delivery-order contracts or multiple task-order contracts.
- (ii) The CO may exercise broad discretion in developing appropriate order placement procedures. The CO should keep any submission requirements to a minimum. COs may use streamlined procedures, including oral presentations. The CO need not contact each of the multiple awardees under the contract before selecting an order awardee if the CO has information available to ensure that each awardee is provided a fair opportunity to be considered for each order. However, the CO must –
  - (A) Develop placement procedures that will provide each awardee a fair opportunity to be considered for each order;
  - (B) Include the procedures in the solicitation and the contract; and
  - (C) Consider price or cost under each order as one of the factors in the selection decision.
- (iii) *Orders exceeding \$5.5 million.* For task or delivery orders in excess of \$5.5 million, the requirement to provide all awardees a fair opportunity to be considered for each order shall include, at a minimum –
  - (A) A notice of the task or delivery order that includes a clear statement of Bonneville’s requirements;
  - (B) A reasonable response period;



- (C) Disclosure of the significant factors and sub-factors, including cost or price, that Bonneville expects to consider in evaluating proposals or offers, and their relative importance;
  - (D) Where award is made on a best value basis, a written statement documenting the basis for award and the relative importance of quality and price or cost factors; and
  - (E) An opportunity for a postaward debriefing in accordance with paragraph (b)(6) of this section.
  - (iv) The CO should consider the following when developing the procedures:
    - (A)
      - (1) Past performance on earlier orders under the contract, including quality, timeliness, and cost control.
      - (2) Potential impact on other orders placed with the contractor.
      - (3) Minimum order requirements.
      - (4) The amount of time contractors need to make informed business decisions on whether to respond to potential orders.
    - (B) Formal evaluation plans or scoring of quotes or offers are not required.
  - (2) *Exceptions to the fair opportunity process.*
    - (i) The CO shall give every awardee a fair opportunity to be considered for a delivery-order or task-order exceeding \$25,000 unless one of the following exceptions applies:
      - (A) Bonneville's need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays.
      - (B) Only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized.
      - (C) The order must be issued on a sole-sourced basis in the interest of economy or efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order.
      - (D) It is necessary to place an order to satisfy a minimum guarantee.
    - (ii) The justification for an exception to fair opportunity shall be in writing.
  - (3) *Pricing orders.* If the contract did not establish the price for the supply or service, the CO must establish prices for each order.
  - (4) For additional requirements for cost-reimbursement orders see 7.5.1.3.
  - (5) For additional requirements for time-and-materials or labor-hour orders, see 7.8.2(e).
  - (6) *Post award Notices and Debriefing of Awardees for Orders.* The CO shall notify unsuccessful awardees when the total price of a task or delivery order exceeds \$5.5 million.
  - (7) *Decision documentation for orders.*
    - (i) The CO shall document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision. This documentation need not quantify the tradeoffs that led to the decision.
    - (ii) The contract file shall also identify the basis for using an exception to the fair opportunity process (see paragraph (b)(2)).
- (c) *Limitation on ordering period for task-order contracts for advisory and assistance services.*
- (1) Except as provided for in paragraph (c)(2) and (c)(3), the ordering period of a task-order contract for advisory and assistance services, including all options or modifications, normally may not exceed 5 years.
  - (2) For individual task-orders, the period of performance shall be limited to 3 years.

- (3) The CO may include the clause 7-39, Option to Extend Services, to provide the ability to extend the period for a period not to exceed 6 months. Any extension beyond the 6 month period provided in the clause, but no greater than a total of 12 months beyond the original period of performance, shall be approved by the Director of Contracts and Strategic Sourcing if he/she determines that –
- (i) The award of a follow-on contract is delayed by circumstances that were not reasonably foreseeable at the time the initial contract was entered into; and
  - (ii) The extension is necessary to ensure continuity of services, pending the award of the follow-on contract.

#### 7.7.6 Solicitation Provisions and Contract Clauses

- (a) Insert the clause 7-18, Ordering, in solicitations and contracts when a definite-quantity contract or an indefinite-quantity contract is contemplated.
- (b) Insert a clause similar to 7-19, Order Limitations, in solicitations and contracts when a definite-quantity or an indefinite-quantity contract is contemplated.
- (c) Insert the clause 7-20, Definite Quantity, in solicitations and contracts when a definite-quantity contract is contemplated.
- (d) Insert the clause 7-22, Indefinite Quantity, in solicitations and contracts when an indefinite-quantity contract is contemplated.
- (e) Insert the provision 7-27, Single or Multiple Awards, in solicitations for indefinite-quantity contracts that may result in multiple contract awards. The CO shall modify the provision to specify the estimated number of awards. Do not use this provision for advisory and assistance services contracts that exceed 3 years (including all options).
- (f) Insert the provision 7-28, Multiple Awards for Advisory and Assistance Services, in solicitations for task-order contracts for advisory and assistance services that exceed 3 years (including all options), unless a determination has been made under 7.7.4(c)(2)(i)(A). The CO shall modify the provision to specify the estimated number of awards.

## 7.8 TIME-AND-MATERIALS, LABOR-HOUR, AND LETTER CONTRACTS

### 7.8.1 General

Time-and-materials contracts and labor-hour contracts are not fixed-price contracts. Performance-based contracts are to be considered prior to the execution of any time-and-materials contracts.

### 7.8.2 Time-and-Materials Contracts

- (a) Definitions for the purposes of time-and-materials contracts.

*Direct materials* means those materials that enter directly into the end product, or that are used or consumed directly in connection with the furnishing of the end product or service.

*Hourly rate* means the rate(s) prescribed in the contract for payment for the labor that meets the labor category qualification of a labor category specified in the contract that are –

- (1) Performed by the contractor;
- (2) Performed by the subcontractors; or
- (3) Transferred between divisions, subsidiaries, or affiliates of the contractor under a common control.

*Materials* means –

- (1) Direct materials, including supplies transferred between divisions, subsidiaries, or affiliates of the contractor under a common control;
  - (2) Subcontracts for supplies and incidental services for which there is not a labor category specified in the contract;
  - (3) Other direct costs (e.g., incidental services for which there is not a labor category specified in the contract, travel, computer usage charges, etc.); and
  - (4) Applicable indirect costs.
- (b) *Description*. A time-and-materials contract provides for acquiring supplies or services on the basis of –
- (1) Direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit; and
  - (2) Actual cost for materials.
- (c) *Application*. A time-and-materials contract may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.
- (1) *Bonneville surveillance*. A time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, appropriate Bonneville surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used.
  - (2) *Fixed hourly rates*.
    - (i) The contract shall specify separate fixed hourly rates that include wages, overhead, general and administrative expenses, and profit for each category of labor for the prime contractor and all subcontractors (see 7.8.2(f)(1)).
    - (ii) For contract actions that are not awarded using competitive procedures, unless exempt under paragraph (c)(2)(iii) of this section, the fixed hourly rates for services transferred between divisions, subsidiaries, or affiliates of the contractor under a common control –
      - (A) Shall not include profit for the transferring organizations; but
      - (B) May include profit for the prime contractor.
    - (iii) For contract actions that are not awarded using competitive procedures, the fixed hourly rates for services that meet the definition of commercial item in Part 2 that are transferred between divisions, subsidiaries, or affiliates of the contractor under a common control may be the established catalog or market rate when –
      - (A) It is the established practice of the transferring organization to price inter-organizational transfers at other than cost for commercial work of the contractor of any division, subsidiary, or affiliate of the contractor under a common control; and
      - (B) The CO has not determined the price to be unreasonable.
  - (3) *Material handling costs*. When included as part of materials costs, material handling costs shall include only costs clearly excluded from the labor-hour rate. Material handling costs may include all appropriate indirect costs allocated to direct materials in accordance with the contractor's usual accounting procedures consistent with Appendix 13.
  - (4) *Determination*. The CO shall make a determination that contains sufficient facts and rationale to justify that no other contract type authorized in this part is suitable. For hybrid contracts that primarily consist of fixed price components, outweighing the T&M components, a determination is not necessary. At a minimum, the determination should include;
    - (i) A description of the market research conducted;

- (ii) Establish that it is not possible at the time of placing the contract or order to accurately estimate the extent or duration of the work or to anticipate costs with any reasonable degree of confidence;
  - (iii) Establish that the requirement has been structured to maximize the use of firm-fixed-price or fixed-price with economic price adjustment contracts (e.g. by limiting the value or length of the time-and-material/labor-hour contract or order; establishing fixed prices for portions of the requirement) on future acquisitions for the same or similar requirements; and
  - (iv) Describe actions planned to maximize the use of firm-fixed-price or fixed-price with economic price adjustment contracts on future acquisitions for the same requirements.
- (d) *Limitations.* A time-and-materials contract or order may be used only if the contract or order includes a ceiling price that the contractor exceeds at its own risk and a base performance period not exceeding one year. Option periods are not considered part of the “base contract”. Example: a one-year contract plus two single year option periods would not require this higher level approval. Deviations to this limitation shall be approved in writing by the Director, of Contracts and Strategic Sourcing or their acting Tier 4 Manager.
- (e) *Post award requirements.* Prior to an increase in the ceiling price of a time-and-materials or labor-hour contract or order, the CO shall –
- (1) Conduct analysis of pricing and other relevant factors to determine if the action is in the best interest of Bonneville;
  - (2) Document the decision in the contract or order file; and
  - (3) When making a change that modifies the general scope of –
    - (i) An order issued under the Federal Supply Schedules, follow the procedures in Part 29.
    - (ii) An order issued under multiple award task and delivery order contracts, follow the procedures at 7.7.5(b)(2).
- (f) *Solicitation provisions.* The CO shall insert the provision 7-31, Time-and-Materials/Labor-Hour Proposal Requirements, in solicitations contemplating use of a time-and-materials or labor-hour contract.

### 7.8.3 Labor-Hour Contracts

*Description.* A labor-hour contract is a variation of the time-and-materials contract, differing only in that materials are not supplied by the contractor. See 7.8.2(c) and 7.8.2(d) for application and limitations, for time-and-materials contracts that also apply to labor-hour contracts. Performance-based contracts are to be considered prior to the execution of any labor-hour contract.

### 7.8.4 Letter Contracts

#### 7.8.4.1 Description

A letter contract is a written preliminary contractual instrument that authorizes the contractor to begin immediately manufacturing or performing services.

#### 7.8.4.2 Application

- (a) A letter contract may be used when –
  - (1) Bonneville’s interests demand that the contractor be given a binding commitment so that work can start immediately; and

- (2) Negotiating a definitive contract is not possible in sufficient time to meet the requirement. However, a letter contract should be as complete and definite as feasible under the circumstances.
- (b) The CO shall include an overall price ceiling in the letter contract.
- (c) Each letter contract shall, as required by clause 7-25, Contract Definitization, contain a negotiated schedule including –
  - (1) Dates for submission of the contractor’s price proposal, required cost or pricing data, and data other than cost or pricing data, and if required, make-or-buy and subcontracting plans;
  - (2) A date for the start of negotiations; and
  - (3) A target date for definitization, which shall be the earliest practicable date for definitization. The schedule will provide for definitization of the contract within 180 days after the date of the letter contract or before completion of 40 percent of the work to be performed, whichever occurs first. However, the CO may, in extreme cases according to Bonneville procedures, authorize an additional period. If, after exhausting all reasonable efforts, the CO and the contractor cannot negotiate a definitive contract because of failure to reach agreement as to price or fee, clause 7-25 requires the contractor to proceed with the work and provides that the CO may, with approval of the HCA, determine a reasonable price or fee in accordance with Appendix 13, subject to appeal as provided in the Disputes clause.
- (d) The maximum liability of Bonneville inserted in the clause 7-24, Limitation of Government Liability, shall be the estimated amount necessary to cover the contractor’s requirements for funds before definitization. However, it shall not exceed 50 percent of the estimated cost of the definitive contract unless approved in advance by the HCA.

#### 7.8.4.3 Limitations

Letter contracts shall not –

- (a) Commit Bonneville to a definitive contract in excess of the funds available at the time the letter contract is executed;
- (b) Be entered into without competition when competition is required by subpart 11.9; unless responding to an emergent/urgent situation that involves loss of life or property; or
- (c) Be amended to satisfy a new requirement unless that requirement is inseparable from the existing letter contract. Any such amendment is subject to the same requirements and limitations as a new letter contract.
- (d) Be entered into due to a lack of planning (except in the case of emergent/urgent needs wherein planning was not possible) or a general practice when the limit and the extent (to include budget) of the requirement is not or cannot be defined.

#### 7.8.4.4 Contract Clauses

- (a) The CO shall include in each letter contract the clauses required by the BPI for the type of definitive contract contemplated and any additional clauses known to be appropriate for it.
- (b) In addition, the CO shall insert the following clauses in solicitations and contracts when a letter contract is contemplated:
  - (1) The clause 7-23, Execution and Commencement of Work, except that this clause may be omitted from letter contracts awarded using a form similar to Exhibit 7-A;
  - (2) The clause 7-24, Limitations of Government Liability, with dollar amounts completed in a manner consistent with 7.8.4.2(d); and
  - (3) The clause 7-25, Contract Definitization, with its paragraph (b) completed in a manner consistent with 7.8.4.2(c). If at the time of entering into the letter contract, the CO knows

that the definitive contract will be based on adequate price competition or will not require submission of cost or pricing data, the words “and cost or pricing data, sufficient to support its proposal” may be deleted from paragraph (a) of the clause. If the letter contract is being awarded on the basis of price competition, the CO shall use the clause with its Alternate I.

- (c) The CO shall insert clause 7-26, Payments of Allowable Costs Before Definitization, in solicitations and contracts if a cost-reimbursement definitive contract is contemplated.

**Exhibit 7-A**  
**SAMPLE OF LETTER CONTRACT**

Contractor Address Block

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 \_\_\_\_\_ (insert amount not to exceed 50% of estimated costs) 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 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, 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 letter contract).
- (i) The Contracting Officer's Representative is Alice Adams and her telephone number is (503) 230-XXX.
- (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 as necessary for the proper execution of the project).
- (l) A definitized contract is expected to be executed within \_\_\_\_\_ (insert number not to exceed 180 days or 40% of the work performed) days.
- (m) This is contract number \_\_\_\_ (fill in) \_\_\_\_; Accounting data: \_\_\_\_ (fill in) \_\_\_\_.

Sincerely,  
Contracting Officer

## 7.9 AGREEMENTS

### 7.9.1 General

This subpart prescribes policies and procedures for establishing and using basic agreements, basic ordering agreements and blanket purchase agreements. The term “Agreements” as described in this subpart are different and distinct from “Agreements” as described in Part 25 – Interagency Agreements.

### 7.9.2 Basic Agreements

- (a) *Description.* A basic agreement is not a contract. It is a written instrument of understanding, negotiated between Bonneville and a contractor; that –
- (1) Contains contract clauses applying to future contracts between the parties during its term; and
  - (2) Contemplates separate future contracts that will incorporate by reference or attachment the required and applicable clauses agreed upon in the basic agreement.
- (b) *Application.* A basic agreement should be used when a substantial number of separate contracts may be awarded to a contractor during a particular period and significant recurring negotiating problems have been experienced with the contractor. Basic agreements may be used with negotiated fixed-price or cost-reimbursement contracts.
- (1) Basic agreements shall contain –
    - (i) Clauses required by the BPI and
    - (ii) Other clauses prescribed in, or allowed by, the BPI that the parties agree to include in each contract as applicable.
  - (2) Each basic agreement shall provide for discontinuing its future applicability upon 30 days’ written notice by either party.
  - (3) Each basic agreement shall be reviewed annually before the anniversary of its effective date and revised as necessary. A basic agreement may be changed only by modifying the agreement itself and not by a contract incorporating the agreement.
  - (4) Discontinuing or modifying a basic agreement shall not affect any prior contract incorporating the basic agreement.
- (c) *Limitations.* A basic agreement shall not –
- (1) Include work orders;
  - (2) State or imply any agreement by Bonneville to place future contracts or orders with the contractor; or
  - (3) Be used in any manner to restrict competition.
- (d) *Contracts incorporating basic agreements.*
- (1) Each contract incorporating a basic agreement shall include a scope of work and price, delivery, and other appropriate terms that apply to the particular contract. The basic agreement shall be incorporated into the contract by specific reference (including reference to each amendment) or by attachment.
  - (2) The CO shall include clauses pertaining to subjects not covered by the basic agreement, but applicable to the contract being negotiated, in the same manner as if there were no basic agreement.
  - (3) If an existing contract is modified to effect new acquisitions, the modification shall incorporate the most recent basic agreement, which shall apply only to work added by the modification, except that this action is not mandatory if the contract or modification includes all clauses required by the BPI as of the date of the modification may incorporate the most recent basic agreement for application to the entire contract as of the date of the modification.



### 7.9.2.1 Contract Clause

If applicable, insert Clause 7-17 in solicitations and contracts for non-commercial acquisitions only.

### 7.9.3 Basic Ordering Agreements

- (a) *Description.* A basic ordering agreement is a written instrument of understanding, negotiated between Bonneville and a contractor, that contains –
- (1) Terms and clauses applying to future contracts (orders) between the parties during its term;
  - (2) A description, as specific as practicable, of supplies or services to be provided; and
  - (3) Methods for pricing, issuing, and delivering future orders under the basic ordering agreement. A basic ordering agreement is not a contract.
- (b) *Application.* A basic ordering agreement may be used to expedite contracting for uncertain requirements for supplies or services when specific items, quantities, and prices are not known at the time the agreement is executed, but a substantial number of requirements for the type of supplies or services covered by the agreement are anticipated to be purchased from the contractor. Under proper circumstances, the use of these procedures can result in economies in ordering parts for equipment support by reducing administrative lead time, inventory investment, and inventory obsolescence due to design changes.
- (c) *Limitations.* A basic ordering agreement shall not state or imply any agreement by Bonneville to place future contracts or orders with the contractor or be used in any manner to restrict competition.
- (1) Each basic ordering agreement shall –
    - (i) Describe the method for determining prices to be paid to the contractor for the supplies or services;
    - (ii) Include delivery terms and conditions or specify how they will be determined;
    - (iii) List one or more Bonneville activities authorized to issue orders under the agreement;
    - (iv) Specify the point at which each order becomes a binding contract (e.g., issuance of the order, acceptance of the order in a specified manner, or failure to reject the order within a specified number of days);
    - (v) Provide that failure to reach agreement on price for any order issued before its price is established (see paragraph (d)(3) of this section) is a dispute under the Disputes clause included in the basic ordering agreement.
  - (2) A basic ordering agreement shall be changed only by modifying the agreement itself and not by individual orders issued under it. Modifying a basic ordering agreement shall not retroactively affect orders previously issued under it.
- (d) *Orders.* A CO representing any Bonneville activity listed in a basic ordering agreement may issue orders for required supplies or services covered by that agreement.
- (1) Before issuing an order under a basic ordering agreement, the CO shall –
    - (i) Obtain competition;
    - (ii) If the order is being placed after competition, ensure that use of the basic ordering agreement is not prejudicial to other offerors; and
    - (iii) Sign or obtain any applicable justifications and approvals and document the award decision, as if the order were a contract awarded independently of a basic ordering agreement.
  - (2) COs shall –
    - (i) Issue orders under basic ordering agreements on any appropriate contractual instrument; and
    - (ii) Incorporate by reference the provisions of the basic ordering agreement.

- (3) The CO shall neither make any final commitment nor authorize the contractor to begin work on an order under a basic ordering agreement until prices have been established, unless the order establishes a ceiling price limiting Bonneville's obligation and either –
- (i) The basic ordering agreement provides adequate procedures for timely pricing of the order early in its performance period; or
  - (ii) The need for the supplies or services is compelling and unusually urgent (i.e., when Bonneville would be seriously injured, financially or otherwise, if the requirement is not met sooner than would be possible if prices were established before the work began). The CO shall proceed with pricing as soon as practical. In no event shall an entire order be priced retroactively.

#### 7.9.4 Blanket Purchase Agreements

##### 7.9.4.1 General

A blanket purchase agreement (BPAs) is a simplified method of filling anticipated repetitive needs for supplies or services by establishing “charge accounts” with qualified sources of supply (see subpart 7.9 for additional coverage of agreements).

##### 7.9.4.2 Establishment of BPAs

- (a) The following are circumstances under which COs may establish Blankets:
- (1) There is a wide variety of items in a broad class of supplies or services that are generally purchased, but the exact items, quantities and delivery requirements are not known in advance and may vary considerably.
  - (2) The use of this procedure would avoid the writing of numerous purchase orders.
- (b) After determining a BPA would be advantageous, COs shall –
- (1) Establish the parameters to limit purchases to individual items or commodity groups or classes, or permit the supplier to furnish unlimited supplies or services; and
  - (2) Consider suppliers whose past performance has shown them to be dependable, and who offer quality supplies or services at consistently lower prices.
- (c) BPAs may be established with –
- (1) More than one supplier for supplies or services of the same type to provide maximum practicable competition;
  - (2) A single firm from which numerous individual purchases will likely be made in a given period; or
  - (3) Federal Supply Schedule contractors, if not inconsistent with the terms of the applicable schedule contract.
- (d) BPAs should be prepared without a purchase requisition and only after contacting suppliers to make the necessary arrangements for –
- (1) Securing maximum discounts;
  - (2) Documenting individual purchase transactions;
  - (3) Periodic billings; and
  - (4) Incorporating other necessary details.

##### 7.9.4.3 Preparation of BPAs

- (a) The following terms and conditions are mandatory –
- (1) *Description of agreement.* A statement that the supplier shall furnish supplies or services, described in general terms, if and when requested by the CO (or the authorized representative of the CO) during a specific period and within a stipulated aggregate amount, if any.

- (2) *Extent of obligation.* A statement that Bonneville is obligated only to the extent of authorized purchases actually made under the BPA.
- (3) *Purchase limitation.* A statement that specifies the dollar limitation for each individual purchase under the BPA.
- (4) *Individuals authorized to purchase under the BPA.* A statement that a list of individuals authorized to purchase under the BPA, identified either by title of position or by name of individual, organizational component, and the dollar limitation per purchase for each position title or individual shall be furnished to the supplier by the CO.
- (5) *Packing slip.* A requirement that all shipments under the agreement, except those for newspapers, magazines, or other periodicals, shall be accompanied by packing slips or sales slips that shall contain the following minimum information:
  - (i) Name of supplier;
  - (ii) Blanket Purchase Agreement number;
  - (iii) Date of purchase;
  - (iv) Order number;
  - (v) Itemized list of supplies or services furnished;
  - (vi) Quantity, unit price, and extension of each item, less applicable discounts (unit prices and extensions need not be shown when incompatible with the use of automated systems, provided that the invoice is itemized to show this information); and
  - (vii) Date of delivery or shipment.
- (6) *Invoices.* One of the following statements shall be included (except that the statement in paragraph (a)(6)(iii) of this subsection should not be used if the accumulation of the individual invoices by Bonneville materially increases the administrative costs of this purchase method);
  - (i) A summary invoice shall be submitted at least monthly or upon expiration of the BPA whichever occurs first, for all deliveries made during a billing period, identifying the packing slips covered therein, stating their total dollar value, and supported by receipt copies of the packing slip.
  - (ii) An itemized invoice shall be submitted at least monthly or upon expiration of this BPA, whichever occurs first, for all deliveries made during a billing period and for which payment has not been received. These invoices need not be supported by copies of packing slips.
  - (iii) When billing procedures provide for an individual invoice for each delivery, these invoices shall be accumulated, provided that –
    - (A) A consolidated payment will be made for each specified period; and
    - (B) The period of any discounts will commence on the final date of the billing period or on the date of receipt of invoices for all deliveries accepted during the billing period, whichever is later.
  - (iv) An invoice for subscriptions or other charges for newspapers, magazines, or other periodicals shall show the starting and ending dates and shall state either that ordered subscriptions have been placed in effect or will be placed in effect upon receipt of payment.

#### 7.9.4.4 Contract Clauses

- (a) The CO shall insert in each BPA the clauses prescribed elsewhere in this part that are required for or applicable to the particular BPA.
- (b) Unless a clause prescription specifies otherwise, if the prescription includes a dollar threshold, the amount to be compared to that threshold is that of any particular order under the BPA.

#### 7.9.4.5 Purchases Under BPAs

- (a) Use a BPA only for purchases that are otherwise authorized by law or regulation.
- (b) The existence of a BPA does not justify purchasing from only one source or considering small businesses. The requirements of 11.9 also apply to each order.
- (c) If, for a particular purchase greater than the micro-purchase threshold, there is an insufficient number of BPAs to ensure maximum practical competition, the CO shall –
  - (1) Solicit quotations from other sources and make the purchase as appropriate; and
  - (2) Establish other BPAs to facilitate future purchases if –
    - (i) Recurring requirements for the same or similar supplies or services seem likely;
    - (ii) Qualified sources are willing to accept BPAs; and
    - (iii) It is otherwise practical to do so.
- (d) Limit documentation of purchases to essential information and forms.

#### 7.9.4.6 Review Procedures

The CO placing orders under a BPA, or the designated representative of the CO, shall review blankets each time it is used to ensure that authorized procedures are being followed. Additionally, the CO shall maintain awareness of changes in market conditions, sources of supply, and other pertinent factors that may warrant making new arrangements.

#### 7.9.4.7 Completion of BPAs

An individual BPA is considered complete when the purchases under it equal its total dollar limitation, if any, or when its stated time period expires.

#### 7.9.4.8 [Reserved]

### 7.10 OPTIONS

#### 7.10.1 General

This subpart prescribes policies and procedures for the use of option solicitation provisions and contract clauses.

#### 7.10.2 Use of Options

##### 7.10.2.1 Description

- (a) Options provide Bonneville with the right to elect to –
  - (1) Purchase additional supplies or services called for by the contract during a specified time, or
  - (2) Extend the term of the contract for an additional specified period.
- (b) If the contract allows for additional quantities of supplies or services through contract line items that were evaluated during solicitation and priced at award of the contract, Bonneville may unilaterally exercise or extend the terms of the contract to include the additional quantities or work effort without further negotiation or further agreement with the contractor.
- (c) The additional timeframes, deliverables, and/or quantities must be included in the contract at award; however, funding for the optional supplies and/or services is not added until the option is exercised.
- (d) 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.

### 7.10.2.2 Application

- (a) The CO may include options in contracts when it is in Bonneville's interest.
- (b) Pre-priced options may be appropriate where repeated supplies or services are required and 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. Pre-priced options may contain specific option pricing or an appropriate economic price adjustment index.
- (c) In recognition of Bonneville's need in certain service contracts for continuity of operations and the potential cost of disrupted support, options may be included in service contracts if there is an anticipated need for a similar service beyond the first contract period.
- (d) Options that are not pre-priced at the time of award must be negotiated and priced before exercising the option. Such options must be bilaterally executed. The scope of such options must be included in the solicitation for initial award.

### 7.10.2.3 Limitations

- (a) Inclusion of an option is normally not in Bonneville's interest when, in the judgement of the CO –
  - (1) The foreseeable requirements involve –
    - (i) Minimum economic quantities (i.e., quantities large enough to permit the recovery of startup costs and the production of the required supplies at a reasonable price); and
    - (ii) Delivery requirements far enough into the future to permit competitive acquisition, production, and delivery.
  - (2) An indefinite quantity or requirements contract would be more appropriate than a contract with options. However, this does not preclude the use of an indefinite-quantity contract or requirements contract with options.
- (b) The CO shall not employ options if –
  - (1) The contractor will incur undue risks; e.g., the price or availability of necessary materials or labor is not reasonably foreseeable;
  - (2) Market prices for the supplies or services involved are likely to change substantially; or
  - (3) The option represents known firm requirements for which funds are available unless –
    - (i) The basic quantity is a learning or testing quantity; and
    - (ii) Competition for the option is impracticable once the initial contract is awarded.
- (c) In recognition of –
  - (1) Bonneville's need in certain service contracts for continuity of operations; and
  - (2) The potential cost of disrupted support, options may be included in service contracts if there is an anticipated need for a similar service beyond the first contract period.

### 7.10.3 Options in Solicitations

- (a) Solicitations shall include appropriate option provisions and clauses when resulting contracts will provide for the exercise of options (see 7.10.8).
- (b) Solicitations containing option provisions shall state the basis of evaluation, either exclusive or inclusive of the option and, when appropriate, shall inform offerors that it is anticipated that Bonneville may exercise the option at time of award.
- (c) Solicitations normally should allow option quantities to be offered without limitation as to price, and there shall be no limitation as to price if the option quantity is to be considered in the evaluation for award (see 7.10.6).
- (d) If Bonneville elects to allow for options with varying prices of the unit price(s), the solicitation shall state that offerors may offer varying prices for options based upon on the quantities actually ordered and/or the dates when ordered.

- (e) If it is anticipated that Bonneville may exercise an option at the time of award, and if the condition specified in paragraph (d) above applies, solicitations shall specify the price at which Bonneville will evaluate the option (highest option price offered or option price for specified requirements).
- (f) Solicitations may, in unusual circumstances, require that options be offered at prices no higher than those for the initial requirement; e.g., when –
  - (1) The option cannot be evaluated under 7.10.6; or
  - (2) Future competition for the option is impracticable.
- (g) Solicitations that require the offering of an option at prices no higher than those for the initial requirement shall –
  - (1) Specify that Bonneville will accept an offer containing an option price higher than the base price only if the acceptance does not prejudice any other offeror; and
  - (2) Limit option quantities for additional supplies to not more than 50 percent of the initial quantity of the same line item. In unusual circumstances, the Director of Contracts and Strategic Sourcing may approve a greater percentage of quantity.
- (h) Include the value of the base and all options in determining if the acquisition will exceed World Trade Organization Government Procurement Agreement or Free Trade Agreement thresholds (see Part 9).

#### 7.10.4 Options in Contracts

- (a) The contract shall specify limits on the purchase of additional supplies or services, or the overall duration of the term of the contract, including any extension.
- (b) The contract shall state the period within which the option may be exercised.
- (c) The period shall be set so as to provide the contractor adequate lead time to ensure continuous production.
- (d) The period may extend beyond the contract completion date for service contracts.
- (e) Unless otherwise waived by the HCA, the total of the basic and option periods shall not exceed 5 years for commercial acquisitions.
- (f) Contracts may express options for increased quantities of supplies or services in terms of –
  - (1) Percentage of specific line items;
  - (2) Increase in specific line items; or
  - (3) Additional numbered line items identified as the option.
- (g) Contracts may express extensions of the term of the contract as a modified completion date or as additional time for performance; e.g., days, weeks, or months.

#### 7.10.5 Documentation

The CO shall justify in writing the quantities or the term under option, the notification period for exercising the option, and any limitation on option price under 7.10.3(g); and shall include the justification in the contract file.

#### 7.10.6 Evaluation

- (a) In awarding the basic contract, the CO shall, except as provided in paragraph (b) of this section, evaluate the offers for any option quantities or periods contained in a solicitation when it has been determined prior to soliciting offers that Bonneville is likely to exercise the options. (see 7.10.8)
- (b) The CO need not evaluate offers for any option quantities when it is determined that evaluation would not be in the best interest of Bonneville and this determination is approved at a level above the CO.

#### 7.10.7 Exercise of Options

- (a) When exercising an option, the CO shall provide written notice to the contractor within the time period specified in the contract.
- (b) When the contract provides for economic price adjustment and the contractor requests a revision of the price, the CO shall determine the effect of the adjustment on prices under the option before the option is exercised.
- (c) The CO may exercise options only after determining that –
  - (1) Funds are available;
  - (2) The requirement covered by the option fulfill an existing Bonneville need;
  - (3) The exercise of the option is the most advantageous method of fulfilling Bonneville’s need, price and other factors (see paragraphs (d) and (e) of this section) considered;
  - (4) The contractor is not debarred in the System for Award Management Exclusions; and
  - (5) The contractor’s performance on this contract has been acceptable;
- (d) The CO, after considering price and other factors, shall make the determination on the basis of one of the following:
  - (1) A new solicitation fails to produce a better price or a more advantageous offer than that offered by the option. If it is anticipated that the best price available is the option price or that this is the more advantageous offer, the CO should not use this method of testing the market.
  - (2) An informal analysis of prices or an examination of the market indicates that the option price is better than prices available in the market or that the option is the more advantageous offer.
  - (3) The time between the award of the contract containing an option and the exercise of the option is so short, that it indicates the option price is the lowest price obtainable or the more advantageous offer. The CO shall take into consideration such factors as market stability and comparison of the time since award with the usual duration of contracts for such supplies or services.
- (e) The determination of other factors under paragraph (c)(3) of this section –
  - (1) Should take into account Bonneville’s need for continuity of operations, potential costs of disrupting operations, and administrative costs of resoliciting the requirements; and
  - (2) May consider the effect on small business.
- (f) Before exercising an option, the CO shall document the contract file that exercise is in accordance with the terms of the option, and the requirements of this section. The option must have been included as part of the initial competition and be exercisable at an amount specified in or reasonably determinable from the pricing in the basic contract, e.g. –
  - (1) Price
    - (i) A specific dollar amount pre-negotiated at time of initial contract award; or
    - (ii) A dollar amount to be negotiated prior to exercising the option;
  - (2) An amount to be determined by applying provisions (or a formula) provided in the basic contract, but not including renegotiating of the price for work in a fixed-price type contract;
  - (3) In the case of a cost-type contract, if –
    - (i) The option contains a fixed or maximum fee; or
    - (ii) The fixed or maximum fee amount is determinable by applying a formula contained in the basic contract (but see 7.2.2(c));
  - (4) A specific price that is subject to an economic price adjustment provision; or
  - (5) A specific price that is subject to change as a result of changes to prevailing labor rates provided by the Secretary of Labor.
- (g) The contract modification or other written document which notifies the contractor of the exercise of the option shall cite the option clause as authority.

#### 7.10.8 Solicitation Provisions and Contract Clauses

- (a) Insert a provision substantially the same as the provision 7-34, Evaluation Exclusive of Options, in solicitations when the solicitation includes an option clause and does not include one of the provisions prescribed in paragraph (b) or (c) of this section.
- (b) Insert a provision substantially the same as the provision 7-35, Evaluation of Options Exercised at Time of Contract Award, in solicitations when the solicitation includes an option clause, the CO has determined that there is a reasonable likelihood that the option will be exercised, and the option may be exercised at the time of contract award.
- (c) Insert a provision substantially the same as the provision 7-36, Evaluation of Options, in solicitation when –
  - (1) The solicitation contains an option clause;
  - (2) An option is not to be exercised at the time of contract award;
  - (3) A firm-fixed-price contract, a fixed-price contract with economic price adjustment, or other type of contract approved under Bonneville procedures is contemplated; and
  - (4) The CO has determined that there is a reasonable likelihood that the option will be exercised.
- (d) Insert a clause substantially the same as the clause 7-37, Option for Increased Quantity, in solicitation and contracts, other than those for services, when the inclusion of an option is appropriate (see 7.10.1 and 7.10.2) and the option quantity is expressed as a percentage of the basic contract quantity or as an additional quantity of a specific line item.
- (e) Insert a clause substantially the same as the clause 7-38, Option for Increased Quantity – Separately Priced Line Item, in solicitations and contracts, other than those for services, when the inclusion of an option is appropriate (see 7.10.1 and 7.10.2) and the option quantity is identified as a separately priced line item having the same nomenclature as a corresponding line item.
- (f) Insert a clause substantially the same as clause 7-39, Option to Extend Services, in solicitations and contracts for services when the inclusion of an option is appropriate (see 7.10.1, 7.10.2, and 23.1.7).
- (g) Insert a clause substantially the same as clause 7-40, Option to Extend the Term of the Contract, in solicitations and contracts when the inclusion of an option is appropriate (see 7.10.1 and 7.10.2) and it is necessary to include the contract any or all of the following:
  - (1) A requirement that Bonneville must give the contractor a preliminary written notice of its intent to extend the contract.
  - (2) A statement that an extension of the contract includes an extension of the option.
  - (3) A specified limitation on the total duration of the contract.

## 7.11 CONCESSION CONTRACTS

- (a) A concession contract is a specialized contractual document between Bonneville and a contractor, referred to in this instance as the concessionaire. Such contracts are normally used when Bonneville 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 Bonneville has provided significant support. Examples of concession contracts include those for food service and day care centers. Concession contracts may require payment to Bonneville by the concessionaire, or by Bonneville 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, the CO 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 Bonneville 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 Bonneville 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 Bonneville 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 Bonneville policies?

## 7.12 FREE TRIAL AGREEMENTS

- (a) *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 Bonneville 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) 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 Bonneville'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.
- (c) Any Bonneville 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.
- (d) 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 Bonneville's competitive processes in the purchase of the same or similar program/product.
- (e) The CO and the supplier shall execute a written agreement outlining the parameters of the transaction (see Exhibit 7-B, Sample Free Trial Agreement).
- (f) Bonneville may return the merchandise at any time during or at the completion of the free trial period.

**Exhibit 7-B**  
**SAMPLE FREE TRIAL AGREEMENT**

FREE TRIAL AGREEMENT

1. This agreement is between Bonneville Power Administration (Bonneville) 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 Bonneville 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 Bonneville which are to be returned at the end of the trial period.]

4. Bonneville 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. Bonneville shall be responsible for costs for any damage resulting from non-normal operation or misuse of the merchandise.

5. Bonneville 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 Bonneville 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 Bonneville's trial use of the merchandise without prior written approval from Bonneville, nor shall the submitter use Bonneville's name in any advertisement or promotion or other solicitation for business without written approval from Bonneville.

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

\_\_\_\_\_  
Contracting Officer's Signature                      Date

\_\_\_\_\_  
Submitter's Signature                                      Date

## 8 SUPPLIER DIVERSITY PROGRAM

### 8.1 SUPPLIER DIVERSITY PROGRAM (SDP)

#### 8.1.1 Policy

- (a) It is Bonneville'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 Bonneville's performance regarding these awards.
- (c) CO's shall take into account Bonneville's supplier diversity policy, 8.1.1(a) above, when carrying out their responsibilities for purchasing strategy and making awards.
- (d) The Bonneville 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 Bonneville fails to meet acceptable standards Bonneville shall intensify its outreach efforts.
  - (3) If participation is still lagging, Bonneville 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

Bonneville has established a Supplier Diversity Program (SDP) 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 Small Business Administration (SBA) representatives. The SDP Manager has a direct line of communication with the HCA to ensure that top-level Bonneville management is actively involved in the supplier diversity program implementation.

#### 8.1.3 Roles and Responsibilities

##### 8.1.3.1 Head of the Contracting Activity

The HCA is ultimately accountable for the success of the Supplier Diversity Program (SDP) by performing the following:

- (a) Providing oversight of program;
- (b) Issuing SDP supporting policy and data requirements;
- (c) Setting program goals;
- (d) Reviewing Quarterly and annual reports on program status; and
- (e) Performing compliance reviews.

##### 8.1.3.2 Contracts and Strategic Sourcing Management

The Director of Contracts and Strategic Sourcing is responsible for the following:

- (a) Maintaining the SDP Manager position; and

- (b) Developing a performance plan and metrics for this position that facilitates the program's success.

#### 8.1.3.3 Supplier Diversity Program Manager

The SDP Manager is responsible for the following:

- (a) Acting as the subject matter expert (SME) for the program;
- (b) Assisting COs in reviewing and managing subcontracting plans;
- (c) Developing SDP training curriculum;
- (d) Conducting training and information outreach to contracting and program office personnel; and
- (e) Reporting program status to the HCA and CSCO quarterly, or as requested.

#### 8.1.3.4 Contracting Officers and Program Office Personnel

COs and Program Office personnel are responsible for implementing SDP policy and process as established by the HCA and SDP Manager by considering small business first for each award.

#### 8.1.3.5 Small Business Administration

- (a) If requested by the SDP Manager, the SBA may –
  - (1) Support Bonneville and contractors in carrying out their responsibilities with regard to subcontracting plans;
  - (2) Review any solicitation that meets the dollar threshold in BPI 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 Bonneville prime contracts or subcontracts.

## 8.2 DEFINITIONS

*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.

*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).

*Economically disadvantaged women-owned small business (EDWOSB) concern* means a small business concern that is at least 51 percent directly and unconditionally owned by, and the management and daily business operations of which are controlled by, one or more women who are citizens of the United States and who are economically disadvantaged in accordance with 13 CFR part 127. It automatically qualifies as a women-owned small business concern eligible under the WOSB Program.

*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.

*Service-Disabled 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 “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 (38 U.S.C. § 101(16)).

*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.

*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).

*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.

*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 (38 U.S.C. § 101(2)).

*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.

## **8.3 SUBCONTRACT PLAN**

### **8.3.1 Subcontracting Requirements**

- (a) The policy contained herein requires subcontracting plans, except as otherwise provided in 8.3.4.1. The successful offeror(s) awarded contracts exceeding \$150,000 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 \$750,000 for supplies and services, and \$1,500,000 for construction, for the total contract including optional extensions, shall submit an appropriate subcontracting plan.

- (b) Any contractor (except, for Bonneville purposes, small businesses, or contracts with individuals) receiving a contract for more than \$150,000 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 Bonneville policy, except as per 8.3.1(d) and (e) below, to fully implement subcontracting plans. Each solicitation or contract expected to exceed \$750,000 (\$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 contract file.
- (e) A subcontracting plan is neither required, nor does it apply to:
  - (1) Small business concerns;
  - (2) Utility contracts; or
  - (3) Intergovernmental Contracts awarded under Part 25;
  - (4) 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 in subsection 8.3.2 and according to the procedures published in this subpart.
- (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 Solicitation Provision and Contract Clause

- (a) The CO shall include the provision 8-1, Supplier Diversity Program Award Representation, in all solicitations, except task orders or delivery orders and new transactions under \$25,000.
- (b) The CO shall include the 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 Subcontracting Plan Requirements

- (a) Each subcontracting plan required under section 8.3.1(a) must include –
  - (1) Separate percentage goals for using small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns as subcontractors;
  - (2) A statement of the total dollars planned to be subcontracted and a statement of the total dollars planned to be subcontracted to small businesses, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business and women-owned small business concerns.
  - (3) A description of the principal types of supplies and services to be subcontracted and an identification of types planned for subcontracting to small business, veteran-owned small

- business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business and women-owned small business concerns.
- (4) A description of the method used to develop the subcontracting goals;
  - (5) A description of the method used to identify potential sources for solicitation purposes;
  - (6) A statement as to whether or not the offeror included indirect costs in establishing subcontracting goals, and a description of the method used to determine the proportionate share of indirect costs to be incurred with small business, veteran-owned small business, service-disabled veteran-owned business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;
  - (7) The name of an individual employed by the offeror who will administer the offeror's subcontracting program, and a description of the duties of the individual;
  - (8) A description of the efforts the offeror will make to ensure that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns;
  - (9) Assurances that the offeror will include the clause 8-3, Utilization of Supplier Diversity Program Categories, in all subcontracts that offer further subcontracting opportunities, and that the offeror will require all subcontractors (except small business concerns) that receive subcontracts in excess of \$750,000 (\$1.5 million for construction) to adopt a plan that complies with the requirements this subsection.
  - (10) Assurances that the offeror will –
    - (i) Cooperate in any studies or surveys as may be required;
    - (ii) Submit periodic reports so that Bonneville can determine the extent of compliance by the offeror with the subcontracting plan;
    - (iii) Submit the Individual Subcontract Report (ISR) and the Summary Subcontract Report (SSR) using the applicable forms in accordance with the instructions on the form.
      - (A) The ISR shall be submitted semi-annually during contract performance for the periods ending March 31 and September 30. A report is also required for each contract within 30 days of contract completion. Reports are due 30 days after the close of each reporting period, unless otherwise directed by the CO. Reports are required when due, regardless of whether there has been any subcontracting activity since the inception of the contract or the previous reporting period.
      - (B) The SSR shall be submitted annually for the twelve-month period ending September 30. Reports are due 30 days after the close of each reporting period.
    - (iv) Ensure that its subcontractors with subcontracting plans agree to submit the ISR and SSR using the required forms;
    - (v) Provide its contract number, DUNS number, the e-mail address of the offeror's official responsible for acknowledging receipt of or rejecting the ISRs to all first-tier subcontractors with subcontracting plans so they can include this information when submitting their ISRs; and
    - (vi) Require that each subcontractor with a subcontracting plan provide the prime contract number, its own DUNS number, and the e-mail address of the subcontractor's official responsible for acknowledging receipt of or rejecting the ISRs, to its subcontractors with subcontracting plans.
  - (11) A description of the types of records that will be maintained concerning procedures adopted to comply with the requirements and goals in the plan, including establishing source lists; and a description of the offeror's efforts to locate small business, veteran-owned small business, service-disabled veteran-owned business, HUBZone small

business, small disadvantaged business, and women-owned small business concerns and to award subcontracts to them.

- (b) For multiyear contracts or contracts containing options, the cumulative value of the basic contract and all options is considered in determining whether a subcontracting plan is necessary (8.3.1(a)). If a plan is necessary and the offeror is submitting an individual contract plan, the plan shall contain all the elements required by paragraph (a) of this section and shall contain separate statements and goals for the basic contract and each option.

### 8.3.3 Reviewing the Subcontracting Plan

- (a) The CO shall review the subcontracting plan for adequacy. Assistance with this review may be obtained from the SDP Manager.
- (b) 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.
- (c) 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 Bonneville's cost or seriously impede the attainment of purchase objectives.
- (d) In determining the acceptability of a proposed subcontracting plan, the CO may obtain advice and recommendations from the SDP Manager.
- (e) 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.

### 8.3.4 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 SDP 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 SDP Manager a reasonable time to review the material and submit advisory recommendations to the CO. Failure of the SDP 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.

#### 8.3.4.1 Solicitation Provision and Contract Clause

- (a) The CO shall include the provision 8-4, Subcontracting Plan Requirement, in solicitations that exceed \$750,000 (\$1.5M for construction) and offer opportunities for subcontracting, except if the award is to a small business or an individual.
- (b) The CO shall include the clause 8-5, Liquidated Damages-Small Business Subcontracting Plan, in solicitations and contracts that exceed \$750,000 (\$1.5M for construction) and offer opportunities for subcontracting, except if the award is to a small business or an individual.

#### 8.3.5 Liquidated Damages

- (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 Bonneville 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.

### 8.3.6 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 SDP Manager, if not done so during contract negotiation.
- (b) Forwarding a copy of each plan and any associated approvals to the SDP Manager.
- (c) Giving to the SDP Manager a copy of the final negotiated subcontracting plan that was incorporated into a contract or contract modification.
- (d) Notifying the SDP 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 subsection 8.3.5, upon receipt of evidence to indicate that such action is warranted.

## 9 FOREIGN ACQUISITIONS

### 9.1 BUY AMERICAN ACT – SUPPLIES

This subpart implements the Buy American Act (41 U.S.C. chapter 83) obligations of the United States under certain international agreements regarding government procurement, and under Executive Orders 10582, 13881, and 14005 as amended, January 25, 2021. 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.
- (4) Except when an end product that consists wholly or predominantly of iron or steel or combination of both the cost of all the components shall exceed 60 percent of all the components, except that the percentage for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in 2029.
  - (i) A contract with a period of performance that spans the schedule of domestic content threshold increases specified in paragraph (a)(4) of this section shall be required to comply with each increased threshold for the items in the year of delivery.
  - (ii) Unless the Head of the Contracting Activity (HCA) allows for an alternative clause allowing for the same threshold that will apply to the entire period of performance for that contract, requiring an approved HCA waiver.
  - (iii) To help prevent scheduled increases in the content threshold from taking work away from domestic suppliers who are actively adjusting their supply chains; and avoid unintentionally raising the foreign content of Federal purchases through increased use of waivers while domestic suppliers adjust. The fallback threshold will be a temporary measure designed to limit foreign content while contractors transition to U.S.- based supply chains. A determination is not required before January 1, 2030, if there is an offer for a foreign end product that exceeds 55 percent domestic content.
- (b) The Buy American Act does not apply to acquisitions subject to certain trade agreement. In these acquisitions, end products and construction materials from certain countries receive nondiscriminatory treatment in evaluation with domestic offers. Generally, the dollar value of the acquisition determines which of the trade agreements applies. Exceptions to the applicability of the trade agreements are outlined in subpart 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. § 1907, the component test of the Buy American Act is waived for an end product that is a COTS item.

### 9.1.2 Definitions

As used in this subpart –

*Civil aircraft and related articles means –*

- (1) All aircraft;
- (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 to be used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of the aircraft without regard to whether the aircraft or articles receive duty-free treatment under section 601(a)(2) of the Trade Agreements Act.

*Component* means an article, material, or supply incorporated directly into the end product or construction material.

*Cost of components means –*

- (5) For components purchased by the contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product or construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- (6) For components manufactured by the contractor, all costs associated with the manufacture of the component, including transportation costs are described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

*Critical Component* means a component that is mined, produced, or manufactured in the United States and deemed critical to the US supply chain.

*Critical Item* means a domestic construction material or domestic end product that is deemed critical to the US supply chain.

*Domestic end product means:*

- (1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both -
  - i. An unmanufactured construction material mined or produced in the United States; or
  - ii. An end product manufactured in the United States, if –
    - (A) The cost of its components mined, produced, or manufactured in the United States exceeds 65 percent for items delivered in the calendar years of 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

- (B) The end product is a commercially available off-the-shelf (COTS) item; or
- (2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used in the end product. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of “cost of components” in this section.

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

*Eligible offer* means an offer of an eligible product. When the solicitation specifies that award will be made on a group of line items, an eligible offer means a foreign offer where the combined proposed price of the eligible products and the domestic end products exceeds 50 percent of the total proposed price of the group.

*Eligible product* means a foreign end product, construction material, or service that, due to applicability of a trade agreement to a particular acquisition, is not subject to discriminatory treatment.

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

Fallback threshold means a temporary measure designed to limit foreign content while contractors transition to U.S.- based supply chains.

*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

Under the authority of Section 303 of the Trade Agreements Act, the U.S. Trade Representative has waived the Buy American statute for civil aircraft and related articles that meet the substantial transformation test of the Trade Agreements Act, from countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are: Albania, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Macao China, Malta, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan (Chinese Taipei), and the United Kingdom. See Provision 9-2, Waiver of Buy American Act for Civil Aircraft and Related Articles, for details.

### 9.1.4 Evaluation Procedure

- (a) The contracting officer must not apply the evaluation procedure to offers of eligible products if the acquisition is subject to a trade agreement under subpart 9.4.
- (b) For end products that are not critical items and do not contain critical components. If there is a domestic offer that is not the low offer, and the restrictions of the buy American Statute apply to the low offer (foreign offer), the contracting officer must determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer (foreign offer), inclusive of duty-
  - (1) More than 20 percent, if the lowest domestic offer is from a large business concern; or
  - (2) More than 30 percent, if the lowest domestic offer is from a small business concern.
- (c) The evaluation in (a) or (b) 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. If the proposed price of domestic end products exceeds 50 percent of the total proposed price of the group, evaluate the entire group as a domestic offer. Evaluate all other groups as foreign offers.
- (d) The Provision 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.
- (e) Where the offeror indicates that it intends to furnish both foreign and domestic articles, Bonneville shall apply the appropriate differential to each item determined to be an end product. Bonneville 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.
- (f) 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.
- (g) 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, Bonneville shall assume that domestic firms intend to furnish domestic products and that foreign firms intend to furnish products of foreign origin.
- (h) 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 Bonneville-furnished property (such as transformer oil) or to award evaluation factors such as multiple award or cost of inspection evaluation factors.
- (i) To determine whether a trade agreement (see subpart 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.
- (j) 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.
- (k) 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 Solicitation Provisions and Contract Clauses

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.

- (a) The CO shall include the provision 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 Provision 9-2);
  - (2) Supplies subject to a trade agreement and expected to exceed the thresholds established in subpart 9.4; and
  - (3) Information technology equipment or supplies that are commercial items.
- (b) The CO shall include the provision 9-2, Waiver of Buy American Act for Civil Aircraft and Related Articles, in solicitations for the acquisition of civil aircraft and related articles if the acquisition is less than \$183,000.
- (c) The CO shall include the clause 9-3, Buy American Act – Supplies, in all solicitations and contracts for supplies, or for services involving the furnishing of supplies, except those for the purchase of:
  - (1) Civil aircraft and related articles (see provision 9-2);
  - (2) Supplies subject to a trade agreement and expected to exceed the thresholds established in subpart 9.4; and
  - (3) Information technology equipment or information technology supplies that are commercial products.
- (d) The CO shall include the provision 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 provision 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

This subpart implements the Buy American Act (41 U.S.C. chapter 83) and obligations of the United States under trade agreements (see BPI 9.4) and under Executive Orders 10582, 13881,

14005 as amended, January 25, 2021 and waiver of the domestic content test of the Buy American statute for acquisitions of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C. 1907. 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;
- (4) Except for construction material that consists wholly or predominantly of iron or steel or combination of both, the cost of domestic components must exceed 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029.
- (i) A contract with a period of performance that spans the schedule of domestic content threshold increases specified in paragraph (a)(4) of this section shall be required to comply with each increased threshold for the items in the year of delivery.
  - (ii) Unless the Head of the Contracting Activity (HCA) allows for an alternative clause allowing for the same threshold that will apply to the entire period of performance for that contract, requiring an approved HCA waiver.
  - (iii) To help prevent scheduled increases in the content threshold from taking work away from domestic suppliers who are actively adjusting their supply chains; and avoid unintentionally raising the foreign content of Federal purchases through increased use of waivers while domestic suppliers adjust. The fallback threshold will be a temporary measure designed to limit foreign content while contractors transition to U.S.- based supply chains. A determination is not required before January 1, 2030, if there is an offer for a foreign construction material that exceeds 55 percent domestic content.
- (b) The Buy American Act does not apply to the purchase of construction materials that is subject to certain trade agreements as outlined in subpart 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

As used in this subpart--

*Component* means an article, material, or supply incorporated directly into the end product or construction material.

*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 by a 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 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 Bonneville are supplies, not construction material.

*Domestic construction material* means:

- (1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both -
  - i. An unmanufactured construction material mined or produced in the United States; or
  - ii. A construction material manufactured in the United States, if –
    - (A) The cost of its components mined, produced, or manufactured in the United States exceeds 55 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. Components of unknown origin are treated as foreign; or
    - (B) The construction material is a commercially available off-the-shelf (COTS) item; or
- (2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used in such construction material. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of “cost of components” in this section.

*Foreign construction material* means a construction material other than a domestic construction material.

### 9.2.3 Evaluation Procedures

- (a) For construction material that is not a critical item and does not contain critical components. Unless the Head of the Contracting Activity (HCA) specifies a higher percentage. The contracting officer shall add to the offered price 20 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American Statute based on the unreasonable costs of domestic construction materials. In the case of a tie, the contracting officer shall give preference to an offer that does not include foreign construction material accepted at the request of the offer or on the basis of unreasonable cost.
- (b) The Provision 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) 20 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 outlined in subpart 9.4.

#### 9.2.4 Contract Clauses and Solicitation Provisions

- (a) The CO shall include the 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 subpart 9.4.
- (b) The CO shall include the Provision 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 subpart 9.4.
- (c) The CO shall include the Provision 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 subpart 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 9.2.5.9.

#### 9.2.5 American Recovery and Reinvestment Act Requirements for Buy American Act – Construction Matters

This section implements the requirements for application of the Buy American Act when project funding is attributed to, in whole or in part, the American Recovery and Reinvestment Act.

##### 9.2.5.1 Policy

Bonneville shall comply with the unique requirements for Buy American Act as imposed by the American Reinvestment and Recovery Act of 2009 (ARRA).

##### 9.2.5.2 Definitions

As used in this subsection –

*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.

*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:

- (a) Processed into a specific form and shape; or
- (b) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

#### 9.2.5.3 Policy

Except as provided in 9.2.5.4. –

- (a) None of the funds made available by ARRA may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work; as defined in BPI 9.2.5.2, 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.

#### 9.2.5.4 Exceptions

- (a) When one of the following exceptions applies, the CO may allow the contractor to incorporate foreign construction materials without regard to the restrictions of section 1605 of the ARRA or the Buy American Act:
  - (1) Non-availability. The HCA 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 CO concludes that the cost of domestic construction material is unreasonable in accordance with 9.2.5.7.

- (3) Inconsistent with public interest. The HCA may determine that application of the restriction of section 1605 of the ARRA or Buy American Act to a particular construction material would be inconsistent with 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 CO shall list the excepted materials in the contract; and
  - (2) The HCA shall publish a notice in the Federal Register within two (2) weeks after the determination is made, unless the construction material has already been determined to be domestically non-available. See 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 \$6,708,000 or more, also see subpart 9.4. Offers of products determined to be eligible products per subpart 9.4 shall receive equal consideration with domestic offers per subpart 9.4.
  - (2) For purposes of ARRA, designated countries do not include the Caribbean Basin Countries.

#### 9.2.5.5 Preaward Determination Concerning the Inapplicability of Section 1605 of the Recovery Act of the Buy American Act

- (a) For any acquisition, an offeror may request from the CO 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 Provision 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 9-48.
- (b) Before award, the CO 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 CO 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 CO shall determine that the cost of the domestic manufactured construction material is unreasonable.
  - (2) Unmanufactured construction material. The CO 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 CO shall determine that the cost of the unmanufactured construction material is unreasonable.

#### 9.2.5.6 Procedure for Evaluating Offers of Foreign Construction Material

- (a) To ensure receipt of all information necessary to perform evaluation of offers, the CO 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 CO has determined that an exception applies because the cost of certain domestic construction material is unreasonable, in accordance with BPI 9.2.3., the CO 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 20 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) + (.20 x cost of foreign unmanufactured construction material, if (a)(2) applies).
- (c) If two or more offers are equal in price, the CO 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 CO 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 CO must add the excepted materials to the list in the contract clause.

#### 9.2.5.7 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 CO concludes that the contractor should have made the request before contract award, the CO may deny the request.
- (b) The CO 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 9.2.5.4(a) is made after contract award that an exception to section 1605 of the Recovery Act or to the Buy American Act applies, the CO 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 9.2.5.6(b).

#### 9.2.5.8 Non-compliance

The CO 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 9.2.5.7.
  - (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 CO 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 HCA and Office of General Counsel for agency suspension or debarment decision and procedures. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

#### 9.2.5.9 Solicitation Provisions and Contract Clauses

The CO shall include the following clauses in 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 the 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 \$6,708,000.
  - (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 HCA determines that a higher percentage is appropriate, substitute the higher evaluation in paragraph (b)(4)(i) of the clause.
- (b) The CO shall include the provision 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 the clause 9-46. 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 the clause 9-48, Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials Under Trade Agreements in solicitations and contracts for construction that is performed in the United States, valued at \$6,708,000 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 HCA determines that a higher percentage is appropriate, substitute the higher evaluation 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 \$6,708,000 or more but less than \$13,296,489. 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 the provision 9-49, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials Under Trade Agreements, in solicitations that include Clause 9-48.
  - (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.
  - (2) The CO shall use Alternate II to replace paragraph (d) Alternate Offers, if the acquisition is valued at \$6,708,000 or more, but less than \$13,296,489. 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 that excepted foreign construction material is from a Recovery Act designated country other than Bahrain, Mexico, or Oman.
  - (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 Emergencies

In the event of a locally declared emergency event, the Contracting Officer retains the authority to redirect the Contractor from services originally contracted to services in support of disaster relief that are within the Contractor's capabilities.

#### 9.3.2 Restricted Foreign Purchases

- (a) 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) 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.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>. 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.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen->

[index2.aspx](#). 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
- (1) 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).
  - (2) 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.
  - (3) Certification
    - (i) 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 Sanctions Act.
    - (ii) 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 controlled 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](mailto:CISADA106@state.gov).
  - (4) 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.
  - (5) 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
- (1) 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).
  - (2) Certification: The Act requires each offeror to certify that it does not conduct restricted business operations in Sudan.
  - (3) Remedies: False certification may result in termination of the contract, suspension of the contractor, and debarment of the contractor.

#### 9.3.2.1 Solicitation Provision and Contract Clause

- (a) The CO shall include the clause 9-8, Restrictions on Certain Foreign Purchases, in all solicitations and contracts.
- (b) The CO shall include the provision 9-9, Offeror Representation and Certifications – Prohibited Foreign Transactions in all solicitations.

#### 9.3.3 [Reserved]

#### 9.3.4 Services

- (a) The evaluation of offers of: (1) covered services; or (2) construction 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 (Pub. L. 103-465);
  - (2) Free Trade Agreements (FTA), consisting of –
    - (i) Chile FTA (the United States – Chile Free Trade Agreement, as approved by Congress in the United States-Chile Free Trade Implementation Act (Public Law 108-77);
    - (ii) 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);
    - (iii) 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);
    - (iv) 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);
    - (v) CAFTA-DR (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);
    - (vi) 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);
    - (vii) 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);
    - (viii) 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);
    - (ix) Korea FTA (the United States-Korea Free Trade Agreement Implementation Act (Pub. L. 112-41) (19 U.S.C. § 3805 note);
    - (x) Colombia FTA (the United States-Colombia Trade Promotion Agreement Implementation Act (Pub. L. 112-42) (19 U.S.C. § 3805 note); and
    - (xi) 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

As used in this subpart –

*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, Chile, Columbia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore. Procurements between Bonneville and Canada are excluded from coverage until Canada covers provinces and hydro utilities.

*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.

*A World Trade Organization Government Procurement Agreement (WTO GPA) country* means any of the following countries: Armenia, Aruba, Austria, Belgium, Bulgaria, Canada, Croatia, 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, Moldova, Montenegro, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as “the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)”), Ukraine, or United Kingdom. Procurements between Bonneville and Canada are excluded from coverage until Canada covers provinces and hydro utilities.

#### 9.4.2 Trade Agreements Thresholds

- (a) The various thresholds for supplies, services, and construction under trade agreements are summarized in the table below. See BPI 9.4.1 for the list of parties to the WTO GPA, CAFTA-DR, 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	Supply Contract (equal to or exceeding)	Service Contract (equal to or exceeding)	Construction Contract (equal to or exceeding)
<p><b>World Trade Organization Government Procurement Agreement (WTO GPA)</b></p> <p>[also covers least developed countries and Caribbean Basin countries]</p> <p>[Canada is excluded from coverage until it covers its provinces and hydro utilities]</p>	\$174,000	\$174,000	\$6,708,000
<p>CAFTA-DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua)</p>	\$102,280	\$102,280	\$6,708,000
<p>United States of America, Mexico, and Canada (USMCA)</p> <p>Formally known as the North American Free Trade Agreement (NAFTA)</p>	Canada [Canada is excluded from coverage until it covers its provinces]	Canada [Canada is excluded from coverage until it covers its provinces]	Canada [Canada is excluded from coverage until it covers its provinces]
- Mexico	\$102,280	\$102,280	\$13,296,489
<p><b>U.S. – Australia Free Trade Agreement</b></p>	\$102,280	\$102,280	\$6,708,000

<b>U.S. – Bahrain Free Trade Agreement</b>	\$174,000	\$174,000	\$13,296,489
<b>U.S. – Columbia Free Trade Agreement</b>	\$102,280	\$102,280	\$6,708,000
<b>U.S. – Chile Free Trade Agreement</b>	\$102,280	\$102,280	\$6,708,000
<b>U.S. – Israel Free Trade Agreement</b>	\$50,000	N/A	N/A
<b>U.S. – Korea Free Trade Agreement</b>	\$100,000	\$100,000	\$6,708,000
<b>U.S. – Morocco Free Trade Agreement</b>	\$174,000	\$174,000	\$6,708,000
<b>U.S. – Oman Free Trade Agreement</b>	\$174,000	\$174,000	\$13,296,489
<b>U.S. – Panama Free Trade Agreement</b>	\$174,000	\$174,000	\$6,708,000
<b>U.S. – Peru Free Trade Agreement</b>	\$174,000	\$174,000	\$6,708,000
<b>U.S. – Singapore Free Trade Agreement</b>	\$102,280	\$102,280	\$6,708,000

## 10 LABOR LAWS

### 10.1 GENERAL LABOR POLICIES

#### 10.1.1 Definitions

As used in this part –

*Act* refers to the subject Act as identified in each respective BPI subpart.

*Administrator, Wage and Hour Division*, means the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210 or an authorized representative.

*Contractor* includes a subcontractor at any tier whose subcontract is subject to the provisions of the Act.

*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 (2) 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* 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 Labor Standards statute (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 (2) 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 (3) 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.

*Statute* refers to the subject statute as identified in each respective BPI subpart.

*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 statute.

*Wage determination* means a determination of minimum wages or fringe benefits made under sections 2(a) or 4(c) of the statute (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 Construction Wage Rate Requirement statute 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.

*Wage Determination OnLine (WDOL)* means the government website for wage determinations for both the Construction Wage Rate Requirement statute and Service Contract Labor Standards statute.

*Worker* means any person engaged in performing on, or in connection with, a contract and whose wages under such contract are governed by the Fair Labor Standards Act (29 U.S.C chapter 8), the Service Contract Labor Standards statute (41 U.S.C chapter 67), or the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, subchapter IV)

#### 10.1.2 Authorities of the Secretary of Labor

- (a) Pursuant to the statutes referred to in subpart 10.2 Labor Policies for Service Contracts, the Secretary of Labor is authorized and directed to enforce the provisions of the statute, make rules and regulations, issue orders, hold hearings, make decisions, and take other appropriate action. The Department of Labor (DOL) has issued implementing regulations on such matters as –
- (1) Service contract labor standards provisions and procedures (29 CFR Part 4, Subpart A);
  - (2) Wage determination procedures (29 CFR Part 4, Subpart B);
  - (3) Application of the Service Contract Labor Standards statute (rulings and interpretations) (29 CFR Part 4, Subpart C);

- (4) Compensation standards (29 CFR Part 4, Subpart D);
  - (5) Enforcement (29 CFR Part 4, Subpart E);
  - (6) Safe and sanitary working conditions (29 CFR Part 1925);
  - (7) Rules of practice for administrative proceedings enforcing labor standards in federal construction and service contracts (29 CFR Part 6); and
  - (8) Practice before the Administrative Review Boards for federal service contracts (29 CFR Part 8).
- (b) Pursuant to the statutes referred to in subpart 10.3 Labor Policies for Construction Contracts, the Secretary of Labor has issued regulations in Title 29, Subtitle A, Code of Federal Regulations, prescribing standards and procedures to be observed by the Department of Labor and the federal contracting agencies. Those standards and procedures applicable to contracts involving construction are implemented in this subpart. The Department of Labor regulations include –
- (1) Part 1, relating to Construction Wage Rate Requirements statute minimum wage rates;
  - (2) Part 3, relating to the Copeland (Anti-Kickback) Act and requirements for weekly statements of compliance and the preservation and inspection of weekly payroll records;
  - (3) Part 5, relating to enforcement of the:
    - (i) Construction Wage Rate Requirements statute, formerly known as the Davis-Bacon Act;
    - (ii) Contract Work Hours and Safety Standards statute; and
    - (iii) Copeland (Anti-Kickback) Act;
  - (4) Part 6, relating to rules of practice for appealing the findings of the Administrator, Wage and Hour Division, in enforcement cases under the various labor statutes, and by which Administrative Law Judge hearings are held; and
  - (5) Part 7, relating to rules of practice by which contractors and other interested parties may appeal to the Department of Labor Administrative Review Board, decisions issued by the Administrator, Wage and Hour Division, or administrative law judges under the various labor statutes.
- (c) 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 by federal contracting agencies. Those standards and procedures are incorporated here.

#### 10.1.3 Policy

- (a) Bonneville complies with federal labor requirements as directed by the Secretary of Labor to the extent allowed by Bonneville's governing statutes.
- (b) Bonneville is responsible for ensuring full and impartial enforcement of the labor standards in the administration of its contracts. Bonneville shall maintain an effective program that ensures that contractors, and subcontractors, carry out their obligations under the labor standards clauses.
- (c) Bonneville will show no preference for either union or non-union contractors.
- (d) Bonneville 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 Bonneville contract. They shall be referred to the Department of Labor (DOL). Bonneville's Manager for Labor Management Relations should be advised of the referral.
- (e) Bonneville will exchange information concerning labor matters with other affected agencies to ensure a uniform Government approach concerning a particular plant or labor-management dispute.



- (f) Bonneville 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, Bonneville purchase programs.
- (g) Bonneville 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.
- (h) 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 clauses 20-3 and 28-8).

#### 10.1.3.1 Procedures

- (a) The requirements identified in subpart 10.1 General Labor Policies apply to all procurements, regardless of applicability of the Service Contract Labor Standards statute or the Construction Wage Rates Requirements statute. For procurements of services and construction, additional specific policies and procedures are identified in subpart 10.2 Labor Policies for Service Contracts and subpart 10.3 Labor Policies for Construction Contracts. In addition to the policies and procedures in subpart 10.1, the CO shall consult with the policies and procedures identified in subparts 10.2 and 10.3 if the subject procurement is for services or construction.
- (b) The CO shall notify the HCA and the Director of Contracts and Strategic Sourcing prior to investigating or attempting to resolve complaints or issues related to labor policies. The CO shall not attempt to investigate or resolve complaints related to labor policies received from individuals without specific instruction from the HCA.
- (c) 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.
- (d) Some of the statutes and regulations enforced by the U.S. Department of Labor require that federal contractors post required notices in the workplace. DOL provides free electronic and printed copies of these required posters. If the contractor is unable to download and print copies of the required notice, the CO shall provide hard copies upon the contractor's request. Contractors' failure to post the notices as required by the DOL/OFPPC is a breach of the Bonneville contract.
- (e) The CO shall refer to 29 CFR, the Department of Labor website, and to the Department of Labor's User's Guide for procedures and instruction on labor matters.

#### 10.1.4 Equal Employment Opportunity

##### 10.1.4.1 Policy

- (a) Bonneville 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, sexual orientation, gender identity, or national origin. (See Executive Order 11246).
- (b) The requirements of Executive Order 11246 shall not be included in contracts for the following:
  - (1) Work performed outside the United States by employees who were not recruited within the United States;
  - (2) State or local governments or any agency, instrumentality or subdivision thereof;

- (3) Work on or within 40 miles of an Indian reservation where a Tribal Employment Rights Ordinance (TERO) is known to be in effect; and
- (4) Work performed by individuals (i.e., no employees).
- (c) Neither Bonneville, nor its contractors, will solicit, or contract, in a manner to avoid applicability of the nondiscrimination, affirmative action or equal opportunity provisions of this Part.
- (d) 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).
- (e) 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.
- (f) 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.
- (g) Complaints received alleging violation of the Equal Employment Opportunity clause must be referred 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.
- (h) No contract or modification involving new acquisition shall be entered into, and no subcontract shall be approved by a CO, with a person who has been found ineligible by the Deputy Assistant Secretary for reasons of noncompliance with the requirements of Executive Order 11246.

#### 10.1.4.2 Procedures

- (a) Postings: Prior to performance of an applicable contract, the CO shall direct the contractor to the DOL/OFCCP website for information and copies of the Equal Employment Opportunity posters. If the contractor is unable to download and print copies of the required notice, the CO shall provide hard copies upon the contractor's request. Contractor failure to post the required notice is a breach of the Bonneville contract per Clause 10-1(c)(3) and (9).
- (b) Clearances:
  - (1) Other than construction contracts:
    - (i) The CO shall obtain a pre-award clearance from the OFCCP website at <https://www.dol.gov/agencies/ofccp/pre-award> 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.
    - (ii) 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.
    - (iii) 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.

- (iv) 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 Bonneville's course of action.

(2) Construction contracts:

- (i) Construction contractors are required to meet the contract terms and conditions which cite affirmative action requirements covering specified geographical areas or projects, and applicable requirements of 41CFR 60-1 and 60-4.2.
  - (ii) COs shall submit to OFCCP, electronically, notice of an award of a construction contract or subcontract in excess of \$10,000 at <https://ncap.dol.gov/> 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.
  - (iii) When requested by the OFCCP area office, the CO shall arrange a conference among contractor, Bonneville's contracting personnel and EEO Contract compliance personnel to discuss the contractor's compliance responsibilities.
- (c) The CO shall refer all EEO complaints to the regional office of the OFCCP, after notifying the HCA.

#### 10.1.4.3 Solicitation Provision and Contract Clauses

- (a) The CO shall include the clause 10-1, Equal Opportunity, in all solicitations and contracts, except under the following conditions:
  - (1) valued less than \$25,000;
  - (2) with individuals (as opposed to a firm with multiple employees);
  - (3) on or within 40 miles of an Indian reservation where a Tribal Employment Rights Ordinance (TERO) is known to be in effect;
  - (4) for work performed outside the United States by employees who were not recruited within the United States; or
  - (5) with State or local governments or any agency, instrumentality or subdivision thereof.
- (b) The CO shall include the provision 10-15, Pre-award On-Site Equal Opportunity Compliance Review, in all solicitations, except for the following conditions:
  - (1) valued at \$10,000,000 or less;
  - (2) with individuals (as opposed to a firm with multiple employees);
  - (3) on or within 40 miles of an Indian reservation where a Tribal Employment Rights Ordinance (TERO) is known to be in effect; or
  - (4) for construction.
- (c) The CO shall include the clause 10-16, Affirmative Action Compliance Requirements, for Construction, in all solicitations and contracts for construction, except for awards valued

under \$25,000. The percentage goal must be inserted by the CO (as obtained from the OFCCP published listing at: <https://www.dol.gov/agencies/ofccp/>).

- (d) The CO shall include the clause 10-17, Equal Opportunity Pre-award Clearance of Subcontracts, in all solicitations and contracts. Clause 10-17 shall not be included in solicitations and contracts when there is not a reasonable opportunity for a subcontract exceeding \$10,000,000 in contract value including options.

#### 10.1.5 Affirmative Action for Workers with Disabilities

This subpart prescribes policies and procedures for implementing Section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. § 793) (the Act); Executive Order 11758, January 15, 1974; and the regulations of the Secretary of Labor (41 CFR Part 60-741). In this subpart, the terms *contract* and *contractor* include *subcontract* and *subcontractor*.

##### 10.1.5.1 Policy

- (a) Section 503 of the Act applies to all Government contracts in excess of \$15,000 for supplies and services (including construction) except as waived by the Secretary of Labor. Clause 10-2 Affirmative Action for Workers with Disabilities implements the Act.
- (b) The requirements of Clause 10-2, Affirmative Action for Workers with Disabilities, in any contract with a State or local government (or any agency, instrumentality, or subdivision thereof) shall not apply to any agency, instrumentality, or subdivision of that government that does not participate in work on or under the contract.
- (c) DOE through the delegation to the Administrator and HCA, with the concurrence of the Deputy Assistant Secretary for Federal Contract Compliance of the U.S. Department of Labor (Deputy Assistant Secretary), may waive any or all of the terms of the clause 10-2, Affirmative Action for Workers with Disabilities, when it is determined that the contract is essential to the national security, and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, DOE shall notify the Deputy Assistant Secretary in writing within 30 days.

##### 10.1.5.2 Procedures

- (a) Prior to performance of an applicable contract, the CO shall direct the contractor to the DOL/OFCCP website for information on rights and obligations of individuals with disabilities and for copies of the Equal Employment Opportunity posters. If the contractor is unable to download and print copies of the required notice, the CO shall provide hard copies upon the contractor's request. Contractor failure to post the required notice is a breach of the contract per Clause 10-2(b).
- (b) The CO shall notify the HCA prior to forwarding complaints received about the administration of the Act to the Deputy Assistant Secretary for Federal Contract Compliance 200 Constitution Avenue, N.W. Washington, DC 20210 or to any OFCCP regional or area office. The OFCCP shall institute investigation of each complaint and shall be responsible for developing a complete case record.
- (c) The CO shall take necessary action, as soon as possible upon notification by the HCA, to implement any sanctions imposed on a contractor by the Department of Labor for violations of Clause 10-2 Affirmative Action for Workers with Disabilities. These sanctions (see 41 CFR 60-741.66) may include:
- (1) Withholding from payments otherwise due;
  - (2) Termination or suspension of the contract; or
  - (3) Debarment of the contractor.

### 10.1.5.3 Contract Clause

The CO shall include the clause 10-2, Affirmative Action for Workers with Disabilities, in all solicitations and contracts. Clause 10-2 shall not be included in solicitations and contracts:

- (a) Where both performance of the work and the recruitment of workers will occur outside the U.S., Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, or Wake Island; or
- (b) The contract is with a State or local government (or any agency, instrumentality, or subdivision) when that entity does not participate in work on or under the contract.

### 10.1.6 Discrimination on the Basis of Age

#### 10.1.6.1 Policy

Executive Order 11141, February 12, 1964 (29 FR 2477), states that the Government policy is as follows:

- (a) Contractors and subcontractors shall not, in connection with employment, advancement, or discharge of employees, or the terms, conditions, or privileges of their employment, discriminate against persons because of their age except upon the basis of a bona fide occupational qualification, retirement plan, or statutory requirement.
- (b) Contractors and subcontractors, or persons acting on their behalf, shall not specify in solicitations or advertisements for employees to work on Government contracts, a maximum age limit for employment unless the specified maximum age limit is based upon a bona fide occupational qualification, retirement plan, or statutory requirement.
- (c) Agencies will bring this policy to the attention of contractors. The use of contract clauses is not required.

#### 10.1.6.2 Procedure

The CO shall bring complaints regarding a contractor's compliance with this policy to that contractor's attention (in writing, if appropriate), stating the policy, indicating that the contractor's compliance has been questioned, and requesting that the contractor take any appropriate steps that may be necessary to comply.

### 10.1.7 National Labor Relations Act Notification

- (a) Definitions. As used in this subsection –

*United States* means the 50 States, the District of Columbia, Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island. Executive Order 13496 requires contractors to post a notice informing employees of their rights under federal labor laws.

- (b) The Secretary of Labor has determined that the notice must contain employee rights under the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The NLRA encourages collective bargaining, and protects the exercise by employees of their freedom to associate, to self-organize, and to designate representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.
- (c) Exceptions
  - (1) The requirements of this subpart do not apply to:
    - (i) Contracts under \$150,000;
    - (ii) Subcontracts of \$10,000 or less; or

- (iii) Contracts or subcontracts for work performed exclusively outside the United States.
- (2) Exemption granted by the Secretary:
  - (i) If the Secretary of Labor finds that the requirements of the Executive Order impair the ability of the Government to procure goods and services on an economical and efficient basis or if special circumstances require an exemption in order to serve the national interest, the Secretary may exempt a contracting department or agency, or groups of departments or agencies, from the requirements of any or all of the provisions of this Executive Order with respect to a particular contract or subcontract, or any class of contracts or subcontracts, including the requirement to include clause 10-6 Notification of Employee Rights Under the National Labor Relations Act, or parts of that clause, in contracts.
  - (ii) Requests for exemptions may be submitted in accordance with Department of Labor regulations at 29 CFR 471.3.

#### 10.1.7.1 Procedure

- (a) Prior to performance of an applicable contract, the CO shall direct the contractor to the DOL/OFCCP website for information and posters on rights and obligations of individuals under the National Labor Relations Act.
- (b) If the contractor is unable to download and print copies of the required notice, the CO shall provide hard copies upon the contractor's request. Contractor failure to post the required notice is a breach of the contract per Clause 10-6(a) and (c).

#### 10.1.7.2 Contract Clause

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, except acquisitions –

- (a) For collective bargaining agreements as defined in 5 U.S.C. § 7103(a)(8);
- (b) For purchases less than \$150,000. For indefinite-quantity contracts, include the clause if the value of orders in any calendar year of the contract is expected to exceed \$150,000;
- (c) For work performed exclusively outside the territorial United States;
- (d) For work covered (in their entirety) by an exemption by the Department of Labor; or
- (e) With Federal, State and local governments.

#### 10.1.8 Employment Eligibility Verification

##### 10.1.8.1 Policy

- (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 a Federal contract.
- (b) Definition as used in this subsection – *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 BPI 10.1.8.3. 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.

- (c) 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](http://www.dhs.gov/e-verify)). However, it is not a substitute for any other employment eligibility verification requirement.
- (d) 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.
- (e) 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, Bonneville must refer the contractor to the Department of Energy 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.

#### 10.1.8.2 Procedures

COs shall include in solicitations and contracts as prescribed by the requirements at 10.1.8.3 that Federal contractors must:

- (a) Enroll as Federal contractors in E-verify;
- (b) 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:
  - (1) An institution of higher education as defined by 20 U.S.C. § 1001(a);
  - (2) A State or local government or the government of a federally recognized Indian tribe; or
  - (3) A surety performing under a takeover agreement entered into with a Federal agency pursuant to a performance bond.
- (c) Use E-verify to verify employment eligibility of all employees assigned to the contract; and include these requirements in subcontracts for:
  - (1) 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
  - (2) Construction.

#### 10.1.8.3 Contract Clause

The CO shall insert the clause 10-18, Employment Eligibility Verification, in all solicitations and contracts that exceed \$150,000, except those that –

- (a) Are only for work that will be performed outside the United States;
- (b) Are with other U.S. Federal Government agencies.
- (c) Are for a period of performance of less than 120 days; or
- (d) Are only for:
  - (1) Commercially available off-the-shelf items;

- (2) Items that would be COTS items, but for minor modifications (as defined in subpart 2.2);  
or
- (3) 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.

#### 10.1.9 Equal Opportunity for Veterans

This subsection prescribes policies and procedures for implementing the following:

- (a) The Vietnam Era Veterans' Readjustment Assistance Act of 1972 (38 U.S.C. § 4211 and 4212) (the Act).
- (b) The Veterans Employment Opportunities Act of 1998, Public Law 105-339.
- (c) The Jobs for Veterans Act, Public Law 107-288.
- (d) Executive Order 11701, January 24, 1973 (3 CFR, 1971-1975 Comp., p. 752).
- (e) The regulations of the Secretary of Labor (41 CFR part 60-300, and 61-300).

##### 10.1.9.1 Definitions

As used in this subsection –

*Active duty wartime or campaign badge veteran* means a veteran who served on active duty in the U.S. military, ground, naval, or air service, during a war or in a campaign or expedition for which a campaign badge has been authorized under the laws by the Department of Defense.

*Armed Forces service medal veteran* means any veteran who, while serving on active duty in the U.S. military, ground, naval, or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (61 FR 1209).

*Disabled veteran* means –

- (1) A veteran of the U.S. military, ground, naval, or air service, who is entitled to compensation (or who, but for the receipt of military retired pay, would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs; or
- (2) A person who was discharged or released from active duty because of a service-connected disability.

*Executive and senior management* means –

- (1) Any employee –
  - (i) Compensated on a salary basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging, or other facilities;
  - (ii) Whose primary duty consists of the management of the enterprise in which the individual is employed or of a customarily recognized department or subdivision thereof;
  - (iii) Who customarily and regularly directs the work of two or more other employees; and
  - (iv) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; or



- (2) Any employee who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management.

*Protected veteran* means a veteran who is protected under the non-discrimination and affirmative action provisions of 38 U.S.C § 4212; specifically, a veteran who may be classified as a “disabled veteran,” “recently separated veteran,” “active duty wartime or campaign badge veteran,” or an “Armed Forces service medal veteran,” as defined by this section.

*Qualified disabled veteran* means any veteran during the three-year period beginning on the date of such veteran’s discharge or release from active duty in the U.S. military, ground, naval, or air service.

*United States*, means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

#### 10.1.9.2 Policy

- (a) 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) Undertake appropriate outreach and positive recruitment activities that are reasonably designed to effectively recruit protected veterans; and
  - (4) Establish a hiring benchmark and apply it to hiring of protected veterans in each establishment, on an annual basis, in the manner prescribed in the regulations of the Secretary of Labor.
  - (5) Report on employment of veterans using the Department of Labor’s annual form VETS-4212, Federal Contractor Veterans’ Employment Report (VETS-4212 Report).
- (b) The Act applies to contracts and subcontracts for personal property and services (including construction) of \$150,000 or more except as waived by the Secretary of Labor.
- (c) Contracts with foreign entities and Indian Tribal governments are exempt from all aspects of the Act.
- (d) The requirements of the Clause 10-19, Equal Opportunity for Veterans, in any contract with a State or local government (or any agency, instrumentality, or subdivision) do not apply to any agency, instrumentality, or subdivision of that government that does not directly participate in work on or under the contract.
- (e) The Act requires Clause 10-19 Equal Opportunity for Veterans and Clause 10-20 Employment Reports on Veterans in solicitations and contracts greater than \$150,000 unless an exemption is provided by the Act.
- (f) IGCs are exempt from the reporting and the award and modification restrictions in the Act.
- (g) The CO 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 submitted the required annual VETS-4212, Federal Contractor Veterans’ Employment Report (VETS 4212 Report), with respect to the preceding fiscal year if the contractor was subject to the reporting requirements of 38 U.S.C § 4212(d).

### 10.1.9.3 Procedures

- (a) To verify if a proposed contractor is current with its submission of the VETS-4212 Report, the CO shall:
  - (1) Query the Department of Labor's VETS 4212 Database via the Internet at <https://www.dol.gov/vets/vets4212.htm> under "Filing Verification"; and
  - (2) Contact the VETS-4212 customer support via e-mail at [VETS-4212-customersupport@dol.gov](mailto:VETS-4212-customersupport@dol.gov) for confirmation, if the proposed contractor represents that it has submitted the VETS-4212 Report and is not listed on the verification file.
- (b) The CO is permitted to award and modify contracts for commercial items and services at any dollar value without confirming the contractor has submitted the required annual VETS-4212 Report.
- (c) The CO is permitted to award and modify contracts for non-commercial items and services that do not exceed \$150,000 without confirming the contractor has submitted the required annual VETS-4212 Report.
- (d) The CO 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 submitted the required annual VETS-4212 Report.
- (e) If performance under the clause, Equal Opportunity for Veterans, may necessitate a revision of a collective bargaining agreement, the CO must advise the affected labor unions that the Department of Labor will give them appropriate opportunity to present their views. However, neither the CO nor any representative of the CO may discuss with the contractor or any labor representative any aspect of the collective bargaining agreement.
- (f) The CO must take necessary action as soon as possible upon notification by the appropriate agency official to implement any sanctions imposed on a contractor by the Department of Labor for violations of the clause 10-19, Equal Opportunity for Veterans. The sanctions (see 41 CFR 60-300.66) may include withholding of progress payments, termination or suspension of the contract, or debarment of the contractor.

### 10.1.9.4 Contract Clauses

- (a) The CO shall include the clause 10-19, Equal Opportunity for Veterans, in all solicitations and contracts when the contract value is expected to exceed \$150,000.
- (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 and IGCs with State and local governments.

### 10.1.10 Combating Trafficking in Persons

#### 10.1.10.1 Definitions

As used in this subsection –

Agent means any individual, including a director, an officer, an employee, or an independent contractor, authorized to act on behalf of the organization.

Coercion means-

- (1) Threats of serious harm to or physical restraint against any person;
- (2) Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(3) The abuse or threatened abuse of the legal process.

Commercial sex act means any sex act on account of which anything of value is given to or received by any person.

Debt bondage means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

Employee means an employee of the Contractor directly engaged in the performance of work under the contract who has other than a minimal impact or involvement in contract performance.

Forced labor means knowingly providing or obtaining the labor or services of a person-

- (1) By threats of serious harm to, or physical restraint against, that person or another person;
- (2) By means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or
- (3) By means of the abuse or threatened abuse of law or the legal process.

Involuntary servitude includes a condition of servitude induced by means of-

- (1) Any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such conditions, that person or another person would suffer serious harm or physical restraint; or
- (2) The abuse or threatened abuse of the legal process.

Recruitment fees means fees of any type, including charges, costs, assessments, or other financial obligations, that are associated with the recruiting process, regardless of the time, manner, or location of imposition or collection of the fee.

- (1) Recruitment fees include, but are not limited to, the following fees (when they are associated with the recruiting process) for-
  - (i) Soliciting, identifying, considering, interviewing, referring, retaining, transferring, selecting, training, providing orientation to, skills testing, recommending, or placing employees or potential employees;
  - (ii) Advertising;
  - (iii) Obtaining permanent or temporary labor certification, including any associated fees;
  - (iv) Processing applications and petitions;
  - (v) Acquiring visas, including any associated fees;
  - (vi) Acquiring photographs and identity or immigration documents, such as passports, including any associated fees;

(vii) Accessing the job opportunity, including required medical examinations and immunizations; background, reference, and security clearance checks and examinations; and additional certifications;

(viii) An employer's recruiters, agents or attorneys, or other notary or legal fees;

(ix) Language interpretation or translation, arranging for or accompanying on travel, or providing other advice to employees or potential employees;

(x) Government-mandated fees, such as border crossing fees, levies, or worker welfare funds;

(xi) Transportation and subsistence costs-

(A) While in transit, including, but not limited to, airfare or costs of other modes of transportation, terminal fees, and travel taxes associated with travel from the country of origin to the country of performance and the return journey upon the end of employment; and

(B) From the airport or disembarkation point to the worksite;

(xii) Security deposits, bonds, and insurance; and

(xiii) Equipment charges.

(2) A recruitment fee, as described in the introductory text of this definition, is a recruitment fee, regardless of whether the payment is

(i) Paid in property or money;

(ii) Deducted from wages;

(iii) Paid back in wage or benefit concessions;

(iv) Paid back as a kickback, bribe, in-kind payment, free labor, tip, or tribute; or

(v) Collected by an employer or a third party, whether licensed or unlicensed, including, but not limited to-

(A) Agents;

(B) Labor brokers;

(C) Recruiters;

(D) Staffing firms (including private employment and placement firms);

(E) Subsidiaries/affiliates of the employer;

(F) Any agent or employee of such entities; and

(G) Subcontractors at all tiers.

Severe forms of trafficking in persons means-

(1) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(2) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

Sex trafficking means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

Subcontract means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

United States means the 50 States, the District of Columbia, and outlying areas.

#### 10.1.10.2 Policy

(a) The United States Government has adopted a zero tolerance policy regarding trafficking in persons. Additional information about trafficking in persons may be found at the website for the Department of State's Office to Monitor and Combat Trafficking in Persons. Bonneville contracts shall:

- (1) Prohibit contractors, contractor employees, subcontractors, and subcontractor employees from:
  - (i) Engaging in severe forms of trafficking in persons during the period of performance of the contract;
  - (ii) Procuring commercial sex acts during the period of performance of the contract; or
  - (iii) Using forced labor in the performance of the contract.

- (1) Require contractors and subcontractors to notify employees of the prohibited activities described in paragraph (1) of this section and the actions that may be taken against them for violations; and

- (2) Impose suitable remedies, including termination, on contractors that fail to comply with the requirements of paragraphs (1) and (2) of this section.

(b) Violations. Bonneville may impose the remedies set forth in paragraph (b) of this section if:

- (1) The contractor, contractor employee, subcontractor, or subcontractor employee engages in severe forms of trafficking in persons during the period of performance of the contract;
- (2) The contractor, contractor employee, subcontractor, or subcontractor employee procures a commercial sex act during the period of performance of the contract;
- (3) The contractor, contractor employee, subcontractor, or subcontractor employee uses forced labor in the performance of the contract; or
- (4) The contractor fails to comply with the requirements of Clause 10-25, Combating Trafficking in Persons.

(c) Remedies. After determining in writing that adequate evidence exists to suspect any of the violations at paragraph (a) of this section, the CO may pursue any of the remedies specified in paragraph (e) of Clause 10-25 Combating Trafficking in Persons. The CO may take into consideration whether the contractor had a Trafficking in Persons awareness program at the time of the violation as a mitigating factor when determining the appropriate remedies.

These remedies are in addition to any other remedies available to Bonneville.

#### 10.1.10.3 Procedure

The CO shall refer to 29 CFR, the Department of Labor website, and to the Department of Labor's User's Guide for procedures and instruction on labor matters.

#### 10.1.10.4 Contract Clause

The CO shall include the clause 10-25, Combating Trafficking in Persons, in all solicitations and contracts.

#### 10.1.11 Child Labor

##### 10.1.11.1 Policy

(a) Definitions. As used in this subsection:

*Forced or indentured child labor* means all work or service—

- (1) Exacted from any person under the age of 18 under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily; or
- (2) Performed by any person under the age of 18 pursuant to a contract the enforcement of which can be accomplished by process or penalties.

*List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor* means the list published by the Department of Labor in accordance with Executive Order 13126 of June 12, 1999, Prohibition of Acquisition of Products Produced by Forced or Indentured Child Labor. The list identifies products, by their country of origin, that the Departments of Labor, Treasury, and State have a reasonable basis to believe might have been mined, produced, or manufactured by forced or indentured child labor.

- (b) Bonneville must take appropriate action to enforce the laws prohibiting the manufacture or importation of products that have been mined, produced, or manufactured wholly or in part by forced or indentured child labor, consistent with 19 U.S.C. § 1307, 29 U.S.C. § 201, et seq., and 41 U.S.C. Chapter 65. COs should make every effort to avoid acquiring such products.
- (c) Violations. Bonneville may impose remedies set forth in paragraph (d) of this section for the following violations (note that the violations in paragraphs (c)(3) and (c)(4) of this section go beyond violations of the requirements relating to certification of end products):
  - (1) The contractor has submitted a false certification regarding knowledge of the use of forced or indentured child labor.
  - (2) The contractor has failed to cooperate as required in accordance with Clause 10-24 Child Labor Cooperation with Authorities and Remedies, with an investigation of the use of forced or indentured labor by an Inspector General, the Attorney General, or the Secretary of the Treasury.
  - (3) The contractor used forced or indentured child labor in its mining, production, or manufacturing processes.
  - (4) The contractor has furnished an end product or component mined, produced, or manufactured, wholly or in part, by forced or indentured child labor. Remedies in paragraphs (d)(2) and (d)(3) of this section are inappropriate unless the contractor knew of the violation.
- (d) Remedies:
  - (1) The CO may terminate the contract.
  - (2) The Department of Energy suspending official may suspend the contractor in accordance with Department procedures.
  - (3) The Department of Energy debaring official may debar the contractor for a period not to exceed 3 years in accordance with the Department procedures.

### 10.1.11.2 Procedures

- (a) When issuing a solicitation for supplies expected to exceed the micro-purchase threshold, the CO must check the List of Products Requiring Contractor Certification as to Forced or Indentured Child Labor (the List) on the Department of Labor website. Appearance of a product on the List is not a bar to purchase of any such product mined, produced, or manufactured in the identified country, but rather is an alert that there is a reasonable basis to believe that such product may have been mined, produced, or manufactured by forced or indentured child labor.
- (b) The requirements of this subpart that result from the appearance of any end product on the List do not apply to a solicitation or contract if the identified country of origin on the List is:
  - (1) Canada, and the anticipated value of the acquisition is \$25,000 or more (see subpart 9.4 Trade Agreements);
  - (2) Israel, and the anticipated value of the acquisition is \$50,000 or more (see subpart 9.4 Trade Agreements);
  - (3) Mexico, and the anticipated value of the acquisition is \$102,280 or more (see subpart 9.4 Trade Agreements); or
  - (4) Armenia, Aruba, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, the Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Singapore, Slovak Republic, Romania, Slovenia, Spain, Sweden, Switzerland, Taiwan, Ukraine or the United Kingdom and the anticipated value of the acquisition is \$174,000 or more (see subpart 9.4 Trade Agreements)
- (c) Except as provided in paragraph (b) of this section, before the CO may make an award for an end product (regardless of country of origin) of a type identified by country of origin on the List the offeror must certify that—
  - (1) It will not supply any end product on the List that was mined, produced, or manufactured in a country identified on the List for that product, as specified in the solicitation by the CO in the Certification Regarding Knowledge of Child Labor for Listed End Products; or
  - (2) It has made a good faith effort to determine whether forced or indentured child labor was used to mine, produce, or manufacture any end product to be furnished under the contract that is on the List and was mined, produced, or manufactured in a country identified on the List for that product; and
  - (3) On the basis of those efforts, the offeror is unaware of any such use of child labor.
- (d) Absent any actual knowledge that the certification is false, the CO must rely on the offerors certifications in making award decisions.
- (e) Whenever a CO has reason to believe that forced or indentured child labor was used to mine, produce, or manufacture an end product furnished pursuant to a contract awarded subject to the certification required in paragraph (c) of this section, the CO must refer the matter for investigation by the agency's Inspector General, the Attorney General, or the Secretary of the Treasury, whichever is determined appropriate in accordance with agency procedures, except to the extent that the end product is from the country listed in paragraph (b) of this section, under a contract exceeding the applicable threshold.
- (f) Proper certification will not prevent the head of an agency from imposing remedies in accordance with BPI 10.1.11.1(d) if it is later discovered that the contractor has furnished an end product or component that has in fact been mined, produced, or manufactured, wholly or in part, using forced or indentured child labor.

### 10.1.11.3 Contract Clause

The CO shall include clause 10-24, Child Labor-Cooperation with Authorities and Remedies, in solicitations and contracts for the acquisition of supplies.

#### 10.1.12 Establishing Paid Sick Leave for Federal Contractors

This subsection prescribes policies and procedures to implement E.O. 13706, Establishing Sick Leave for Federal Contractors, dated September 7, 2015, and Department of Labor implementing regulations at 29 CFR part 13.

##### 10.1.12.1 Definitions

As used in this subsection (in accordance with 29 CFR 13.2) –

*Accrual year* means the 12-month period during which a contractor may limit an employee's accrual of paid sick leave to no less than 56 hours (see 29 CFR 13.5(b)(1)).

*Certification issued by a health care provider* has the meaning given in 29 CFR 13.2.

*Employee* means -

- (1) Any person engaged in performing work on or in connection with a contract covered by E.O. 13706, and
  - (i) Whose wages under such contract are governed by the Service Contract Labor Standards statute (41 U.S.C. chapter 67), the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, subchapter IV), or the Fair Labor Standards Act (29 U.S.C. chapter 8);
  - (ii) Including employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions;
  - (iii) Regardless of the contractual relationship alleged to exist between the individual and the employer; and
  - (iv) Includes any person performing work on or in connection with the contract and individually registered in a bona fide apprenticeship or training program registered with the Department of Labor's Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.
- (2) An employee performs on a contract if the employee directly performs the specific services called for by the contract; and
- (3) An employee performs in connection with a contract if the employee's work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

*Health care provider* has the meaning given in 29 CFR 13.2.

*Multiemployer plan* means a plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer.

*Paid sick leave* means compensated absence from employment that is required by E.O. 13706 and 29 CFR part 13.

##### 10.1.12.2 Policy



- (a) Contractors are required to allow employees performing work on or in connection with a contract covered by E.O. 13706 to accrue and use paid sick leave in accordance with the E.O. and 29 CFR part 13.
- (b) *Interaction with other laws.* Nothing in E.O. 13706 or 29 CFR part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under E.O. 13706 and 29 CFR part 13. For additional details regarding interaction with the Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, the Family and Medical Leave Act, and State and local paid sick time laws, see 29 CFR 13.5(f)(2) through (4).
- (c) *Interaction with paid time off policies.* In accordance with 29 CFR 13.5(F)(5)(i), the paid sick leave requirements of E.O. 13706 and 29 CFR part 13 may be satisfied by a contractor's voluntary paid time off policy, whether provided pursuant to a collective bargaining agreement or otherwise, where the voluntary paid time off policy meets or exceeds the requirements. For additional details regarding paid time off policies, see 29 CFR (f)(5)(ii) and (iii).
- (d) Unless otherwise provided in this subsection, compliance is the responsibility of the contractor and enforcement is the responsibility of the Department of Labor.

#### 10.1.12.3 Applicability

- (a) This subsection applies to –
  - (1) Contracts that –
    - (i) Are covered by the Service Contract Labor Standards statute (41 U.S.C. chapter 67, formerly known as the Service Contract Act, BPI subpart 10.2);
    - (ii) Are covered by the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, Subchapter IV, formerly known as the Davis Bacon Act, BPI subpart 10.3); and
    - (iii) Require performance in whole or in part within the United States. When performance is in part within and part outside the United States, this subsection applies to the part of the contract which is performed within the United States; and
  - (2) Employees performing on or in connection with such contracts whose wages are governed by the Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, or the Fair Labor Standards Act, including employees who qualify for an exemption from the Fair Labor Standards Act's minimum wage and overtime provisions.
- (b) Exclusions. The following are excluded from coverage of this subsection –
  - (1) Contracts for the manufacturing or furnishing of materials, supplies, or equipment to Bonneville.
  - (2) Contracts and agreements with Indian tribes.
  - (3) Employees performing in connection with contracts for less than 20 percent of their work hours in a given workweek. This exclusion is inapplicable to employees performing on contracts covered by the E.O., i.e., those employees directly engaged in performing the specific work called for by the contract, at any point during the workweek. (see 29 CFR 13.4(e)).
  - (4) Until the earlier date the agreement terminates or January 1, 2020, employees whose covered work is governed by a collective bargaining agreement ratified before September 30, 2016, that –

- (i) Already provides 56 hours (or 7 days, if the agreement refers to days rather than hours) of paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year; or
  - (ii) Provides less than 56 hours (or 7 days, if the agreement refers to days rather than hours) of paid sick time (or paid time off that may be used for reasons related to sickness or health care) each year, *provided* that each year the contractor provides covered employees with the difference between 56 hours (or 7 days) and the amount provided under the existing agreement in accordance with 29 CFR 13.4(f).
- (5) Bonneville's unilateral exercise of a pre-negotiated option to renew an existing contract that does not contain the clause 10-22, will not automatically trigger the application of that clause (see definition of *new contract* at 29 CFR 13.2)

#### 10.1.12.4 Paid Sick Leave for Federal Contractors and Subcontractors

In accordance with 29 CFR 13.5, and by operations of the clause 10-22, Paid Sick Leave Under Executive Order 13706, the following contractor requirements apply –

- (a) **Accrual.**
- (1) Contractors are required to permit an employee to accrue not less than one (1) hour of paid sick leave for every 30 hours worked on or in connection with a contract covered by the E.O. (see 29 CFR 13.5(a)(1)).
  - (2) Contractors are required to inform each employee, in writing, of the amount of paid sick leave the employee has accrued but not used no less than once each pay period or each month, whichever interval is shorter, as well as upon a separation from employment and upon reinstatement of paid sick leave, pursuant to 29 CFR 13.5(b)(4) (see 29 CFR 13.5(a)(2)).
  - (3) Contractors may choose to provide employees with at least 56 hours of paid sick leave at the beginning of each accrual year rather than allowing the employee to accrue such leave based on hours worked over time (see 29 CFR 13.5(a)(3)).
- (b) **Maximum accrual, carryover, reinstatement, and payment for unused leave.**
- (1) Contractors may limit the amount of paid sick leave employees are permitted to accrue to not less than 56 hours in each accrual year (see 29 CFR 13.5(b)(1)).
  - (2) Paid sick leave shall carry over from one accrual year to the next. Paid sick leave carried over from the previous accrual year shall not count toward any limit the contractor sets on annual accrual (see 29 CFR 13.5(b)(2)).
  - (3) Contractors may limit the amount of paid sick leave an employee is permitted to have available for use at any point to not less than 56 hours (see 29 CFR 13.5(b)(3)).
  - (4) Contractors are required to reinstate paid sick leave for employees only when rehired by the same contractor within 12 months after a job separation (see 29 CFR 13.5(b)(4)).
  - (5) Nothing in E.O. 13706 or 29 CFR part 13 requires contractors to make a financial payment to an employee for accrued paid sick leave that has not been used upon a separation from employment. If a contractor nevertheless makes such a payment in an amount equal to or greater than the value of the pay and benefits the employee would have received pursuant to 29 CFR 13.5 (c)(3) had the employee used the paid sick leave, the contractor is relieved of the obligation to reinstate an employee's accrued paid sick leave upon rehiring the employee within 12 months of the separation pursuant to 29 CFR 13.5(b)(4) (see 29 CFR 13.5(b)(5)).
- (c) **Use.** Contractors are required to permit an employee to use paid sick leave in accordance with 29 CFR 13.5(c).
- (d) **Request for paid sick leave.** Contractors are required to permit an employee to use any or all of the employee's available paid sick leave upon the oral or written request of an

employee that includes information sufficient to inform the contractor that the employee is seeking to be absent from work for a purpose described in 29 CFR 13.5(c) and, to the extent reasonably feasible, the anticipated duration of the leave (see 29 CFR 13.5(d)).

- (e) *Certification or documentation for leave of 3 or more consecutive full workdays.* Contractors may require certification issued by a health care provider to verify the need for paid sick leave used for a purpose described in 29 CFR 15.5(c)(1)(i), (ii), or (iii), or documentation from an appropriate individual or organization to verify the need for paid sick leave used for a purpose described in 29 CFR 13.5(c)(1)(iv), only if the employee is absent for 3 or more consecutive full workdays (see 29 CFR 13.5(e)).

#### 10.1.12.5 Prohibited Acts

In accordance with 29 CFR 13.6, and by operation of the clause 10-22, Paid Sick Leave Under Executive Order 13706, a contractor may not –

- (a) Interfere with an employee’s accrual or use of paid sick leave as required by E.O. 13706 or 29 CFR part 13 (see 29 CFR 13.6(a));
- (b) Discharge or in any other manner discriminate against any employee for –
- (1) Using, or attempting to use, paid sick leave as provided for under E.O. 13706 and 29 CFR part 13;
  - (2) Filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under E.O. 13706 or 29 CFR part 13;
  - (3) Cooperating in any investigation or testifying in any proceeding under E.O. 13706 or 29 CFR part 13; or
  - (4) Informing any other person about his or her rights under E.O. 13706 or 29 CFR part 13 (see 29 CFR 13.6(b)); or
- (c) Fail to make and maintain or to make available to authorized representatives of the Wage and Hour Division records for inspection, copying, and transcription as required by 29 CFR 13.25, or otherwise fail to comply with the requirements of 29 CFR 13.25 (see 29 CFR 13.6(c)).

#### 10.1.12.6 Waiver of Rights

Employees cannot waive, nor may contractors induce employees to waive, their rights under E.O. 13706 or 29 CFR part 13 (see 29 CFR 13.7).

#### 10.1.12.7 Multiemployer Plans or other Funds, Plans or Programs

Contractors may fulfill their obligations under E.O. 13706 and 29 CFR part 13 jointly with other contractors through a multiemployer plan, or may fulfill their obligations through an individual fund, plan, or program (see 29 CFR 13.8).

#### 10.1.12.8 Enforcement of Executive Order 13706 Paid Sick Leave Requirements

- (a) *Authority.* Section 4 of the E.O. grants to the Secretary of Labor the authority for investigating potential violations of, and obtaining compliance with, the E.O. The Secretary of Labor, in promulgating the implementing regulations required by section 3 of the E.O. has assigned this authority to the Administrator of the Wage and Hour Division. Bonneville does not have the authority to conduct compliance investigations under 20 CFR part 13 as implemented in this subsection. This does not limit the CO’s authority to otherwise enforce the terms and conditions of the contract.
- (b) *Complaints.*

- (1) Complaints are filed with the Administrator of the Wage and Hour Division and may be brought by any person (including the employee), entity, or organization that believes a violation of this subsection has occurred.
- (2) The identity of any individual who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the individual's identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the individual, unless otherwise authorized by law.
- (3) If the CO receives a complaint or is notified that the Administrator of the Wage and Hour Division has received a complaint, the CO shall report, within 14 days to the Department of Labor, Wage and Hour Division, Office of Government Contracts, 200 Constitution Avenue N.W., Room S3006, Washington D.C. 20210, all of the following information that is available without conducting an investigation:
  - (i) The complaint or description of the alleged violation.
  - (ii) Available statements by the employee, contractor, or any other person regarding the alleged violation.
  - (iii) Evidence that clause 10-22, Paid Sick Leave Under Executive Order 13706, was included in the contract.
  - (iv) Information concerning known settlement negotiations between the parties, if applicable.
  - (v) Any other relevant facts known to the CO or other information requested by the Wage and Hour Division.
- (c) *Investigations.* Complaints will be investigated by the Administrator of the Wage and Hour Division, if warranted, in accordance with the procedures in 29 CFR 13.43.
- (d) *Remedies and sanctions.*
  - (1) *Withholding or suspending payment.* The CO shall, upon his or her own action or upon written request by the Administrator of the Wage and Hour Division –
    - (i)
      - (A) Withhold or cause to be withheld from the contractor under the contract covered by the E.O. or any other Federal contract with the same contractor, so much of the accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of E.O. 13706 or 29 CFR part 13; and
      - (B) In the event of any such violation, the CO may, after authorization or by direction of the Administrator of the Wage and Hour Division and written notification to the contractor, take action to cause suspension of any further payment, advance, or guarantee of funds until such violations have ceased; or
    - (ii) Take action to cause suspension of any further payment, advance, or guarantee of funds to a contractor that has failed to make available for inspection, copying, and transcription any of the records identified in 29 CFR 13.25.
  - (2) *Civil actions to recover greater underpayments than those withheld.*
    - (i) If the payments withheld under 29 CFR 13.11(c), are insufficient to reimburse all monetary relief due, or if there are no payments to withhold, the Department of Labor, following a final order of the Secretary of Labor, may bring an action against the contractor in any court of competent jurisdiction to recover the remaining amount.
    - (ii) The Department of Labor shall, to the extent possible, pay any sums it recovers in this manner directly to the employee who suffered the violation(s) of 29 CFR 13.6(a) or (b).

- (iii) Any sum not paid to an employee because of inability to do so within 3 years shall be transferred into the Treasury of the United States as miscellaneous receipts.
- (3) *Termination.* COs may consider the failure of a contractor to comply with the requirements of E.O. 13706 and 29 CFR part 13 as grounds for termination for default or cause.
- (4) *Debarment.*
  - (i) The Department of Labor may initiate debarment proceedings under 29 CFR 13.44(d) and 29 CFR 13.52 whenever a contractor is found to have disregarded its obligations under E.O. 13706 or 29 CFR part 13.
  - (ii) COs shall notify the HCA and Office of General Counsel when a contractor commits significant violations of contract terms and conditions related to this subsection.
- (5) Remedies for interference.
  - (i) When the Administrator of the Wage and Hour Division determines that a contractor has interfered with an employee's accrual or use of paid sick leave in violation of 29 CFR 13.6(1), the Administrator of the Wage and Hour Division will notify the contractor and the relevant contracting office of the interference and request that the contractor remedy the violation.
  - (ii) If the contractor does not remedy the violation, the Administrator of the Wage and Hour Division shall direct the contractor to provide any appropriate relief to the affected employee(s) in the investigative findings letter issued pursuant to 29 CFR 13.51. Such relief may include –
    - (A) Any pay and/or benefits denied or lost by reason of the violation;
    - (B) Other actual monetary losses sustained a direct result of the violation; or
    - (C) Appropriate equitable or other relief.
  - (iii) Payment of liquidated damages in an amount equaling any monetary relief may also be directed unless such amount is reduced by the Administrator of the Wage and Hour Division because the violation was in good faith and the contractor had reasonable grounds for believing it had not violated the E.O. or 29 CFR part 13.
  - (iv) The Administrator of the Wage and Hour Division may additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief. Upon the final order of the Secretary of Labor that monetary relief is due, the Administrator of the Wage and Hour Division may direct the relevant CO to transfer the withheld funds to the Department of Labor for disbursement.
- (6) Remedies for discrimination.
  - (i) When the Administrator of the Wage and Hour Division determines that a contractor has discriminated against an employee in violation of 29 CFR 13.6(b), the Administrator of the Wage and Hour Division will notify the contractor and the relevant contracting office of the discrimination and request that the contractor remedy the violation.
  - (ii) If the contractor does not remedy the violation, the Administrator of the Wage and Hour Division shall direct the contractor to provide appropriate relief to the affected employee(s) in the investigative findings letter issued pursuant to 29 CFR 13.51. Such relief may include, but is not limited to –
    - (A) Employment;
    - (B) Reinstatement;
    - (C) Promotion;
    - (D) Restoration of leave, or lost pay and/or benefits.

- (iii) Payment of liquidated damages in the amount equaling any monetary relief may also be directed unless such amount is reduced by the Administrator of the Wage and Hour Division because the violation was in good faith and the contractor had reasonable grounds for believing the contractor had not violated the E.O. or 29 CFR part 13.
  - (iv) The Administrator of the Wage and Hour Division may additionally direct that payments due on the contract or any other contract between the contractor and the Federal Government be withheld as may be necessary to provide any appropriate monetary relief. Upon the final order of the Secretary of Labor that monetary relief is due, the Administrator of the Wage and Hour Division may direct the relevant contracting office to transfer the withheld funds to the Department of Labor for disbursement.
- (7) *Recordkeeping.* When a contractor fails to make, maintain, or protect records; or produce records when requested by authorized representatives of the Administrator of the Wage and Hour Division, or otherwise comply with the requirements of 29 CFR 13.25 in violation of 29 CFR 13.6(c), the Administrator of the Wage and Hour Division will request that the contractor remedy the violation. If the contractor fails to produce records upon request, the CO shall, upon his or her own action or upon direction of an authorized representative of the Department of Labor, take such action as may be necessary to cause suspension of any further payment, advance, or guarantee of funds on the contract until such time as the violations are discontinued.
- (e) *Inclusion of contract clause.* If the contracting office fails to include the clause 10-22 in a contract to which the E.O. applies, the CO on his or her own initiative or within 15 days of notification by an authorized representative of the Department of Labor, shall incorporate the contract clause retroactive to commencement of performance under the contract through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination).

#### 10.1.12.9 Contract Clause

The CO shall include the clause 10-22, Paid Sick Leave Under Executive Order 13706, in all solicitations and contracts that include the clause 10-3, Service Contract Labor Standards, or 10-7, Construction Wage Rate Requirements, where work is to be performed, in whole or in part, inside the United States. This clause shall not be used in solicitations and contracts with Indian tribes.

## 10.2 LABOR POLICIES FOR SERVICE CONTRACTS

This subpart prescribes policies and procedures implementing the provisions of the Service Contract Labor Standards statute, (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).

### 10.2.1 Policy

- (a) Service contracts over \$2,500 shall contain mandatory provisions regarding minimum wages and fringe benefits, safe and sanitary working conditions, and notification to employees of the minimum allowable compensation. Under 41 U.S.C. § 6707(d), service contracts may not exceed 5 years.
- (b) Contractors performing on service contracts in excess of \$2,500 to which no predecessor contractor's collective bargaining agreement applies shall pay their employees at least the wages and fringe benefits found by the Department of Labor to prevail in the locality or, in

the absence of a wage determination, the minimum wage set forth in the Fair Labor Standards Act.

- (c) Successor contractors performing on contracts in excess of \$2,500 for substantially the same services performed in the same locality must pay wages and fringe benefits (including accrued wages and benefits and prospective increases) at least equal to those contained in any bona fide collective bargaining agreement entered into under the predecessor contract. This requirement is self-executing and is not contingent upon incorporating a wage determination or the wage and fringe benefit terms of the predecessor contractor's collective bargaining agreement in the successor contract. This requirement will not apply if the Secretary of Labor determines –
  - (1) After a hearing, that the wages and fringe benefits are substantially at variance with those which prevail for services of a similar character in the locality; or
  - (2) That the wages and fringe benefits are not the result of arm's length negotiations.
- (d) The CO shall refer to 29 CFR, the Department of Labor website, and to the Department of Labor's User's Guide for procedures and instruction on labor matters.

### 10.2.2 Service Contract Labor Standards Statute

This subpart applies to contracts with the principal purpose 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.

#### 10.2.2.1 Policy

The Service Contract Labor Standards statute does not apply to any purchase:

- (a) Valued at or less than \$2,500;
- (b) For construction, alteration, or repair of public buildings or public works, including painting and decorating;
- (c) For dismantling, demolition or removal of improvements when purchased as part of a construction contract (see subsection 24.4.1);
- (d) For transporting freight or personnel by vessel, aircraft, bus, truck, express, railroad, or oil or gas pipeline where published tariff rates are in effect;
- (e) For furnishing services by radio, telephone, telegraph, or cable companies subject to the Communications Act of 1934;
- (f) For utility services;
- (g) With an individual (rather than a firm with multiple employees);
- (h) Principally established for the maintenance, calibration or repair of certain items of automated data processing, scientific, medical, and office/business equipment; or
- (i) Where the predominant purpose is to provide executive, administrative or professional services as defined in 29 CFR 541.

#### 10.2.2.2 Procedures

- (a) For service contracts over \$2,500, the statute requires CO to incorporate into the contract a requirement to pay prevailing wages and benefits issued by DOL in the form of a wage determination. The applicable wage determination must be identified and incorporated into the contract.
- (b) The CO shall obtain wage determinations for the following service contracts:
  - (1) Each new solicitation and contract in excess of \$2,500.
  - (2) Each contract modification which brings the contract above \$2,500 and:
    - (i) Extends the existing contract pursuant to an option clause or otherwise; or

- (ii) Changes the scope of the contract whereby labor requirements are affected significantly.
- (3) Each multiple year contract in excess of \$2,500 upon:
  - (i) Annual anniversary date if the contract is subject to annual appropriations; or
  - (ii) Biennial anniversary date if the contract is not subject to annual appropriations and its proposed term exceeds 2 years -- unless otherwise advised by the Wage and Hour Division.
- (c) Wage determinations are available online and are archived at the Department of Labor's Wage Determinations OnLine site at <http://www.wdol.gov>.
- (d) Requests for limitations, variances, tolerances, and exemptions from the statute shall be drafted by the CO and submitted through the CO's supervisor and the HCA for approval by the Department of Labor.
- (e) The CO must monitor the Department of Labor's Wage Determinations database regularly to determine if a selected wage determination has been revised and may be applicable for contract action.
- (f) The CO shall refer all contractor questions relating to the application and interpretation of wage determinations (including the classifications therein) and the interpretation of the Department of Labor regulations in this subsection to the Administrator, Wage and Hour Division.
- (g) Prior to performance of an applicable contract, the CO shall direct the contractor to the DOL/OFCCP site for information and copies of the required notices. If the contractor is unable to download and print copies of the required notice, the CO shall provide hard copies upon the contractor's request. Contractor failure to post the required notice is a breach of the contract per Clause 10-3(g).
- (h) The CO shall refer to 29 CFR, the Department of Labor website, and to the Department of Labor's User's Guide for procedures and instruction on labor matters.

#### 10.2.2.3 Contract Clauses

- (a) The CO shall include the clause 10-3, Service Contract Labor Standards, in solicitations and contracts for services covered by the statute (see 10.2.2.1 for exemptions). Clause 10-3 may not be incorporated by reference.
- (b) The CO shall include the clause 10-5, Service Contract Wage Determination, in solicitations and contracts for services to identify and to incorporate the wage determination applicable to the contract.

### 10.2.3 Compensation

#### 10.2.3.1 Minimum Wage

##### 10.2.3.1.1 Policy

Federal contracts are subject to minimum wage requirements regardless of contract amount under the Fair Labor Standards Act, Executive Order 13658, Minimum Wage for Contractors, and OMB Policy Memorandum M-14-09, dated June 12, 2014. Each service employee, laborer or mechanic in the performance of a federal contract shall be paid not less than the applicable federal minimum wage. This requirement shall be included in all subcontracts.

##### 10.2.3.1.2 Procedures

- (a) The CO shall assure that minimum wages paid under federal contracts conform to the applicable annual minimum wage as determined by the Secretary of Labor as published in the Federal Register or on the Department of Labor website.



- (b) The CO shall annually adjust the contract price or contract unit price only for the increase in labor costs resulting from the annual inflation increases in the minimum wage beginning on January 1, 2016. The CO shall not adjust the contract price for any costs other than annual inflation adjustments. The CO shall not provide price adjustments which would result in duplicate price adjustments under the Service Contract Labor Standards statute or the Construction Wage Rate Requirements statute.
- (c) The CO shall refer to 29 CFR, the Department of Labor website, and to the Department of Labor's User's Guide for procedures and instruction on labor matters.

#### 10.2.3.1.3 Contract Clause

The CO shall include Clause 10-28 Minimum Wage for Federal Contracts in all solicitations and contracts unless the work is to be performed in whole or in part outside the United States (the 50 States and the District of Columbia) and includes the clause 10-3, Service Contract Labor Standards, or 10-7, Construction Wage Rate Requirements.

#### 10.2.3.2 Overtime Compensation

##### 10.2.3.2.1 Policy

- (a) This subpart prescribes policies and procedures for applying the requirements of 40 U.S.C. Chapter 37, Contract Work Hours and Safety Standards to contracts that may require or involve laborers or mechanics. In this subpart, the term "laborers or mechanics" includes apprentices, trainees, helpers, watchmen, guards, firefighters, fireguards, and workmen who perform services in connection with dredging or rock excavation in rivers or harbors, but does not include any employee employed as a seaman.
- (b) 40 U.S.C. Chapter 37, Contract Work Hours and Safety Standards, requires that contracts that require the employment of laborers or mechanics contain a clause specifying that no laborer or mechanic doing any part of the work contemplated by the contract shall be required or permitted to work more than 40 hours in any workweek unless paid for all additional hours at not less than 1 1/2 times the basic rate of pay.
- (c) Contractors shall perform all contracts, so far as practicable, without using overtime, particularly as a regular employment practice, except when lower overall costs to Bonneville will result or when it is necessary to meet urgent program needs. Any approved overtime, extra-pay shifts, and multi-shifts should be scheduled to achieve these objectives.

##### 10.2.3.2.2 Procedure

The CO shall refer to 29 CFR, the Department of Labor website, and to the Department of Labor's User's Guide for procedures and instruction on labor matters.

##### 10.2.3.2.3 Contract Clause

The CO shall include Clause 10-21 Contract Work Hours and Safety Standards – Overtime Compensation in all solicitations and contracts (including, for this purpose, basic ordering agreements) when the contract may require or involve the employment of laborers or mechanics.

#### 10.2.3.3 Price Adjustment

##### 10.2.3.3.1 Procedure

The CO shall refer to 29 CFR, the Department of Labor website, and to the Department of Labor's User's Guide for procedures and instruction on labor matters.

#### 10.2.3.3.2 Contract Clauses

- (a) The CO shall include a clause similar to the clause 10-4, Fair Labor and Service Contract Standards – Price Adjustment, in solicitations and contracts if the contract is expected to be a firm-fixed-price, or time-and-materials, service contract containing Clause 10-3 Service Contract Labor Standards and has a period of performance exceeding two years or will include option(s) for which a differing wage determination may apply.
- (b) The clause 10-4 shall be included in contracts subject to area prevailing wage determination, an incumbent contractor’s collective bargaining agreement (CBA) or in the absence of either, subject to the minimum wage identified in the Fair Labor Standards Act.
- (c) If an economic price adjustment clause such as the clause 7-2, Economic Price Adjustment – Supplies, 7-3, Economic Price Adjustment – Labor and Materials, or 7-4 Price Adjustment is also used, the clauses must be edited to protect against duplication of labor-related price adjustments.

#### 10.2.4 Nondisplacement of Qualified Workers

##### 10.2.4.1 Policy

Service contracts are subject to Executive Order 13495 Nondisplacement of Qualified Workers Under Service Contracts, dated January 30, 2009 and related Secretary of Labor regulations and instructions under 29 CFR Part 9.

##### 10.2.4.2 Procedure

COs are directed to subsection 23.1.8 for policy and procedures on nondisplacement of qualified workers under service contracts.

### 10.3 LABOR POLICIES FOR CONSTRUCTION CONTRACTS

#### 10.3.1 Policy

- (a) Contracts for dismantling, demolition, or removal of improvements are subject to either the Service Contract Labor Standards statute (41 U.S.C. § 6701-6707) or the Construction Wage Rate Requirements statute (40 U.S.C. § 3141-3148). If the contract is solely for dismantling, demolition, or removal of improvements, the Service Contract Labor Standards statute 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 Bonneville work forces, then the Construction Wage Rate Requirements statute applies to the contract for dismantling, demolition, or removal.
- (b) In addition to the requirements identified in subpart 10.1, General Labor Policies, the 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 subpart 2.2 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 Bonneville work 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;
  - (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; and
  - (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.
- (c) Application to contracts other than construction:
- (1) 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:
    - (i) The construction work is to be performed on a public building or public work;
    - (ii) 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
    - (iii) 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. If requirements are segregable as construction work, the CO shall include in such solicitations and contracts the applicable construction labor clauses required in this subpart and identify the item or items of the contract schedule to which the clauses apply.
  - (2) The requirements of this subpart do not apply if:
    - (i) The construction work is incidental to the furnishing of supplies, equipment, or services; or
    - (ii) 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.

### 10.3.2 Construction Wage Rate Requirements

#### 10.3.2.1 Policy

40 U.S.C. chapter 31, subchapter IV, Construction Wage Rate Requirements statute, formerly known as the Davis-Bacon Act, provides that contracts in excess of \$2,000 to which the United States or the District of Columbia is a party for construction, alteration, or repair (including painting and decorating) of public buildings or public works within the United States, shall contain a clause 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.

#### 10.3.2.2 Procedures

- (a) For construction contracts over \$2,000, the statute requires COs to incorporate into the contract a requirement to pay prevailing wages and benefits issued by Department of Labor

in the form of a wage determination. The applicable wage determination must be identified and incorporated into the contract.

- (b) The CO shall obtain wage determinations for the following construction contracts:
  - (1) Each new solicitation and contract in excess of \$2,000.
  - (2) Each contract modification which brings the contract above \$2,000, and:
    - (i) Extends the existing contract pursuant to an option clause or otherwise; or
    - (ii) Changes the scope of the contract whereby labor requirements are affected significantly.
  - (3) Each multiple year contract in excess of \$2,000 upon:
    - (i) Annual anniversary date if the contract is subject to annual appropriations; or
    - (ii) Biennial anniversary date if the contract is not subject to annual appropriations and its proposed term exceeds 2 years – unless otherwise advised by the Administrator of the Wage and Hour Division.
- (c) Wage determinations are available online at the Department of Labor's Wage Determinations OnLine site.
- (d) Requests for limitations, variances, tolerances, and exemptions from the statute shall be drafted by the CO and submitted through the CO's supervisor and the HCA for approval by the Department of Labor.
- (e) The CO shall monitor the Department of Labor's Wage Determinations database regularly to determine if a selected wage determination has been revised prior to the expiration of the "effective date" for that particular contract action.
- (f) Prior to performance of an applicable contract, the CO shall direct the contractor to the DOL/OFCCP site for information and copies of the Wage Rate Requirements (Davis-Bacon Act) posters. If the contractor is unable to download and print copies of the required notice, the CO shall provide hard copies upon the contractor's request. Contractor failure to post the required notice is a breach of the contract per Clause 10-7(a).
- (g) The CO shall refer all questions relating to the application and interpretation of wage determinations (including the classifications therein) and the interpretation of the Department of Labor regulations in this subsection to the Administrator of the Wage and Hour Division.
- (h) The CO shall refer to 29 CFR, the Department of Labor website, and to the Department of Labor's User's Guide for procedures and instruction on labor matters.

### 10.3.2.3 Contract Clauses

- (a) The CO shall include the clause 10-7, Construction Wage Rate Requirements in solicitations, contracts and orders/releases for construction in excess of \$2,000.
- (b) The CO shall include the clause 10-8, Withholding – Labor Violations, in solicitations, contracts and orders/releases for construction in excess of \$2,000.
- (c) The CO shall include the clause 10-9, Payrolls and Basic Records, in solicitations, contracts and orders/releases in excess of \$2,000.
- (d) The CO shall include the clause 10-10, Apprentices, Trainees and Helpers, in solicitations, contracts and orders/releases for construction in excess of \$2,000.
- (e) The CO shall include the clause 10-11, Subcontracts (Labor Standards), in solicitations, contracts and orders/releases for construction in excess of \$2,000.
- (f) The CO shall include the clause 10-12, Certification of Eligibility, in solicitations, contracts and orders/releases for construction in excess of \$2,000.
- (g) The CO shall include the clause 10-13, Construction Wage Determination, in solicitations, contracts and orders/releases for construction in excess of \$2,000.

- (h) The CO shall include the clause 10-14, Approval of Wage Rates, in solicitations, contracts and orders/releases for construction in excess of \$2,000 where labor is provided on a cost-reimbursement basis.
- (i) The CO shall include the clause 10-32 Construction Wage Rate Requirements for Oregon Port of Morrow Lease Finance Projects, in solicitations, contracts and orders/releases for construction when work is performed in Oregon and the Port of Morrow is the lease financier.

### 10.3.3 Kickbacks

#### 10.3.3.1 Policy

- (a) The Copeland 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.
- (b) Contractors are required to comply with the requirements of the Copeland Act and its implementing regulations as set forth by the Department of Labor, including preparing the weekly statements per 29 CFR Part 3. Contractors shall submit the statements to Bonneville upon the CO's request.

#### 10.3.3.2 Procedure

The CO shall require submission of the weekly statements as set forth in 29 CFR Part 3 upon receipt of information indicating that there may be unlawful activities as described in DOL regulations. The CO shall consult with the Department of Labor's website for procedures addressing alleged violations of the Copeland Act.

#### 10.3.3.3 Contract Clause

The CO shall include the clause 10-23, Compliance with Copeland Act Requirements, in solicitations, contracts and orders/releases for construction in excess of \$2,000.

### 10.3.4 Compensation

#### 10.3.4.1 Minimum Wage

##### 10.3.4.1.1 Policy

Construction contracts subject to the Construction Wage Rate Requirements statute are required to pay service employees, laborers and mechanics not less than the applicable minimum wage under Executive Order 13658 as described in 10.2.3.1.1.

##### 10.3.4.1.2 Procedures

- (a) The CO shall assure that minimum wages paid under federal contracts conform to the applicable annual minimum wage as determined by the Secretary of Labor as published in the Federal Register or on the Department of Labor website.
- (b) The CO shall annually adjust the contract price or contract unit price only for the increase in labor costs resulting from the annual inflation increases in the minimum wage beginning on January 1, 2016. The CO shall not adjust the contract price for any costs other than annual inflation adjustments. The CO shall not provide price adjustments which would result in

duplicate price adjustments under the Service Contract Labor Standards statute or the Construction Wage Rate Requirements statute.

- (c) The CO shall refer to 29 CFR, the Department of Labor website, and to the Department of Labor's User's Guide for procedures and instruction on labor matters.

#### 10.3.4.1.3 Contract Clause

The CO shall include the clause 10-28, Minimum Wage for Federal Contracts, in all solicitations and contracts, except where work is to be performed in whole or in part outside the United States (the 50 States and the District of Columbia) and includes clause 10-7, Construction Wage Rate Requirements, or clause 10-3, Service Contract Labor Standards.

#### 10.3.4.2 Overtime Compensation

##### 10.3.4.2.1 Policy

- (a) Construction contracts are subject to the overtime requirements of the Contract Work Hours and Safety Standards Act when the contract requires or involves the employment of laborers or mechanics. The Contract Work Hours and Safety Standards Act requires payment of overtime compensation for work in excess of a 40 hour work week in specified contracts.
- (b) This subpart prescribes policies and procedures for applying the requirements of 40 U.S.C. Chapter 37, Contract Work Hours and Safety Standards to contracts that may require or involve laborers or mechanics. In this subpart, the term "laborers or mechanics" includes apprentices, trainees, helpers, watchmen, guards, firefighters, fireguards, and workmen who perform services in connection with dredging or rock excavation in rivers or harbors, but does not include any employee employed as a seaman.
- (c) 40 U.S.C. Chapter 37, Contract Work Hours and Safety Standards, requires that contracts that require the employment of laborers or mechanics contain a clause specifying that no laborer or mechanic doing any part of the work contemplated by the contract shall be required or permitted to work more than 40 hours in any workweek unless paid for all additional hours at not less than 1 1/2 times the basic rate of pay.
- (d) Contractors shall perform all contracts, so far as practicable, without using overtime, particularly as a regular employment practice, except when lower overall costs to Bonneville will result or when it is necessary to meet urgent program needs. Any approved overtime, extra-pay shifts, and multi-shifts should be scheduled to achieve these objectives.

##### 10.3.4.2.2 Procedure

The CO shall refer to 29 CFR, the Department of Labor website, and to the Department of Labor's User's Guide for procedures and instruction on labor matters.

##### 10.3.4.2.3 Contract Clause

The CO shall include the clause 10-21, Contract Work Hours and Safety Standards – Overtime Compensation, in all solicitations and contracts (including, for this purpose, basic ordering agreements) when the contract may require or involve the employment of laborers or mechanics; unless one, or more of the following conditions exist:

- (a) When the solicitation or contract does not require or involve the employment of laborers or mechanics;
- (b) For the acquisition of commercial items;
- (c) Valued at or below \$150,000;
- (d) For the transportation or the transmission of intelligence;

- (e) For work to be performed outside the United States, Puerto Rico, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, and Outer Continental Shelf as defined in the Outer Continental Shelf Lands Act (43 U.S.C. § 1331) (29 CFR 5.15);
- (f) For supplies that include incidental services that do not require substantial employment of laborers or mechanics; or
- (g) Exempt under regulations of the Secretary of Labor (29 CFR 5.15).

#### 10.3.4.3 Wage Determination Price Adjustment

##### 10.3.4.3.1 Policy

- (a) The Department of Labor may modify a wage determination to make it current by specifying only the items being changed or by reissuing the entire determination with changes incorporated.
- (b) All project wage determination modifications expire on the same day as the original determination. The need to include a modification of a project wage determination for the primary site of the work in a solicitation is determined by the time of receipt of the modification by the contracting office. Therefore, the contracting office must annotate the modification of the project wage determination with the date and time immediately upon receipt.
- (c) The need for inclusion of the modification of a general wage determination for the primary site of the work in a solicitation is determined by the date the modified wage determination is published on the WDOL, or the date the contracting office receives actual written notice of the modification from the Department of Labor, whichever occurs first. (Note the distinction between receipt by the contracting office (modification is effective) and receipt by the CO, which may occur later.) During the course of the solicitation, the CO shall monitor the WDOL website to determine whether the applicable wage determination has been revised. Revisions published on the WDOL website or otherwise communicated to the CO are applicable and must be included in the resulting contract. Monitoring can be accomplished by use of the WDOL website's "Alert Service."

##### 10.3.4.3.2 Procedures

- (a) Each time the CO exercises an option to extend the term of a contract for construction, or a contract that includes substantial and segregable construction work, the CO must modify the contract to incorporate the most current wage determination.
- (b) If a contract with an option to extend the term of the contract has indefinite-delivery or indefinite-quantity construction requirements, the CO must incorporate the wage determination incorporated into the contract at the exercise of the option into task orders or releases issued during that option period. The wage determination will be effective for the complete period of performance of those task orders or releases without further revision.
- (c) The CO must include in fixed-price contracts a clause that specifies one of the following methods, suitable to the interest of Bonneville, to provide an allowance for any increases or decreases in labor costs that result from the inclusion of the current wage determination at the exercise of an option to extend the term of the contract:
  - (1) The CO may provide the offerors the opportunity to bid or propose separate prices for each option period. The CO must not further adjust the contract price as a result of the incorporation of a new or revised wage determination at the exercise of each option to extend the term of the contract. Generally, this method is used in construction-only contracts (with options to extend the term) that are not expected to exceed a total of 3 years.

- (2) The CO may include in the contract a separately specified pricing method that permits an adjustment to the contract price or contract labor unit price at the exercise of each option to extend the term of the contract. At the time of option exercise, the CO must incorporate a new wage determination into the contract, and must apply the specific pricing method to calculate the contract price adjustment. An example of a contract pricing method that the CO might separately specify is incorporation in the solicitation and resulting contract of the pricing data from an annually published unit pricing book (e.g., the U.S. Army Computer-Aided Cost Estimating System or similar commercial product), which is multiplied in the contract by a factor proposed by the contractor (e.g., .95 or 1.1). At option exercise, the CO incorporates the pricing data from the latest annual edition of the unit pricing book, multiplied by the factor agreed to in the basic contract. The CO must not further adjust the contract price as a result of the incorporation of the new or revised wage determination.
- (3) The CO may provide for a contract price adjustment based solely on a percentage rate determined by the CO using a published economic indicator incorporated into the solicitation and resulting contract. At the exercise of each option to extend the term of the contract, the CO will apply the percentage rate, based on the economic indicator, to the portion of the contract price or contract unit price designated in the contract clause as labor costs subject to the provision of the Construction Wage Rate Requirements statute. The CO must insert 50 percent as the estimated portion of the contract price that is labor unless the CO determines, prior to issuance of the solicitation, that a different percentage is more appropriate for a particular contract or requirement. This percentage adjustment to the designated labor costs must be the only adjustment made to cover increases in wages and/or benefits resulting from the incorporation of a new or revised wage determination at the exercise of the option.
- (4) The CO may provide a computation method to adjust the contract price to reflect the contractor's actual increase or decrease in wages and fringe benefits (combined) to the extent that the increase is made to comply with, or the decrease is voluntarily made by the contractor as a result of incorporation of, a new or revised wage determination at the exercise of the option to extend the term of the contract. Generally, this method is appropriate for use only if contract requirements are predominately services subject to the Service Contract Labor Standards statute and the construction requirements are substantial and segregable. The methods used to adjust the contract price for the service requirements and the construction requirements would be similar.
- (d) The CO shall refer to 29 CFR, the Department of Labor website, and to the Department of Labor's User's Guide for procedures and instruction on labor matters.

#### 10.3.4.3.3 Contract Clauses

- (a) The CO shall include the clause 10-29, Construction Wage Rate Requirements – Price Adjustment (None or Separately Specified Pricing Method), in solicitations and contracts if the contract is expected to be –
  - (1) A fixed-price contract subject to the Construction Wage Rate Requirements statute that will contain option provisions by which the CO may extend the term of the contract, and the CO determines the most appropriate contract price adjustment method is the method at BPI 10.3.4.3.2(c)(1) or (2); or
  - (2) A cost-reimbursable type contract subject to the Construction Wage Rate Requirements statute that will contain option provisions by which the CO may extend the term of the contract.
- (b) The CO shall include the clause 10-30, Construction Wage Rate Requirements – Price Adjustment (Percentage Method), in solicitations and contracts if the contract is expected to



be a fixed-price contract subject to the Construction Wage Rate Requirements statute that will contain option provisions by which the CO may extend the term of the contract, and the CO determines the most appropriate contract price adjustment method is the method at BPI 10.3.4.3.2(c)(3).

- (c) The CO shall include the clause 10-31, Construction Wage Rate Requirements – Price Adjustment (Actual Method), in solicitations and contracts if the contract is expected to be a fixed-price contract subject to the Construction Wage Rate Requirements statute that will contain option provisions by which the CO may extend the term of the contract, and the CO determines the most appropriate method to establish contract price is the method at BPI 10.3.4.3.2(c)(4).

### 10.3.5 Contract Termination and Debarment

#### 10.3.5.1 Policy

If a contract or subcontract is terminated for violation of the identified labor standards clauses, the CO, through the HCA and the Office of General Counsel, shall submit a report to the Administrator, Wage and Hour Division, and the Comptroller General. The report shall include:

- (a) The number of the terminated contract;
- (b) The name and address of the terminated contractor or subcontractor;
- (c) The name and address of the contractor or subcontractor, if any, who is to complete the work;
- (d) The amount and number of the replacement contract, if any; and
- (e) A description of the work.

#### 10.3.5.2 Procedures

- (a) The CO shall prepare and submit the report identified in 10.3.5.1 to the HCA within five days of the terminating a contract for a labor standard violation.
- (b) The CO shall refer to 29 CFR, the Department of Labor website, and to the Department of Labor's User's Guide for procedures and instruction on labor matters.

#### 10.3.5.3 Contract Clause

The CO shall include the clause 10-26, Contract Termination – Debarment, in solicitations and contracts and releases for construction in excess of \$2,000.

### 10.3.6 Disputes Concerning Labor Standards

#### 10.3.6.1 Policy

- (a) The areas of possible differences of opinion between COs and contractors in construction contract labor standards enforcement include:
  - (1) Misclassification of workers;
  - (2) Hours of work;
  - (3) Wage rates and payment;
  - (4) Payment of overtime;
  - (5) Withholding practices; and
  - (6) The applicability of the labor standards requirements under varying circumstances.
- (b) Generally, these differences are settled administratively at the project level by Bonneville. If necessary, these differences may be settled with assistance from the Department of Labor.
- (c) When requesting the contractor to take corrective action in labor violation cases, the CO shall inform the contractor of the following:

- (1) Disputes concerning the construction labor standards requirements of the contract are handled under Clause 10-27, Disputes Concerning Labor Standards, and not under the general disputes clause included in the subject contract.
- (2) The contractor may appeal the CO's findings or part thereof by furnishing the CO a complete statement of the reasons for the disagreement with the findings.
- (d) The Administrator, Wage and Hour Division, will respond directly to the contractor or subcontractor, with a copy to the CO. The contractor or subcontractor may appeal the Administrator's findings in accordance with the procedures outlined in Labor Department Regulations (29 CFR 5.11). Hearings before administrative law judges are conducted in accordance with 29 CFR Part 6, and hearings before the Labor Department Administrative Review Board are conducted in accordance with 29 CFR Part 7.
- (e) The Administrator, Wage and Hour Division, may institute debarment proceedings against the contractor or subcontractor if the Administrator finds reasonable cause to believe that the contractor or subcontractor has committed willful or aggravated violations of the Contract Work Hours and Safety Standards statute or the Copeland (Anti-Kickback) Act, or any of the applicable statutes listed in 29 CFR 5.1 other than the Construction Wage Rate Requirements statute, or has committed violations of the Construction Wage Rate Requirements statute that constitute a disregard of its obligations to employees or subcontractors under 40 U.S.C. § 3144.

#### 10.3.6.2 Procedures

- (a) The CO shall notify the HCA's office of labor standards issues prior to transmitting any findings and statements to the Department of Labor's Administrator, Wage and Hour Division.
- (b) Upon receipt of contractors' notice of appeal of the CO's findings, the CO shall promptly transmit the CO's findings and the contractor's statement to the Administrator, Wage and Hour Division.
- (c) The CO shall immediately notify the HCA's office of the Administrator's findings or appeals thereof.
- (d) The CO shall refer to 29 CFR, the Department of Labor website, and to the Department of Labor's User's Guide for procedures and instruction on labor matters.

#### 10.3.6.3 Contract Clause

The CO shall include Clause 10-27 Disputes Concerning Labor Standards in solicitations, contracts and releases for construction in excess of \$2,000.

## 11 SOLICITATION POLICIES

### 11.1 REQUIRED SOURCES

#### 11.1.1 Policy

Bonneville shall satisfy requirements for supplies and services from or through the sources and publications listed below in descending order of priority before using commercial sources for supplies and services:

- (a) *Supplies.*
  - (1) Inventories of the agency;
  - (2) Federal Prison Industries, Inc.; and
  - (3) Supplies that are on the Procurement List maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled.
- (b) *Services.* Services that are on the Procurement List maintained by the Committee for Purchase from People Who Are Blind or Severely Disabled.

#### 11.1.1.1 Excess Property

Bonneville shall use excess property in fulfilling its requirements and those of its cost-reimbursement suppliers when Bonneville 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.

#### 11.1.1.2 Federal Prison Industries

- (a) 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) Bonneville shall purchase required supplies of the classes listed in the Schedule of Products made in Federal Penal and Correctional Institutes 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 Bonneville employees may be subjected to significant harassment during inspection activities.
- (c) Before purchasing an item of supply listed in the FPI Schedule, conduct market research to determine whether the FPI item is comparable to supplies available from the private sector that best meet Bonneville's needs in terms of price, quality, and time of delivery. This is a unilateral determination made at the discretion of the CO.
- (d) The CO shall prepare a written determination that includes supporting rationale explaining the assessment of price, quality, and time of delivery, based on the results of market research comparing the FPI item to supplies available from the private sector. If the FPI item is comparable, purchase the item from FPI following the ordering procedures at <http://www.unicor.gov/>. If the FPI item is not comparable in one or more of the areas of price, quality, and time of delivery, acquire the item using competitive procures (see subpart 11.8).

#### 11.1.1.3 Purchases from the Blind and other Severely Disabled

- (a) 41 U.S.C. § 8501-8506, also referred to as the Javits-Wagner-O-Day Act, requires the Government to purchase supplies or services on the Procurement List, at prices established

by the Committee, from AbilityOne participating nonprofit agencies if they are available within the period required.

- (1) The program implementing the Javits-Wagner-O'Day Act (JWOD) is called AbilityOne. Points of contact and a list of available products and services are provided at the following Internet site: [www.abilityone.gov](http://www.abilityone.gov).
  - (2) Bonneville shall obtain supplies and services on the Procurement List whenever Bonneville's best buy objective can be met through AbilityOne sources. COs may fulfill ordering requirements through the wholesale supply sources, such as GSA.
  - (3) The CO shall document the official contract file with a written determination that includes supporting rationale when the award is not made to an AbilityOne source.
- (b) The Randolph-Sheppard Act (20 U.S.C § 107), as amended, was enacted to provide individuals who are blind with remunerative employment and to enhance their economic well-being. Through the Randolph-Sheppard Act (R-SA) programs, individuals who are blind and in need of employment are given priority in the operation of vending facilities on federally-owned or occupied property.
- (1) R-SA programs are run by a state licensing agency through the U.S. Department of Education's state vocational rehabilitation program. R-SA programs may also be labeled "business enterprise programs" or "vending facilities programs."
  - (2) Vending facilities governed by R-SA regulations include:
    - (i) Automatic vending machines,
    - (ii) Cafeterias,
    - (iii) Snack bars, and
    - (iv) Cart service,
  - (3) COs shall give priority award preference to R-SA programs for vending facilities before considering commercial sources.

#### 11.1.2 Federal Supply Schedules

- (a) Federal Supply Schedule (FSS) contracts are not required sources of supply for Bonneville. Unless a FSS contractor offers the best buy, price and other factors considered, acquisitions shall be made in the open market.
- (b) 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 (see part 29).

#### 11.1.3 Defense Logistics Agency

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 Bonneville'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.

#### 11.1.4 Purchase of Printing and Related Supplies

- (a) "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) 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) Requisitioners shall obtain approval from the Bonneville 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).

#### 11.1.4.1 Contract Clause

The CO shall include the clause 11-9, Printing, in all solicitations and contracts.

## 11.2 UTILITY SERVICES

### 11.2.1 Definitions

As used in this subpart –

*Utility service* means a service such as furnishing electricity, natural or manufactured gas, water, sewerage, thermal energy, chilled water, steam, hot water, or high temperature hot water. This includes both regulated and unregulated type utilities that are acquired without obligation to Bonneville except for services received, and where a written, bilateral agreement or contract with unique terms and conditions is neither required 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. The following are not considered a utility service –

- (a) High-speed internet;
- (b) Cable television;
- (c) Telephone/cellular phone services; and
- (d) Refuse removal when multiple providers are available, refuse removal will be considered a commercial service and shall follow the competition requirements in BPI 11.8.
  - (1) Only if one of the following conditions are present, shall refuse removal be treated as a utility:
    - (i) If market research determines that only one commercial source is available, refuse removal may be acquired in the same manner as utility services by program personnel responsible for arranging other utility services for the facility; or
    - (ii) A local government (i.e., city or county) provided services to a directed source.

### 11.2.2 Acquisition of Utility Services

Unless otherwise included in a lease or other established contract by or on behalf of Bonneville, 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 supplies and services authority shall execute the agreement (see 1.8.4.3.).

#### 11.2.2.1 GSA-Owned Facilities

GSA generally acquires all utility services for GSA-owned facilities. When GSA designates Bonneville as the facility manager of a GSA-owned facility, Bonneville 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.

#### 11.2.2.2 Bonneville-Owned Facilities

Acquisition of utility services for Bonneville-owned facilities shall generally be accomplished by the program office.

#### 11.2.2.3 Bonneville Leased Facilities

Bonneville'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 Bonneville 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.

#### 11.2.2.4 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 LEASING OF MOTOR VEHICLES AND/OR EQUIPMENT

#### 11.3.1 Scope of Subpart

This subpart covers the procedures for the leasing, from commercial concerns, of motor vehicles that comply with Federal Motor Vehicle Safety Standards and applicable State motor vehicle safety regulations. It does not apply to motor vehicles leased outside the United States and its outlying areas. This subpart also applies to leased equipment.

##### 11.3.1.1 Definitions

As used in this subpart –

*Leasing* means the acquisition of motor vehicles, other than by purchase from private or commercial sources, and includes the synonyms “hire” and “rent.”

*Motor vehicle* means an item of equipment, mounted on wheels, and designed for highway and/or land use, that --

- (1) Derives power from a self-contained power unit; or
- (2) Is designed to be towed by and used in conjunction with self-propelled equipment.

##### 11.3.1.2 Presolicitation Requirements

- (a) Except as specified in (c), before preparing solicitations for leasing of motor vehicles, COs shall obtain from the requiring activity a written certification that –
  - (1) The vehicles are of maximum fuel efficiency and minimum body size, engine size, and equipment (if any) necessary to fulfill operational needs, and meet prescribed fuel economy standards;
  - (2) The Fleet Manager has certified that the requested passenger automobiles larger than Type IA, IB, or II are essential to Bonneville's mission; and
  - (3) Internal approvals have been received.

- (a) Commercial vehicle lease sources may be used only when the General Services Administration (GSA) has advised that it cannot furnish the vehicle(s) through the Interagency Motor Pool System and it has been determined that the vehicle(s) are not available through the GSA Consolidated Leasing Program. All subsequent lease renewals or extensions may be exercised only when GSA has advised that it cannot furnish the vehicle(s) as prescribed herein.
- (b) With respect to requirements for leasing motor vehicles for a period of less than 60 days, the CO need not obtain the certification specified in (a) –
  - (1) If the requirement is for type 1A, 1B, or II vehicles, which are by definition fuel efficient; or
  - (2) If the requirement is for passenger vehicles larger than 1A, 1B, or II, and the agency has established procedures for advance approval, on a case-by-case basis, of such requirements.
- (c) Solicitations shall not be limited to current-year production models, unless a deviation is approved by the HCA (see 1.7).

#### 11.3.1.3 Contract Requirements

COs shall include the following items in each contract for leasing motor vehicles –

- (1) Scope of contract.
- (2) Method of computing payments.
- (3) A listing of the number and type of vehicles required, and the equipment and accessories to be provided with each vehicle.
- (4) Responsibilities of the contractor or the Government for furnishing gasoline, motor oil, antifreeze, and similar items.
- (5) Unless it is determined that it will be more economical for the Government to perform the work, a statement that the contractor shall perform all maintenance on the vehicles.
- (6) A statement as to the applicability of pertinent State and local laws and regulations, and the responsibility of each party for compliance with them.
- (7) Responsibilities of the contractor or the Government for emergency repairs and services.

#### 11.3.1.4 Leasing of fuel-efficient vehicles

- (a) All sedans and station wagons and certain types of light trucks, as specified by GSA, that are acquired by lease for 60 continuous days or more for official use by Bonneville Power Administration or its authorized contractors, are subject to the requirements of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94-163 and of Executive Order 12003 and subsequent implementing regulations.
- (b) Leased vehicles will meet the miles-per-gallon criteria of, and be incorporated in, the approved plan of the fiscal year in which leases are initiated, reviewed, extended, or increased in scope. Vehicle leases will specify the vehicle model type to be provided.

#### 11.3.1.5 Contract Clauses

- (a) Insert the following clauses in solicitations and contracts for leasing of motor vehicles and/or leased equipment.
  - (1) 11-10, Vehicle Lease Payments;
  - (2) 11-11, Condition of Leased Vehicles;
  - (3) 11-12, Marking of Leased Vehicles;
  - (4) A clause substantially the same as 11-13, Tagging of Leased Vehicles, for vehicles leased over 60 days;
  - (5) 11-14, Equipment Lease Payments for equipment leased;

- (6) 11-15, Condition of Leased Equipment for equipment leased;
  - (7) The provisions and clauses prescribed in Part 28 for solicitations and contracts for supplies when a fixed-price contract is contemplated, but excluding –
  - (8) 28-1.3, Blanket Purchase Agreement – Basic Terms;
  - (9) 28-1.5, Blanket Ordering Agreement – Basic Terms;
  - (10) 28-4.1, Payment – Firm-Fixed-Price;
  - (11) 28-12, Limitation of Liability;
  - (12) 28-14, Indemnification;
  - (13) 28-15, Risk of Loss; and
  - (14) 28-16, Title.
- (b) Insert the following clauses in all cost reimbursement solicitations and contracts, regardless of dollar value when contemplating the usage of vehicles or GSA vehicles in the contract performance or when the CO decides it is in the best interest of BPA.
- (1) 11-16, Policy Authorization to Utilize GSA Vehicles; and
  - (2) 11-17, Authorization to Utilize GSA Vehicles

#### **11.4 [RESERVED]**

#### **11.5 MARKET INFORMATION**

- (b) 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.
- (c) 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 through direct contacts with suppliers.
- (d) Methods of obtaining market knowledge include:
- (1) Attending supplier presentations;
  - (2) Supplier visits to Bonneville sites;
  - (3) Visits to supplier locations;
  - (4) Professional organization meetings, conferences and training sessions;
  - (5) Publication reviews;
  - (6) Library research;
  - (7) Discussions with other organization(s) buyers;
  - (8) Attendance at trade and industry shows and presentations;
  - (9) Internal Bonneville sources, such as program technical staff, subject matter experts, contract oversight staff, materials management staff, etc.;
  - (10) Supplier performance and information file; and
  - (11) Issuing formal requests for information (RFIs).
- (e) COs should encourage sales representatives to make presentations to contracting and program personnel, or otherwise provide information concerning supplies or services for which Bonneville 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 Bonneville's time.

- (f) COs may use Standard Form 330, Architect-Engineer Qualification, Parts I and II, to obtain market information for architect-engineering and related services.
- (g) The time and expense devoted to obtaining market information shall be commensurate with the value to Bonneville of the supplies or services being procured.

## **11.6 PROTECTING AGENCY CONTROLLED UNCLASSIFIED INFORMATION**

- (a) It is Bonneville policy to protect agency Controlled Unclassified Information (CUI). CUI, as defined in Bonneville Policy 433-1, must be safeguarded against loss, misuse, compromise, unauthorized access, or modification, by the originating organization and any other Bonneville organization that has a business need to distribute the information. COs, in coordination with the requisitioning organization, shall obtain written assurance from prospective offerors that any CUI provided to the offeror during the market research phase, solicitation of offers, or subsequent contract performance, will be safeguarded.
- (b) Contractors who must have access to CUI in order to effectively respond to Bonneville market research, a solicitation, or during contract performance, may be asked to affirm in writing that they will comply with Bonneville policy and procedures to safeguard CUI. Such affirmation may be obtained through a non-disclosure agreement (NDA). NDAs shall be in accordance with either the requisitioners' or Supply Chain Services' organizational Operations Security Plans. Unless information is specifically unmarked as CUI at a later date, the requirements for protection and non-disclosure obligation should be deemed permanent.
- (c) If an NDA disclosing Bonneville's CUI is required and has not already been signed by prospective offerors during the market research phase, the CO 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) The CO's warranted authority does not include the authority to sign an NDA where Bonneville's CI is being provided to the contractor. NDAs protecting Bonneville's CUI are filed and maintained by the respective Program Office. See BPI 17.6.2 for procedures regarding Bonneville's protection of contractor information.
- (e) 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) In the event an NDA is agreed between Bonneville and any solicitation recipient or contractor, the requirements in sections 15.10 Homeland Security, 15.11 Export Control, and 15.12 Entity and Service Location Control shall continue to be followed. NDAs provide additional data and information security only and do not replace or supersede the requirements under sections 15.10 Homeland Security, 15.11 Export Control, and 15.12 Entity and Service Location Control.
- (g) CO's or the requisitioner, or the originator of the NDA shall ensure the NDA complies with BPI data and information security requirements and Bonneville Policy 430-3.
- (h) 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 Bonneville Security and IT organizations to identify and initiate prompt remedial action.

## 11.7 CONTRACTING OFFICER ASSESSMENT OF RISK

- (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 Bonneville 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 Bonneville, 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 Bonneville'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 contractor?
  - (4) Is the product or service commercially available, or is this a Bonneville 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?
  - (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 Bonneville'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 (Bonneville-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.

## 11.8 COMPETITION

- (a) It is Bonneville'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, Bonneville'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 Bonneville the best buy, as elsewhere defined in subpart 2.2. After reviewing the marketplace to determine the firms best qualified to meet Bonneville'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 Bonneville 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.

## 11.9 NONCOMPETITIVE TRANSACTIONS

This subpart prescribes policies, procedures, and identifies the statutory authorities, for contracting without competition. Under certain circumstances, contracting without competition is permissible. Each contract awarded without competition shall contain a reference to the specific authority under which it was so awarded. CO's shall use the appropriate citation and document the official file. Documentation of the official file may vary from competitive and noncompetitive procurements; however market conditions and price reasonableness shall continue to be addressed in all noncompetitive transactions.

### 11.9.1 Only One Responsible Source and No Other Supplies or Services Will Satisfy Bonneville Requirements

- (a) *Policy.* When the supplies or services required by Bonneville are available from only one responsible source, and no other type of supplies or services will satisfy the requirements, competition is not required.
- (1) Supplies or services may be considered to be available from only one source if the source has submitted an unsolicited research proposal that –
    - (i) Demonstrates a unique and innovative concept, or demonstrates a unique capability of the source to provide the particular research services proposed;
    - (ii) Offers a concept or service not otherwise available to Bonneville; and
    - (iii) Does not resemble the substance of a pending competitive acquisition.
  - (2) Supplies or services may be deemed to be available only from the original source in the case of a follow-on contract when it is likely that award to any other source would result in –
    - (i) Substantial duplication of cost to Bonneville that is not expected to be recovered through competition; or
    - (ii) Unacceptable delays in fulfilling the requirements.
  - (3) When acquiring utility services, circumstances may dictate that only one supplier can furnish the service; or when the contemplated contract is for construction of a part of a utility company itself is the only source available to work on the system.
- (b) *Procedures.*
- (1) A citation, justification and CO approval is required in the official file for procuring without competition when acquiring from only one responsible source and no other supplies or services will satisfy the requirements; and
  - (2) An award for expert and/or consulting services, when contracting directly with individuals, a Senior Level VP's written approval is also required (see Part 23).

### 11.9.2 Unusual and Compelling Urgency

- (a) *Policy.* When Bonneville’s needs for supplies or services are of such an unusual and compelling urgency that Bonneville would be seriously injured.
- (1) An unusual and compelling urgency precludes competition; and
  - (2) Delay in award of a contract would result in serious injury, financial or other, to Bonneville.
  - (3) This may not exceed one year, including all options, unless that the HCA determines exceptional circumstances apply. This determination must be documented in the contract file; and
  - (4) Any subsequent modification using this authority, which will extend the period of performance beyond one year under this same authority, requires a separate HCA determination. This determination is only required if the cumulative period of performance exceed one year.
- (b) *Procedure.* A citation, justification, and approval by no less than a tier IV manager within Contracts and Strategic Sourcing Services, in the official file is required for procuring without competition when acquiring for Bonneville’s need for the supplies or services is of such an unusual and compelling urgency that Bonneville would be seriously injured.

### 11.9.3 Engineering, development, or research capability, or expert services

- (a) *Policy.* Competition is not required when it is necessary to award the contract to a particular source or sources in order –
- (1) To maintain a facility, producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency or to achieve industrial mobilization;
  - (2) To 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; or
  - (3) To acquire the services of an expert or neutral person for any current or anticipated litigation, dispute, hearing, or other administrative process. The expert or neutral person may be an attorney, hearing officer, judge, mediator, or other related recognized expert(s).
- (b) *Procedure.* A citation and brief explanation is required in the official file for procuring without competition when acquiring industrial mobilization, engineering, developmental, or research capability, or expert services.

### 11.9.4 Authorized, required by statute; or uncodified enactments

- (a) *Policy.* Competition is not required when a statute, executive order, court order, or law expressly authorizes or requires that the acquisition be made through another government or from a specified source. Competition is not required in the following circumstances –
- (1) “Purchases at or below the competition threshold, including Construction and Service contracts subject to DOL labor laws.”;
  - (2) Federal Prison Industries (UNICOR) (18 U.S.C. § 4124);
  - (3) Qualified nonprofit agencies for the blind or other severely disabled (41 U.S.C Chapter 85), Committee for Purchase From People Who Are Blind or Severely Disabled;
  - (4) Government Printing and Binding (44 U.S.C. § 501-504, 1121);
  - (5) Sole source awards under the 8(a) Program (15 U.S.C. § 637);
  - (6) Sole source awards under the HUBZone Act of 1997 (15 U.S.C. § 657(a));
  - (7) Sole source awards under the Veterans Benefits Act of 2003;

- (8) Sole source awards under the Women-Owned Small Business (WOSB) Program or the Economically Disadvantaged Women-Owned Small Business (EDWOSB) Program (15 U.S.C. § 637(m));
  - (9) When an identified entity is responsible to manage a property and/or resource and the responsible entity has specified a source, the specified source will be used.
- (b) *Procedure. "A citation only is required in the official file.*

### **11.10 SELECTING FIRMS TO SOLICIT**

- (a) Bonneville 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 Bonneville. However, this alone does not ensure that a firm will be solicited for a specific purchase. Bonneville'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) 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) Bonneville will do business with responsible and reputable firms and individuals. Prospective firms should be registered in SAMS prior to issuance of award, except when;
  - (1) Purchases under the micro-purchase thresholds, subject to part 26; or
  - (2) Emergency purchases, subject to part 27; or
  - (3) Sensitive contracts that could compromise the safeguarding of sensitive information; or
  - (4) Noncompetitive Transaction, subject to subpart 11.9.
  - (5) If the firm is unable to register in SAMS prior to issuance of award, the CO may request an HCA waiver.
- (d) COs must obtain HCA approval prior to soliciting or awarding a contract to any firm or individual listed on the System for Award Management (SAMS) that are flagged as delinquent or debarred. Firms and individuals who are delinquent on a Federal debt, or have been debarred or suspended by the Federal Government are identified in SAMS COs shall check this website [www.sam.gov](http://www.sam.gov) to verify prospective offeror's SAMS status upon initial award, except for pre-priced task and delivery orders, and when exercising any options. COs shall include a statement in the documentation of award decision, or in record of modification when exercising options, confirming the date SAMS was verified no more than 10 days prior to award and the result of the SAMS review. See Part 26 for purchase cardholder instructions.
- (e) 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.

- (f) A brief description of the potential offerors considered shall be included in the Document of Award Decision. See 12.8.1.2.1.

#### 11.10.1 Contract Clause

COs shall include the clause 11-7, Subcontracting with Debarred or Suspended Entities, in solicitations and contracts; except for IGCs with Federal agencies.

### 11.11 REQUESTS FOR QUOTATIONS (RFQ)

- (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 awarded using any source selection and evaluation process approved by Part 12.
- (b) An RFQ may be either oral or written. Bonneville's Request for Quotations form may be used when issuing written RFQs.

### 11.12 REQUESTS FOR PROPOSALS (RFP)

Requests for Proposals (RFP) solicit requests for offers to sell; responses to RFPs 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 source selection and award 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 Bonneville's needs. The CO must discuss all aspects of the transaction, including quality assurance, warranty, payment (see subpart 22.6) and other significant aspects of the transaction that would be included in a written RFP.

#### 11.12.1 Oral Requests for Quotes

- (a) Oral Request for Quotes (RFQ) may be used. The acceptance of the offer to sell generally will be made orally after evaluation of the information provided.
- (b) Oral RFQs 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 RFQs will generally be used when Bonneville 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) Non-commercial transactions exceeding \$500,000 shall be approved by the HCA before using this technique.

#### 11.12.2 Written Solicitations

- (a) When oral RFQs are not practical because of the complexity of the purchase description or Bonneville-required terms and conditions, written RFP/RFQs (solicitations) 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. Solicitations may be issued

on Bonneville's Request for Offers and Award form to be consistent with standard contract form language in 4.4.2.1. Amendments shall be made using Bonneville's Amendment of Solicitation form 4220.51.

- (b) For those purchases where it is impractical to expect Bonneville to award without negotiations, the RFP shall request only the level of detail necessary for Bonneville to quickly determine which offer presents the most potential for obtaining the best buy in fulfilling Bonneville'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 sufficient instructions in the solicitation informing the offeror to address their proposed solutions.

#### 11.12.3 Solicitation Provisions

- (a) The CO shall obtain the information required by inserting provision 11-1, Type of Business Organization, in the solicitation 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 subparts 4.5 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 provision similar to 11-2.1, Instructions to Offerors and Evaluation Factor – Lowest Price Technically Acceptable or 11-2.2 Instructions to Offerors and Evaluation Factor – Tradeoff, in written solicitations for supplies, construction and/or services. Provision 11-2.1 or 11-2.2 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 Bonneville requirement to differentiate between offers. If a solicitation is being issued pursuant to Part 28 Acquisition of Commercial Items and Services, the CO shall revise provision 11-2.1 or 11-2.2 to address/delete references to past performance, as appropriate to the subject procurement.

#### 11.12.4 Executive Summaries of Requests for Offers

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.

### 11.13 PREPARING SOLICITATIONS

- (a) 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) Bonneville will minimize the use of solicitations requiring elaborate proposals.
- (c) COs should generally use simple processes with few terms and conditions when purchasing commercial products and services. COs generally should not add Bonneville-unique inspection, testing or warranty requirements to purchases of commercial goods and services.

#### 11.13.1 Evaluation Factors

- (a) Offerors should consider all of Bonneville'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 Bonneville's needs rather than structuring an offer geared to predefined, rigid evaluation factors. The provision 11-2.1, Instructions to Offerors and Evaluation Factor – Lowest Price Technically Acceptable or 11-2.2 Instructions to Offerors and Evaluation Factor – Tradeoff, advises the supplier of this approach.

- (b) Bonneville 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.
- (c) 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.
- (d) 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.

#### 11.13.1.1 Policy

- (a) Bonneville shall award contracts based on stated evaluation factors and shall evaluate consistent with the methods of evaluation identified in the solicitation. The award methodology (LPTA or TO) as stated in the solicitation shall not be changed after receipt of proposals.
- (b) 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 Bonneville's requirements, while ensuring that Bonneville 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.
- (c) 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.
- (d) 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 Bonneville's requirement instead of predetermined sub-factors. Solicitations for commercial items do not have to contain sub-factors 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.



### 11.13.1.2 Procedure

The CO shall document the evaluation factors as identified in subsection 11.13.1(b) in addition to the importance of pricing relative to the non-pricing evaluation factors.

### 11.13.2 Lowest Price Technically Acceptable Offer

- (a) 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.
- (b) Evaluation factors to be scored on a pass/no pass basis may include but are not limited to: 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.

#### 11.13.2.1 Policy

- (a) For awards based on technically acceptable lowest price evaluation, the evaluation factors shall be identified in the solicitation. Should review of the proposals of Bonneville program needs raise relevant new issues, Bonneville will notify offerors as appropriate, and amend the solicitation as necessary. Since price is never ranked, it shall not be included as a technical evaluation factor.
- (b) 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.
- (c) 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 document of award decision. Where past performance is included as an evaluation factor, the solicitation shall state the general approach for evaluating past performance. See 12.5.7(c) for evaluations of past performance for commercial acquisitions.

#### 11.13.2.2 Solicitation Provision

COs shall include a provision similar to 11-2.1, Instructions to Offerors and Evaluation Factor – 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.

### 11.13.3 Reverse Auction

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.

#### 11.13.3.1 Policy

COs may conduct reverse auctions to obtain a portion or all of suppliers' pricing information, as approved by the Director of Contracts and Strategic Sourcing and the HCA. Electronic reverse auctions shall be conducted only through auction service providers that have been approved for use by the Director of Contracts and Strategic Sourcing and the HCA.

#### 11.13.3.2 Procedure

COs shall document as identified in 12.8.1.2.1(b)(2) the process for determining the lowest price through the reverse auction method employed.

#### 11.13.3.3 Solicitation Provision

COs shall include the provision 11-3.1 Reverse Auction, when procuring commercial items utilizing a reverse auction technique. When using clause 11-3.1, COs shall include the provision 11-2.1, Instructions to Offerors and Evaluation Factor – Lowest Price Technically Acceptable. COs shall not combine into one procurement reverse auction requirements and non-reverse auction requirements.

#### 11.13.4 Tradeoff Analysis

- (a) Under tradeoff analysis procurement, offers are evaluated against the identified factors and ranked according to which offer represents the best buy to Bonneville, as described in BPI 1.1(c). A tradeoff process is appropriate when it is in the best interest of the Government to consider award to other than the lowest priced offeror or other than the highest technically rated offeror. This process permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal. The perceived benefits of the higher priced proposal shall merit the additional cost, and the rationale for tradeoffs must be documented in the Document of Award Decision (DAD).
- (b) Evaluation factors may include such factors as total cost to Bonneville, 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.

##### 11.13.4.1 Policy

- (a) For awards based on a tradeoff evaluation, the evaluation factors shall be identified, with pricing included as an evaluation factor to be traded with non-price/cost 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.
- (b) COs shall use the tradeoff analysis when it is in Bonneville's best interest to consider awarding to other than the lowest price technically acceptable offer.
  - (1) COs may tradeoff between price/cost and technical (non-price/cost) attributes, or may elect to award to an offeror without a tradeoff analysis, only when the offer represents both the lowest evaluated price/cost and the highest technical/management offer.

- (2) Price or cost must be included as an evaluation factor in order to be traded with non-price technical factors.
- (c) COs shall identify whether all evaluation factors, other than cost or price, when combined, are:
  - (1) Significantly more important than price/cost;
  - (2) Approximately equal to price/cost; or
  - (3) Significantly less important than price/cost.
- (d) 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 document of award decision. Where past performance is included as an evaluation factor, the solicitation shall state the general approach for evaluating past performance. See 12.5.7(c) for evaluations of past performance for commercial acquisitions.
- (e) Additional information and procedural guidance can be found in the BPA Trade-off Source Selection Guide.

#### 11.13.4.2 Solicitation Provision

COs shall include a provision similar to 11-2.2, Instructions to Offerors and Evaluation Factor – 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 the provision 11-2.2, 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.

#### 11.13.5 Innovative Approaches

Bonneville encourages proposals offering innovative, cost-effective approaches to meeting Bonneville's requirements from a technical, work performance, delivery, pricing or other standpoint which produce an improved result for Bonneville. 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.

##### 11.13.5.1 Policy

- (a) COs may encourage innovative alternative approaches to addressing Bonneville's requirements by including the provision 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 subpart 12.1, Receipt of Offers.
- (b) Innovative approaches shall be evaluated under a tradeoff analysis.
- (c) Bonneville is not obligated to evaluate submissions of innovative approaches absent an invitation for such submissions in the solicitation.

##### 11.13.5.2 Procedure

COs shall describe in the document of award decision the process for determining that the innovative approach was the best buy through the tradeoff process and analysis (see subpart 12.8).

### 11.13.5.3 Solicitation Provision

COs shall include a provision similar to 11-4.1 Innovative Approaches in solicitations when encouraging the submission of innovative, cost-effective approaches to meeting Bonneville's requirements. When using 11-4.1, COs shall include the provision 11-2.2, Instructions to Offerors and Evaluation Factor – Tradeoff, identifying the importance of pricing in the tradeoff analysis for an innovative approach.

### 11.13.6 Additional Copies of Solicitations

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 Bonneville, 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 Bonneville. 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.

### 11.13.7 Pre-proposal Conferences

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.

#### 11.13.7.1 Procedures

- (a) 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.
- (b) 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 RFP; and
  - (2) Terms of the RFP remain unchanged as a result of the pre-proposal conference unless amended in writing.

### 11.13.8 Site Tours and Inspections

When work is to be performed on a Bonneville 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 Bonneville 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.

#### 11.13.8.1 Solicitation Provisions

- (a) If the CO determines that a guided site visit is not necessary, a provision similar to 11-5, Inspection of Premises, may be used. If the contract requires performance on Bonneville rights-of-way, use the clause with its Alternate I.
- (b) If the CO determines that a guided site visit is necessary, a provision similar to 11-6, Site Tour, may be used. If the contract requires performance on Bonneville rights-of-way, use the clause with its Alternate I.

#### 11.13.9 Use of Commercial Item Descriptions

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 Bonneville specifications or testing requirements is generally not appropriate with such descriptions. See BPI 28.1.2.

##### 11.13.9.1 Solicitation Provision

If using brand-name descriptions, but will consider alternatives to the brand name specified, the CO may include a provision similar to 11-8, Alternative to Brand Name Requirement, in solicitations for commercial acquisitions. If alternate products are not acceptable, it shall be stated in the solicitation. Clause 11-8 shall not be included in solicitations for noncommercial supplies and noncommercial services.

## 11.14 CHANGES IN REQUIREMENTS BEFORE RECEIPT OF OFFERS

When Bonneville modifies its requirements before receipt of offers, the CO shall notify the potential suppliers of the change via an amendment to the solicitation on form 4220.51.

## 11.15 DISCLOSURE OF INFORMATION

- (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 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.

## 11.16 MANAGEMENT REVIEW OF SOLICITATIONS

- (a) COs shall seek higher management level review(s) of certain solicitations and contracts prior to issuance to offerors. The Director of Contracts and Strategic Sourcing, or designee, shall conduct the management review. The reviewer shall possess a Level III Certificate in Contracting.
- (b) Management level reviews shall be conducted if one of the following conditions are met –
  - (1) The solicitation or contract value is expected to be or is \$5 million or more; or

- (2) The purchase is deemed a high-risk acquisition, in terms of performance, delivery, or unique contract terms; or
  - (3) The purchase is deemed to be mission critical by the requisitioner, project manager, a contracting organization manager, the Director of Contracts and Strategic Sourcing, the Chief Supply Chain Officer, the HCA, or the Administrator; or
  - (4) Task or delivery orders when the value is \$10 million or more and subject to 7.7.4 (c).
- (c) The reviewer shall consider the key elements of the purchase and ensure that the contents of the solicitation address those issues. If the reviewer finds that the solicitation or contract is lacking critical content to ensure the best buy objective and reduce risk to Bonneville, the reviewer shall advise to the CO as to how the issues should be addressed. The review and subsequent guidance may be in any written format.
- (d) The CO shall address all deficiencies prior to issuance of the solicitation and/or award of the contract. The review and subsequent CO response(s) shall be filed in the official contract file.

## 12 SOURCE SELECTION AND AWARD

### 12.1 RECEIPT OF OFFERS

#### 12.1.1 Handling of Offers

Offers shall not be opened in public. Offers shall be handled confidentially and in compliance with Bonneville's Standards of Conduct and Business Practices per subsection 3.1.2 and Appendix 3, Section 3.

#### 12.1.2 Late Offers

- (a) 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 Bonneville, or
  - (2) The late offer is important to ensure a competitive negotiation environment.
- (b) COs shall briefly document the disposition of late offers in the official contract file.

#### 12.1.3 Offers from Unsolicited Sources

- (a) 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 Bonneville requirement but was not invited by Bonneville to submit an offer. See BPI 12.2 for information regarding unsolicited proposals.
- (b) 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 in the official contract file.

### 12.2 UNSOLICITED PROPOSALS

- (a) An unsolicited proposal is a written proposal submitted by an offeror:
  - (1) Which was not submitted in response to a known Bonneville requirement (i.e., where Bonneville is not already planning to purchase the type of supply or service offered in the unsolicited proposal), and
  - (2) Which was not solicited by Bonneville.
- (b) 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 Bonneville requirement.

#### 12.2.1 Policy

- (a) Bonneville encourages submission of unsolicited proposals which offer unique or particularly innovative ideas which support Bonneville's mission.
- (b) Bonneville 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, "How to Submit an Unsolicited Proposal," provides additional guidance to offerors.

#### 12.2.2 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.

### 12.2.3 Receipt and Initial Handling

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 Bonneville. The SDP Manager shall log in the proposal, acknowledge receipt of the proposal to the proposer, and send copies to the subject matter expert (or program office) and designated CO. 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 BONNEVILLE POWER ADMINISTRATION AND SHALL NOT BE  
USED FOR PURPOSES OTHER THAN EVALUATION.

### 12.2.4 Evaluation and Negotiation

#### 12.2.4.1 Policy

Unsolicited proposals may not be accepted unless they meet all of the following criteria:

- (a) The proposal must not be within the scope of a pending solicitation;
- (b) The proposal must be unique or propose a particularly innovative idea which was originated by the offeror, or the offeror must have unique qualifications;
- (c) The proposal's basic concept must be acceptable to the subject matter specialist, both technically and from a budget standpoint; and
- (d) Potential organizational conflicts of interest, if any, must be resolved (see subpart 3.3).

#### 12.2.4.2 Procedures

The subject matter expert 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.

- (a) If the CO's and subject matter expert's initial review concludes the proposal should be rejected, they shall notify the offeror verbally and send a brief explanation to the SDP Manager which explains the reasons for rejection and date the offeror was verbally notified. The SDP Manager shall notify the offeror in writing of such.
- (b) If the CO's and subject matter expert'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 12.8.1.2.1 the basis for making award without considering other offerors' qualifications. Such documentation shall include:
  - (1) An explanation of the unique or particularly innovative aspects of the proposal; and
  - (2) An explanation of the offeror's unique qualifications.
- (c) The subject matter expert shall submit a purchase requisition and other documentation to the CO. The CO, assisted by subject matter expert shall negotiate details and other terms and conditions with the offeror. Bonneville retains the right to reject any unsolicited proposal at any time prior to award. The SDP Manager shall be notified of final disposition of the unsolicited proposal.

## 12.3 CHANGES IN REQUIREMENTS AFTER RECEIPT OF OFFERS

See subpart 11.14 for changes in requirements before receipt of offers.



### 12.3.1 Policy

- (a) If there are substantial changes in Bonneville'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.
- (b) COs may encourage innovative alternate approaches to addressing Bonneville's requirements by including the clause 11-4.1, Innovative Approaches, (see subsection 11.13.5). When innovative approaches are received, COs will generally protect such approaches in the same manner as other offers as set forth in subpart 12.1, Receipt of Offers.

## 12.4 EVALUATION TEAMS

### 12.4.1 Establishment of Evaluation Teams

- (a) The CO will typically evaluate simple, low risk purchases without extensive involvement by program staff. A team will evaluate more complex purchases.
- (b) When an evaluation team is used, it shall include both the CO, or his/her representative, and technical personnel. The CO may appoint a project stakeholder or a member or employee of another entity to serve as a non-voting technical expert on the evaluation team. The CO may appoint a contractor employee to serve as a non-voting 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. Technical experts may advise the evaluation team of potential proposal strengths, weaknesses, and deficiencies that the evaluators may consider in the development of the final evaluation. The CO may appoint a federal employee of another federal agency as a voting member of the evaluation team. Prior to appointing a person to the evaluation team in any capacity the CO must address and mitigate any potential conflict of interest.

#### 12.4.1.1 Procedures

- (a) 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.
- (b) Prior to the issuance of a solicitation, the CO shall determine if sufficient personnel with the requisite training and capabilities are available within Bonneville to perform the evaluation or analysis of proposals submitted for the acquisition.
- (c) If for a specific evaluation or analysis, such personnel are not available within Bonneville, the CO may utilize personnel from other Federal agencies so long as Bonneville and the supporting agency have an interagency agreement (see Part 25) for the support personnel availability and costs.
- (d) If after reasonable attempts to obtain personnel is unsuccessful, the CO may request, through a waiver, the HCA's approval in using contractor services.

### 12.4.2 Conduct of Evaluation Teams

- (a) 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 Bonneville obtains the best buy.
- (b) Offerors shall be treated fairly. The actions and decisions of the evaluation team shall be based on good business judgment.

- (c) 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 Bonneville without the offeror's approval.
- (d) Communications between offerors and Bonneville shall only be done through the CO or a designee.
- (e) Members of evaluation teams and technical advisors shall comply with the Standards of Conduct of Purchasing and Assistance Activities described in subpart 3.1 and Appendix 3. 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; and
  - (3) Maintaining confidentiality throughout the purchasing process.

#### 12.4.2.1 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 publicly 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 a Bonneville 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 Policy

- (a) Bonneville will be responsive to the supplier community by evaluating proposals in a fair and timely manner. The costs to both industry and Bonneville of conducting the purchasing process shall be minimized.
- (b) During the 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 11-2.1, Instructions to Offerors and Evaluation Factor – Lowest Price Technically Acceptable , or clause 11-2.2, Instructions to Offerors and Evaluation Factor – Tradeoff.
- (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 sub-factor.
- (f) The technical proposal shall 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 factors traded, and identifying how the tradeoff furthers the procurement objective.
- (g) 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.
- (h) The team shall determine which offer has the highest potential for representing a “best buy” to Bonneville. (See BPI 1.1(c) for discussion of “best buy”.)

## 12.5.2 Analysis of Price, Estimated Cost, and Total Cost

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 Bonneville 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.

### 12.5.2.1 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.

#### 12.5.2.2 Procedures

- (a) The analysis of price, estimated cost and total cost shall be documented in the official file. 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 Bonneville shall also be considered when there is an obvious and significant variation between the total costs of offerors' proposals. For example, the administrative costs for Bonneville 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.
- (b) For awards which do not require a DAD or ROM, price reasonableness shall be addressed by documenting evidence of the obtained pricing in the official file.
- (c) Where an internal Bonneville estimate has been prepared and the proposed price/estimated cost is significantly lower than the Bonneville estimate, the CO shall verify that both the offeror and the Bonneville estimator adequately understand the scope of work.
- (d) 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

- (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) 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. Bonneville's Price/Cost Proposal form may be used if appropriate.
- (b) Although offerors are not required to certify their cost/pricing information, Bonneville 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 Contract Clause

The CO may include the 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) Bonneville'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 Bonneville's Internal Audit staff as advisors to the evaluation team.
- (b) 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 Bonneville;
  - (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); and
  - (5) Time-and-Materials contracts where a substantial amount of equipment, travel or subcontract costs is expected.

#### 12.5.6 Advance Agreements

- (a) 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) 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; and
  - (2) General and Administrative expenses.

#### 12.5.7 Analysis of Past Performance

- (a) Past performance shall be evaluated in accordance with the solicitation's past performance evaluation scheme. However, Bonneville 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. Bonneville 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 Government-wide Past Performance Information Application at the Contract Performance Assessment Reporting System (CPARS) site <https://www.cpars.gov/>; or
  - (4) Any other reasonable basis.

## 12.6 SOURCE SELECTION

- (a) 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 subsection 12.8.1, and shall include the justification for any business judgements and tradeoffs made or relied upon by the CO.
- (b) The CO will generally select only the top-ranked firm for final negotiations. For award decisions based on lowest price technically acceptable offers, Bonneville 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, Bonneville may negotiate with more than one firm concurrently. However, this practice is generally discouraged in order to minimize administrative costs for offerors and Bonneville.
- (c) Based on the quality of offers received and Bonneville'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 Bonneville experience may be awarded small orders for identical training services to give Bonneville 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) Bonneville 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; or
  - (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) 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

The lowest price technically acceptable source selection process is appropriate when the "best buy" to Bonneville is expected to result from the selection of the technically acceptable offer with the lowest evaluated price to the agency.

#### 12.6.1.1 Policy

Bonneville 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.

#### 12.6.1.2 Procedures

- (a) 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 subsection 12.5.1. The CO shall then identify which of the acceptable offers represents the lowest offered price.
- (b) 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 subsection

12.5.1 for determining how offers meet the threshold for technical acceptability for each evaluation factor. The CO shall also document the lowest price determination in the document of award decision.

#### 12.6.2 Tradeoff Analysis Source Selection

The less definitive the solicitation requirements are 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 Bonneville.

##### 12.6.2.1 Policy

Bonneville will utilize a tradeoff analysis when the best buy to Bonneville 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, and risks, the relative differences between the offers and how the specific tradeoff of identified evaluation factors furthers the goals of the procurement.

##### 12.6.2.2 Procedures

###### (a) A tradeoff analysis:

- (1) Is not required when the CO determines that the highest rated technical offer is also the lowest price technically acceptable offer. When a tradeoff analysis is not required, the CO must document this determination in the DAD; and
- (2) Is required when it is in the best interest of Bonneville 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.

###### (b) In the tradeoff analysis, the CO shall document the DAD:

- (1) The strengths, weaknesses, and risks associated with each offer in accordance with the evaluation standards in 12.5.1(e);
- (2) The compiled ranking of the offers based on their ability to not meet, meet or exceed the evaluation criteria; 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

*Negotiation* is the process of discussing with offerors their proposals, terms, conditions, price, Bonneville specifications, and other requirements. The objective of negotiations is to establish a clear understanding of both parties' positions and reach contractual agreement.

### 12.7.1 Policy

- (a) Emphasis shall be placed on person-to-person negotiations which lead to close understanding between Bonneville 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.
- (b) 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. Bonneville has no obligation to negotiate with all firms.

- (c) Under no circumstances will Bonneville:
  - (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.
- (d) 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 Director, of Contracts and Strategic Sourcing, 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 subsection 11.13.3.

## 12.8 REQUIREMENTS FOR DOCUMENTING CONTRACTING OFFICER DECISIONS

### 12.8.1 General

- (a) Bonneville's obligation to its ratepayers requires that Bonneville funding be used in a manner that will ensure the best buy or best value. Documentation in the official contract file provides evidence of the CO's efforts to fulfill this responsibility.
- (b) The official file is the Federal 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.
- (c) An award is any contract action in which Bonneville is committing funds, which includes initial contract awards, modifications, extensions, and releases. Depending on the circumstances, Bonneville documents for source selection, award decisions, modifications and other CO determinations may be made in different formats. The following formats are generally used to document CO decisions:
  - (1) Document of Award Decision (DAD);
  - (2) Record of Modification (ROM); and
  - (3) Memorandum for Record (MFR).

#### 12.8.1.1 Policy

- (a) All of the relevant documents associated with a procurement action shall be filed in the contract file. Where a form or format is not readily available to evidence the action taken, a MFR with the subject matter and relevant BPI citation in the title shall be used.
- (b) 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.
- (c) A DAD is required in the official file for all awards, except pre-priced task or delivery-orders and new awards under the micro-purchase threshold, which obligate Bonneville funds.
- (d) A DAD or ROM shall be signed and dated by the CO with sufficient warrant authority to sign the resulting contract or modification. The CO's signature documents the CO's determination that prices are reasonable, and the award decision is the best value for Bonneville. If a CS assisted in the writing of the DAD or ROM, the CO may, at their discretion, require the CS's name as the preparer of the document.
- (e) Where a DAD or ROM is not required, the CO shall ensure the official contract file contains evidence of the obtained pricing (e.g., vendor quotes, copies of vendor price lists, etc.).



## 12.8.1.2 Procedures

### 12.8.1.2.1 Document of Award (DAD)

- (a) A DAD is required for all new awards with the following exceptions –
- (1) Awards under the micro-purchase threshold; or
  - (2) Task- and Delivery-orders against pre-priced contracts which have evidence of price analysis in the original award decision.
- (b) A DAD shall include, as applicable to each award:
- (1) A description of the market research performed.
  - (2) A description of the sources selected (offerors) to receive the solicitation. If competition was not performed, identify the exemption from the competition requirement (see subpart 11.9), and justification, if required.
  - (3) A description of the evaluation process, including an identification of evaluation factors, relative importance of pricing, evaluation methodology and scoring criteria (see subsections 11.13.2 and 11.13.4),
  - (4) Price/Cost Analysis (see subsection 12.5.2)
    - (i) For awards to the LPTA 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. The CO shall reference the location of pricing documentation in the DAD. 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.
    - (ii) For awards based on a tradeoff analysis, price/cost analysis must be addressed in the DAD.
  - (5) Best Buy Analysis:
    - (i) For awards based on LPTA, a description of the analysis resulting in the best buy determination (see subsection 11.13.2) to include:
      - (A) The relative strengths and weaknesses of the offers in accordance with the evaluation standards.
      - (B) The reasons for the elimination of offers.
    - (ii) For those awards resulting from a tradeoff analysis (see subsection 11.13.4):
      - (A) The ranking of the offers, relative to each other, addressing the relative differences between the offers and risks associated with each offer; and
      - (B) 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.
  - (6) Cross references to other supporting documentation, if applicable; and
  - (7) Contracting officer signature

### 12.8.1.2.2 Record of Modification (ROM)

- (a) A ROM shall be used for any action changing the terms and conditions, including price of the contract. A ROM is required for all modifications unless –
- (1) A MFR is utilized to describe the purpose of the action; or
  - (2) The modification is an administrative change (see subsection 14.10.1) and the change is described in the modification itself so that a third party can understand the purpose for the administrative change.
- (b) A ROM shall include, as applicable to each award:
- (1) Rationale for the change;
  - (2) Price/Cost Analysis (see subsection 12.5.2);
  - (3) Discussion of performance if contractor's performance impacted the schedule;

- (4) Best buy analysis;
  - (5) Cross-references to other supporting documentation, if applicable; and
  - (6) Contracting officer signature.
- (c) Modifications outside the scope of the contract are, for the purpose of this section, are new awards and are subject to the requirements of 12.8.1.2.1 above.

#### 12.8.1.2.3 Memorandum for Record (MFR)

- (a) A MFR is required when a DAD or ROM is not used.
- (b) Where a form or format is not readily available to evidence the action taken, a MFR shall be used.
- (c) A MFR may be used for documenting awards under the micro-purchase threshold, or pre-priced task- or delivery-orders
- (d) A MFR may be used to explain a decision, document performance issues, or any other event in the administration of the contract, or when the CO deems it necessary.

#### 12.8.2 Notification to Unsuccessful Offerors

- (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 notifications to unsuccessful offerors are not a common business practice. However, the CO shall consider the benefits of full and open communication with all of Bonneville's suppliers when making the decision regarding notification.

#### 12.8.3 Debriefings and Release of Related Information

Debriefings are an important method of helping offerors to understand the basis for Bonneville'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 Bonneville's future supplier base. For this reason they shall receive commensurate preparation.

##### 12.8.3.1 Policy

- (a) An offeror may request a debriefing, however the request must be in writing and within three calendar days from the receipt of award notice.
- (b) The CO shall debrief the offeror within ten calendar days from receipt of the offeror's debriefing request.
- (c) Generally written debriefings are preferred, however ultimately it is the CO's decision to determine what method is more appropriate; written, phone or in-person.
  - (1) The relative merits of the competitors' proposals shall not be revealed.
  - (2) Upon request, information that is clearly available under the Freedom of Information Act shall be released.
- (d) The CO shall document debriefings in the official file and shall include any supporting materials used for the debriefing in the official file.

##### 12.8.3.2 Contract Clause

COs shall include the provision 12-1, Debriefing Request, in all solicitations.

#### 12.8.4 Discovery of Mistakes after Award

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.

#### 12.8.5 Disposal of Proposals

All hard copies of unsuccessful proposals shall be returned to the CO following the evaluation. Unsuccessful proposals shall be retained in official contract file.

#### 12.8.6 Examination of Records

Bonneville 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.

##### 12.8.6.1 Contract Clause

The CO shall include Clause 12-3 Examination of Records in all cost reimbursement or time and materials contracts over \$150,000, or in modifications which increases the aggregate contract value over \$150,000, for any type of contract where cost analysis is required to determine the reasonableness of the amount of the modification.

## 13 COST PRINCIPLES

This subpart prescribes policies and procedures for cost principles

### 13.1 GENERAL

- (a) The cost principles and procedures in this part are grouped by organizational type; e.g., commercial concerns, educational institutions, etc. The overall objective is to provide that, to the extent practicable, all organizations of similar types doing similar work will follow the same cost principles and procedures.
- (b) The CO may request a deviation or class deviation concerning cost principles; however, this requires advanced approval from the HCA.

### 13.2 FIXED-PRICE CONTRACTS

- (a) Whenever cost analysis is performed in pricing of fixed-price contracts, subcontracts, and modifications to contracts and subcontracts this part shall be used. 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.
- (b) The final price accepted by the parties reflects agreement only on the total price. Further, notwithstanding the mandatory use of cost principals, the objective will continue to be to negotiate prices that are fair and reasonable, cost and other factors considered.

### 13.3 COST TYPE CONTRACTS

#### 13.3.1 Contracts with Commercial Organizations

- (a) This category includes all contracts and contract modifications for supplies, services or experimental, developmental or research work negotiated with organizations other than construction and architect-engineer contracts, educational intuitions, State and local governments, and nonprofit organizations on the basis of cost.
  - (1) The cost principles and procedures in this subpart shall be used in pricing negotiated supply, service, experimental, developmental, and research contracts and contract modifications with commercial organizations whenever cost analysis is performed.
  - (2) The CO shall incorporate the cost principles and procedures in this subpart by reference in contracts with commercial organizations on the basis for determining reimbursable costs under –
    - (i) Cost-reimbursement contracts and cost-reimbursement subcontracts under these contracts performed by commercial organizations; and
    - (ii) The cost-reimbursement portion of time-and-materials contracts except when material is priced on a basis other than at costs;
  - (3) Negotiating indirect cost rates;
  - (4) Proposing, negotiating, or determining costs under terminated contracts;
  - (5) Price revision of fixed-price incentive contracts;
  - (6) Price redetermination of price redetermination contracts; and
  - (7) Pricing changes and other contract modifications.
- (b) The total cost, including standard costs properly adjusted for applicable variances, of a contract is the sum of the direct and indirect costs allocable to the contract, incurred or to be incurred, plus any allocable cost of money less any allocable credits. In ascertaining what constitutes a cost, any generally accepted method of determining or estimating costs that is equitable and is consistently applied may be used.

- (c) While the total cost of a contract includes all costs properly allocable to the contract, the allowable costs to the Government are limited to those allocable costs which are allowable pursuant to Appendix 13.

#### 13.3.2 Contracts with Educational Institutions

Contracts that refer to this subpart for determining allowable costs under contracts with educational institutions shall refer to, and shall have the allowability of costs determined by the CO in accordance with the BFAI.

#### 13.3.3 Contracts with State and Local Governmental Organizations

Contracts that refer to this subpart for determining allowable costs under contracts with State, local and federally recognized Indian tribal governments shall refer to, and shall have the allowability of costs determined by the CO in accordance with the BFAI.

#### 13.3.4 Contracts with Non-profit Organizations

Contracts that refer to this subpart for determining allowable costs under contracts with nonprofit organizations shall refer to, and shall have the allowability of costs determined by the CO in accordance with the BFAI.

### 13.4 CONTRACT AUDIT SERVICES

This subpart prescribes policies and procedures for requesting auditing services.

#### 13.4.1 Policy

- (a) COs may request audit services directly from the Defense Contract Audit Agency (DCAA) audit or from a private sector provider of audits services. The audit request should only request enough information to determine best buy along with a suspense date of when the information is needed by the CO.
- (b) COs may request audit support for:
- (1) Accounting system reviews;
  - (2) Evaluation of costs or prices of proposed contracts or contract modifications;
  - (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);
  - (5) Reviews to establish billing rates for indirect costs and final indirect cost rates; and
  - (6) Review of claims for contract price or other relief, or of contractor settlement proposals in terminations.
- (c) The DCAA may decline requests for services on a case-by-case basis, if resources of the audit agency are inadequate to accomplish the tasks.
- (d) A copy of the directory or information concerning cognizant audit offices may be obtained by contacting –

Defense Contract Audit Agency  
 Attn: CMO  
 Publications Officer  
 8725 John J. Kingman Road  
 Suite 2135  
 Fort Belvoir, VA 22060-6219

- (e) COs shall notify the Director of Contracts and Strategic Sourcing if they have a contract requiring audit by a cognizant auditor. The Director of Contracts and Strategic Sourcing shall coordinate with the program office for costs of the auditing services.

### **13.5 AUDIT RESOLUTION, FOLLOW-UP AND SETTLEMENT**

- (a) Once the audit findings and recommendations become available, the CO shall review the amount of contract costs questioned, recommend costs to be disallowed, the corrective actions required, then settle such determinations with the contractor.
- (b) The CO shall determine the action to be taken on each audit recommendation within two months of the receipt of the audit report. The action does not need to be completed within the required six-month period for contract closeout; however the accepted audit recommendations shall be implemented expeditiously.
- (c) Audit resolution decisions, actions and settlements shall be documented in the official file.

## 14 CONTRACT ADMINISTRATION

This part prescribes policies and procedures for assigning, performing and reviewing contract administration functions.

### 14.1 ASSIGNMENT OF CONTRACT ADMINISTRATION

This subpart prescribes policies and procedures for assignment, responsibility and administration of the contract.

#### 14.1.1 Contracting Officer

- (a) The CO shall perform contract administration, directly and by delegation of agents, to ensure that Bonneville receives complete and timely delivery of required contract performance. Delegation of functions does not relieve the CO of ultimate responsibility for the administration of the contract.
- (b) The CO may delegate contract administration or specialized support services with the exception of negotiating terms and conditions or committing funds.
- (c) The CO has the unilateral right to rescind a delegated authority or designee at any time.

#### 14.1.2 Contract Specialist

A contract specialist (CS) may perform most contract administrative duties on behalf of the CO with the exception of committing funds or negotiating terms and conditions. The CS does not require a written delegation for the performance of these duties.

#### 14.1.3 Contracting Officer Representative

- (a) A CO may delegate contract administration or specialized support services with the exception of committing funds or negotiating terms and conditions.
  - (1) Administrative duties during the performance of the contract, such as inspecting and accepting work, certifying invoices for payment, and coordinating work with the contractor, may be delegated to a contracting officer representative (COR).
  - (2) This delegation is only for Bonneville employees holding a current COR certification.
  - (3) This delegation must be made in writing, with explicit description of roles, responsibilities, limitations of the COR's authority and definition of the specific contract assigned.
    - (i) The CO shall make this delegation at the time of contract award and upon any changes in delegation.
    - (ii) The COR delegation must not include negotiation of terms of the contract or authorization of commitment of funds, unless given field mod authority, see subsection 24.5.25.
    - (iii) The process for COR delegation must not allow continuation of delegated duties at the conclusion of the contract activities. The process must allow termination of the delegation at any time.
- (b) This delegation from the CO may include responsibilities that require management and oversight of contractor personnel to ensure that duties carried out under a specific contract do not evolve into inherently governmental and/or personal services type relationships. This type of COR delegation requires specific language outlining management and oversight responsibilities of contractor personnel during performance. Additionally, the CO and COR must complete an annual review required in subsection 23.3.2(h) attesting that the services performed during the year did not evolve into a personal services type of contract. Subsections 23.1.5 Personal Services and 23.1.6 Inherently Governmental Functions,

provides specific details and guidance a COR shall follow when performing management and oversight responsibilities as delegated by the CO.

- (c) The CO shall notify the contractor in writing at the time of delegation and whenever a change is made in the CO or COR.

#### 14.1.4 Field Inspector

- (a) Some delegated duties of the COR may be redelegated to a field inspector (FI). This delegation must be made by the COR in writing, explicitly describing the role, responsibilities and limitations of the field inspector for the specific contract assigned.
- (b) The COR shall notify the contractor and the CO in writing at the time of delegation and whenever a change is made in the field inspector(s).
- (c) FI actions shall not include acceptance of the work, approving invoice for payment, directing the contractor to do additional work, negotiate terms of the contract or authorize commitment of funds.

#### 14.1.5 Contract Clauses

- (a) The CO shall include a clause similar to the clause 14-1, Contracting Officer's Representatives – Construction, in solicitations and contracts for construction.
- (b) The CO shall include a clause similar to 14-2, Contract Administration Representatives, in solicitations and contracts which require the involvement of representatives of the CO.
- (c) The CO shall not include clause 14-2, in construction contracts.

#### 14.1.6 Functions of Contract Administration

This subsection prescribes policies and procedures relating to the functions of contract administration.

##### 14.1.6.1 Policy

- (a) The CO is ultimately responsible for contract administration functions. These functions may be delegated and assigned with the exception of negotiating terms and conditions of the contract or committing funds, unless the delegate has a warrant equal to or greater than assigned contract actions.
- (b) The following are examples of contract administration functions that may be delegated:
  - (1) Review the contractor's compensation structure;
  - (2) Review the contractor's insurance plans;
  - (3) Conduct post-award orientation conferences;
  - (4) Review and evaluate contractors' proposals and, when negotiation will be accomplished by the CO, furnish comments and recommendation that officer;
  - (5) Attempt to resolve issues in controversy, using ADR procedures when appropriate;
  - (6) The adequacy of the contractor's accounting system and its associated internal control system; affect the quality and validity of the contractor data upon which the Government must rely for its management oversight of the contractor and contract performance;
  - (7) Review and approve or disapprove the contractor's requests for payments under the progress payments or performance-based payments;
  - (8) Monitor the contractor's financial condition and advise the CO when it jeopardizes contract performance;
  - (9) Perform property administration;
  - (10) Perform necessary screening, redistribution, and disposal of contractor inventory;
  - (11) When contractors request Government property –



- (i) Evaluate the contractor's requests for Government property and for changes to existing Government property and provide appropriate recommendations to the CO;
  - (ii) Ensure required screening of Government property before acquisition by the contractor;
  - (iii) Evaluate the use of Government property on a non-interference basis; and
  - (iv) Ensure payment by the contractor of any rental due; and
- (12) Perform production support, surveillance, and status reporting, including timely reporting of potential and actual slippages in contract delivery schedules;
  - (13) Advise and assist contractors regarding their priorities and allocations responsibilities;
  - (14) Monitor contractor industrial labor relations matters under the contract; actual or potential labor disputes; and coordinate the removal of urgently required material from the strikebound contractor's plan upon instruction from, and authorization of, the CO;
  - (15) Ensure contractor compliance with contractual quality assurance requirements;
  - (16) Ensure contractor compliance with contractual safety requirements;
  - (17) Evaluate potential waivers and deviations;
  - (18) Evaluate and monitor the contractor's procedures for complying with procedure regarding restrictive markings on data;
  - (19) Ensure timely submission of required reports; and
  - (20) Accomplish administrative closeout procedures.
- (c) The following are functions which shall not be delegated:
- (1) Negotiate forward pricing;
  - (2) Determine the allowability of costs suspended or disapproved as required, direct the suspension or disapproval of costs when there is reason to believe they should be suspended or disapproved, and approve final vouchers;
  - (3) Issue Notices of Intent to Disallow or not Recognize Costs;
  - (4) Establish final indirect cost rates and billing rates for those contractors meeting the criteria;
  - (5) Determine the adequacy of the contractor's accounting system. The contractor's accounting system should be adequate during the entire period of contract performance;
  - (6) Issue orders and modifications to contracts;
  - (7) Negotiate prices and execute supplemental agreements for spare parts and other items selected through provisioning procedures when prescribed by agency acquisition regulations;
  - (8) Negotiate prices and execute contractual documents for settlement of partial and complete contract terminations for convenience;
  - (9) Negotiate and execute contractual documents settling cancellation charges under multiyear contracts;
  - (10) Process and execute novation and change of name agreements;
  - (11) Modify contracts to reflect the addition of Government-furnished property and ensure appropriate consideration; and
  - (12) Issue administrative changes, correcting errors or omissions in typing, contractor address, facility or activity code, remittance address, computations which do not require additional contract funds, and other such changes.

## **14.2 [RESERVED]**

## **14.3 CORRESPONDENCE AND VISITS**

### **14.3.1 Contract correspondence**

- (a) Bonneville personnel (and other contracting personnel) normally shall (1) forward correspondence relating to assigned contract administration functions through the cognizant COR, and provide a copy to the CO for the administration file. When urgency requires sending correspondence directly to the contractor, a copy shall be sent concurrently to the CO and COR.
- (b) The COR shall maintain records of pertinent correspondence conducted with the contractor, and provide to the CO upon closeout, or as necessary to aid the CO with contract modifications and exercising options.

#### 14.3.2 Visits to contractors' facilities

- (a) Bonneville personnel planning to visit a contractor's facility in connection with one or more Bonneville contracts shall provide the CO with the following information, sufficiently in advance to permit the CO or COR to make necessary arrangements. Such notification is for the purpose of eliminating duplicative reviews, requests, investigations, and audits relating to the contract administration functions. At a minimum, the notification shall include the following:
  - (1) Visitors' names and official positions
  - (2) Date and duration of visit;
  - (3) Name and address of contractor and contractor personnel to be contacted;
  - (4) Contract number; and
  - (5) Purpose of the visit.
- (b) Bonneville employees shall fully inform the CO of any discussions with the contractor or other results of the visit that may potentially affect the administration of the contract.

### 14.4 BASIC CONTRACT ADMINISTRATION CLAUSES

#### 14.4.1 Order of Precedence

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.

#### 14.4.2 Other Rights at Law

In order to preserve Bonneville's rights under the common law, a clause similar to those used by commercial organizations is provided.

#### 14.4.3 Contract Clauses

- (a) The CO shall include a clause similar to the 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.
- (b) The CO shall include the clause 14-4, Other Rights at Law, in solicitations and contracts for noncommercial procurements.

### 14.5 COMMUNICATIONS WITH SUPPLIERS

- (a) COs are encouraged to establish close working relationships with suppliers and representatives of the CO so that the supplier and Bonneville personnel are working on the contract as a team.
- (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 Bonneville 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; and
  - (3) Routinely throughout the life of the contract effort, even though no problems have been encountered.

#### 14.5.1 Relationships with Suppliers

Bonneville 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. Bonneville shall administer contracts with the objective of developing positive long-term relationships. Such relationships are typically referred to as partnering, strategic alliances, supplier management, and other similar terms.

#### 14.5.2 Protecting Agency Controlled Unclassified Information

COs and CORs shall take necessary steps to control and protect Controlled Unclassified Information (CUI) 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.

#### 14.5.3 Postaward Orientation

This subsection prescribes policies and procedures for the postaward orientation of contractors and subcontracts through conference, letter, email or other written communication.

##### 14.5.3.1 General

- (a) A postaward orientation aids both Bonneville and contractor personnel to (1) achieve a clear and mutual understanding of all contract requirements, and (2) identify and resolve potential problems. However, it is not a substitute for ensuring the contractor's full understanding of the work requirements at the time offers are submitted, nor is it to be used to alter the final agreement arrived at in any negotiations leading to contract award.
- (b) Maximum benefits will be realized when postaward orientation is conducted promptly after award.

##### 14.5.3.2 Policy

- (a) A postaward orientation shall be conducted after every non-commercial contract with the exception of orders for which an orientation was already held at the higher contract level.
- (b) It is up to the CO to decide the appropriate format (conference, letter, telephone, etc.) for the postaward orientation.

#### 14.5.3.2.1 Postaward Conference

##### (a) Arrangements.

- (1) If the CO determines a conference will be held, the CO is responsible for:
  - (i) Establishing the time and place of the conference;
  - (ii) Preparing the agenda, when necessary;
  - (iii) Notifying appropriate Bonneville personnel and the contractor;
  - (iv) Designating, or acting as the chairperson;
  - (v) Conducting a preliminary meeting with Bonneville personnel, if necessary; and
  - (vi) Preparing a summary report of the conference.
- (2) When the CO initiates a conference, the arrangements may be made by the CO, or at his/her request, by the COR.

(b) Procedure. The chairperson of the conference shall conduct the meeting. Unless a contract change is contemplated, the chairperson shall emphasize that it is not the purpose of the meeting to change the contract. The CO may make commitments or give directions within the scope of the CO's authority and shall put in writing and sign any commitment or direction, whether or not it changes the contract. Any change to the contract that results from the postaward conference shall be made only by a contract modification referencing the applicable terms of the contract. Participants without authority to bind Bonneville shall not take action that in any way alters the contract.

##### (c) Policy.

- (1) The chairperson shall prepare and sign a report of the postaward conference. The report shall cover all items discussed, including areas requiring resolution, controversial matters, the names of the participants assigned responsibility for further actions, and the due dates for the actions. The chairperson shall furnish copies of the report to the CO, COR, the contractor, and others who require the information.
- (2) The prime contractor may invite subcontractors, or Bonneville may request subcontractors attend orientation. However, it is important that Bonneville representatives recognize the lack of privity of contract between Bonneville and subcontractors.

#### 14.5.3.2.2 Postaward letters

In some circumstances, a letter or other written form of communication to the contractor may be adequate postaward orientation (in lieu of a conference). The letter should identify the Bonneville representative responsible for administering the contract and cite any unusual or significant contract requirements.

#### 14.5.3.3 Contract Clauses

The CO may include the clause 14-19, Post Award Orientation, in solicitations and contracts when a postaward orientation conference is appropriate.

The CO may include the clause, 14-24, Inconsistency Between English Version and Translation in solicitations and contracts if anticipating translation into another language.

## 14.6 VARIATION IN QUANTITY

### 14.6.1 Supply Contracts

- (a) A fixed-price supply contract may authorize Bonneville acceptance of a variation in the quantity of items called for if the variation is caused by conditions of loading, shipping, or

packaging, or by allowances in manufacturing processes. Any permissible variation shall be stated as a percentage and it may be an increase, a decrease, or a combination of both.

- (b) There should be no standard or usual variation percentage. The overrun or underrun permitted in each contract should be based upon the normal commercial practices of a particular industry for a particular item, and the permitted percentage should be no larger than is necessary to afford a contractor reasonable protection. Considerations shall be given to the quantity to which the percentage variation applies. For example, when delivery will be made to multiple destinations and it desired that the quantity variation apply to the item quantity for each destination, this requirement must be stated in the contract.
- (c) Contractors are responsible for delivery of the specified quantity of items in a fixed-price contract, within allowable variations, if any. If a contractor delivers a quantity of items in excess of the contract requirements plus any allowable variation in quantity, particularly small dollar value overshipments, it results in unnecessary administrative costs to Bonneville in determining disposition of the excess quantity. Accordingly, the contract may include the clause 14-15, Delivery of Excess Quantities, to provide that –
  - (1) Excess quantities of items totaling up to \$1,000 in value may be retained without compensating the contractor; and
  - (2) Excess quantities of items totaling over \$1,000 in value may, at Bonneville’s option, be either returned at the contractor’s expense or retained and paid for at the contract unit price.

#### 14.6.2 Service and Construction Contracts

Service and construction contracts may authorize a variation in estimated quantities of unit-priced items. When the variation between the estimated quantity and the actual quantity of a unit-priced item is more than plus or minus 15 percent, an equitable adjustment in the contract price shall be made upon the demand of either Bonneville or the contractor. The contractor may request an extension of time if the quantity variation is such as to cause an increase in the time necessary for completion. The CO must receive the request in writing within 10 working days from the beginning of the period of delay. However, the CO may extend this time limit before the date of final settlement of the contract. The CO shall ascertain the facts and make any adjustment for extending the completion date that the findings justify.

#### 14.6.3 Contract Clauses

- (a) The CO may include the clause 14-5, Variation in Quantity – Supply Contracts, in solicitations and contracts if authorizing a variation in quantity in fixed-price contracts for supplies or for services that involve the furnishing of supplies. The CO may modify or delete paragraph (b) as appropriate to the purchase.
- (b) The CO may include the clause 14-6, Variation in Estimated Quantity – Service and Construction Contracts, in solicitations and contracts when a fixed-price contract is contemplated that authorizes a variation in the estimated quantity of unit-priced items
- (c) The CO may include the clause 14-15, Delivery in Excess Quantities, in solicitations and contracts when a fixed-price supply contract is contemplated.

### 14.7 USE OF GOVERNMENT SUPPLY SOURCES BY SUPPLIERS

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; and
- (g) US Army Corps of Engineers

#### **14.8 USE OF DOE EXCESS EQUIPMENT**

Bonneville cost reimbursement contractors may make use of excess Bonneville 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 CONSENT TO SUBCONTRACT**

- (a) 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) 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) Bonneville’s interest is not protected by competition among subcontractors;
  - (4) Environmentally sensitive issues are involved;
  - (5) Hazardous materials are involved; and
  - (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 Bonneville approval before subcontracting a portion of the contract. The decision to require subcontracting approval is at the discretion of the CO.
- (c) Bonneville 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 Bonneville considers the contract effort to be sensitive and desires stricter accountability.

##### **14.9.1 Contract Clause**

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 of handling hazardous or toxic wastes.

#### **14.10 CONTRACT MODIFICATIONS AND CHANGES**

##### **14.10.1 Definitions**

As used in this subpart –

*Administration 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 representative 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 clause authorizes 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, may execute contract modifications.
- (b) Contract modifications should be priced before their execution, if this can be done without adversely affecting the interests of Bonneville.
- (c) COs shall convene a Strategy Panel in accordance with the procedures at subpart 6.9 prior to executing modifications that meet any of the criteria .

#### 14.10.3 Types of Contract Modifications

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) Definitized letter 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) **Unilateral extensions.** Contracts may be extended by issuing a unilateral modification whenever such right is provided in the contract thru pre-priced options and the appropriate factors concerning exercise of the option(s) (see 7.10.7 and 14.11) have been considered. The official file shall be documented, as identified in 12.8.1.2.2, to explain why the CO ordered the extension.
- (b) **Bilateral extensions.** Where the contract provides for un-priced options, such extension shall be negotiated with the contractor. These shall be performed before the extension of the contract (see 7.10.7). The official file shall be documented, as identified in BPI 12.8.1.2.2, shall explain why the CO negotiated the extension.

- (c) Extensions to expired contracts. If a contract does not provide for options, a CO shall only negotiate a bilateral extension to the contract after expiration, if the continuation of supply and/or services is for unusual and compelling reasons (see 11.9.2).

#### 14.10.4.1 Procedure

With regard to 14.10.4(c) above, the extension shall be documented as identified in 11.9.2 and 12.8.1.2.1.

- (a) If the contract is expired less than 14 calendar days, the CO and contractor may mutually agree to reinstate the expired contract.
- (b) If the contract is expired more than 14 calendar days, and the CO and contractor mutually agree to reinstate the expired contract, the CO shall submit a waiver requesting approval from the HCA to extend the contract. Contracts expired for more than 14 calendar days cannot be reinstated without HCA approval.
- (c) If the contract is expired more than two months, the CO shall re-compete and/or issue a new contract.

The CO shall document the official file to include reasons surrounding the expired contract, communication with contractor agreeing to reinstate the expired contract, approved HCA waiver and other relevant information.

#### 14.10.5 Changes

##### 14.10.5.1 Changes Made with a Changes Clause

Noncommercial 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.

##### 14.10.5.1.1 Policy

- (a) 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 Bonneville 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, Bonneville prefers changes to be priced before work is initiated on the change.
- (b) Normally payments are not made for work performed under definitized change orders. The CO may authorize provisional payment if such payments are in Bonneville's best interest.
- (c) 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."*



- (d) 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 subsection 12.8.1.2.2 for changes within the scope of the contract.
- (e) Changes outside the scope of the contract shall be documented per 12.8.1.2.1, as if the transaction was a new award.
- (f) COs should use a Part 14 changes clause in noncommercial acquisitions when it is necessary to reserve the right for Bonneville to unilaterally order the types of changes described in paragraph (a) of the changes clauses.

#### 14.10.5.1.2 Contract Clauses

- (a) The CO may include a clause similar to Clause 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 Clause 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 Clause 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 Clause 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.

#### 14.10.6 Changes Made without a Changes Clause

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.

#### 14.10.7 Forms

The Bonneville form 4220.51 shall be used for contract modifications.

### 14.11 EXERCISING OPTIONS

When administering contracts with options, the CO shall refer to the procedures in subsection 7.10.7, when exercising an option.

## 14.12 STOPPING A WORK ACTIVITY AND STOP WORK ORDERS

### 14.12.1 Definitions

*Stop work order* means a written order from the CO to the contractor to stop work. A stop work order may stop all work on the contract, or only a specific portion of the work on the contract.

### 14.12.2 General

Bonneville may need to issue a stop work order when unexpected events occur during performance of a contract. Possible situations that Bonneville may issue a stop work order to cover include, but are not limited to:

- (a) Delays caused by waiting for a decision from Bonneville;
- (b) Adverse weather;
- (c) Technological advancement;
- (d) Changes to Bonneville programs or objectives;
- (e) Protect other structures, occupants, or workers from unsafe conditions;
- (f) Public safety;
- (g) Emergency situations or other urgent conditions;
- (h) Differing site conditions; and
- (i) Violation of contract terms, including Bonneville policies in the clause 15-3, Contract Compliance with Bonneville policies.

### 14.12.3 Notification of Imminent Danger and Workers Rights to Decline Work

All workers, including contractors, and Bonneville employees, are responsible for identifying and notifying others in the affected area of imminent danger at the site of work. Contractor workers have the right to decline to perform tasks, without reprisal, that they believe will endanger the safety and health of themselves or of other workers. Refer to subsection 15.6.1 and Clause 15-12 for additional instructions and procedures.

### 14.12.4 Stopping a Work Activity for Safety and Health Concerns

- (a) Any Bonneville employee may stop a work activity due to safety and health concerns. The authority to resume a stopped work activity is reserved for the Bonneville Safety Office. Refer to subsection 15.6.3 and the clause 15-12 for authorities, responsibilities, and procedures for stopping a work activity.
- (b) Stopping a work activity is limited to the specific activity that resulted in a safety and health concern. A stop work order as defined in subsection 14.12.1 is a separate and distinctly different action than stopping a work activity. Only a CO can issue a Stop Work Order.

### 14.12.5 Stop Work Orders for Safety and Health Concerns

- (a) The CO may issue a stop work order due to safety and health concerns. The CO shall consult the Bonneville Safety Office prior to issuing a stop work order due to safety and health concerns. The Bonneville Safety Office may initiate a request to issue a stop work order for safety and health concerns.
- (b) A stop work order issued for safety and health concerns will not be rescinded without joint approval by the CO and the Bonneville Safety Office.
- (c) Additional policies, procedures, and responsibilities for mitigating safety and health concerns are provided in subpart 15.6.

### 14.12.6 Procedures

- (a) The CO shall consult with the program office and COR prior to issuing a stop work order. See subsection 14.12.5 for additional consultations required for a stop work order due to safety and health concerns.
- (b) The CO may issue the initial stop work order verbally. The CO shall immediately issue a written stop work order that identifies:
  - (1) Clause 14-14 as the authority for the stop work order;
  - (2) A description of the work to be suspended, including applicable specific safety and health concerns;
  - (3) Instructions to continue or stop contractor orders for materials or services;
  - (4) Instructions to continue work or stop work on subcontracts;
  - (5) Other suggestions for minimizing the contractor's costs while the stop work order is in effect; and
  - (6) Procedures for allowing the contractor to perform remedial work to make the site safe.
- (c) The CO shall consult with the program office to evaluate Bonneville's options for resolving the stop work order. The CO shall select one of the following options:
  - (1) Extend the initial stop work order;
  - (2) Rescind the stop work order. See subsection 14.12.5 for additional approvals required to rescind a stop work order covering safety and health concerns; or
  - (3) Terminate the contract.

#### 14.12.7 Contract Clause

The CO may include the clause 14-14, Stop Work Order, in solicitations and contracts when Bonneville wants to retain the right to stop work during contract performance. The CO shall include the clause 14-14, Stop Work Order, in all solicitations and contracts for construction.

### 14.13 NOVATION AND CHANGE-OF-NAME AGREEMENTS

This subpart prescribes policies and procedures for –

- (a) Recognition of a successor in interest to Bonneville contracts when contractor assets are transferred;
- (b) Recognition of a change in a contractor's name; and
- (c) Execution of novation agreements and change-of-name agreements by the CO.

#### 14.13.1 Definitions

*Change-of-name agreement* means a legal instrument executed by the contractor and Bonneville 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) Bonneville, by which, among other things, the transferor guarantees performance of the contract; the transferee assumes all obligations under the contract; and Bonneville recognizes the transfer of the contract and related assets.

#### 14.13.2 Responsibility for Executing Agreements

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

- (a) Bonneville may, if in its interest, recognize a third party as the successor in interest to a Bonneville 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) When it is in Bonneville'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 Bonneville, and the contract may be terminated for default should the original contractor not perform.

#### 14.13.3.1 Procedures

- (a) When a contractor asks Bonneville 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.
- (b) When recognizing a successor in interest to a Bonneville contract is consistent with Bonneville'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 Bonneville;
  - (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.
- (c) The CO generally should use the format in Exhibit 14-A 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.
- (d) 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 Bonneville form F4220.01e, Request New or Change Vendor Profile form, 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.

**Exhibit 14-A**  
**NOVATION AGREEMENT**

NOVATION AGREEMENT

The purpose of the agreement is to recognize \_\_\_\_\_ (Transferee) as the successor in interest to \_\_\_\_\_ (Transferor) under 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) Bonneville Power Administration 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 Bonneville Power Administration 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

- (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 Accounts Payable 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 Bonneville'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 Bonneville form 4220.51, Modification of Contract, for each affected contract, incorporating a copy of the agreement. The modification shall be distributed in the usual manner.

#### 14.13.5 Contractor's Change of Name

- (a) If only a change to the contractor's name is involved and Bonneville'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)."*

- (c) The CO shall ensure that the BES Vendor Maintenance Team receives the information to update the Vendor Record.

### 14.14 PAPERLESS PURCHASING

- (a) *Paperless purchasing*, as used in this subsection, 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) Paperless purchasing techniques are authorized for use at Bonneville whenever practicable or cost-effective. The Director of Contracts and Strategic Sourcing 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- or delivery-orders in an amount specified by the CO in an Indefinite-Delivery contract, or blanket purchase agreement, 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.

#### 14.14.1 Contract Clauses

- (a) COs shall include a clause similar to 14-23, E-Commerce Marketplace Ordering, in solicitation and contracts for the acquisition of commercial items and services that include electronic transactions.
- (b) COs shall include a clause similar to 14-21, 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.
- (c) COs may include the clause 14-22, Definitions, in solicitations and contracts in which electronic transactions will take place.

## **14.15 USE OF PRIVATELY-OWNED US FLAG VESSELS**

Bonneville has experienced excessive damage from the cross-country rail shipment of sensitive materials acquired from foreign vendors. Bonneville has determined that it is its interest to require shipment of sensitive foreign materials by ocean vessel to the port nearest the site where the material will be used.

### **14.15.1 Procedure**

- (a) 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 Bonneville service area allowing minimal handling in rail shipment. In order to achieve the requirement that Bonneville obtain U.S. Flag Vessel shipping for 50 percent of the gross tonnage of foreign-produced materials, a provision requiring 100 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.
- (b) Subcontracts for purchase of commercial items or components are exempt from the use of U.S. Flag Vessels.

### **14.15.2 Contract Clause**

The CO shall include Clause 14-16, Requirement for U.S. Flag Vessels, in solicitations and contracts that will involve ocean transportation for supplies.

### **14.15.3 Remedy for U.S. Flag Vessel Noncompliance**

If, after award of the contract, the contractor is unable to obtain a U.S. Flag Vessel, they may submit to the CO a request to use a foreign-flag vessel(s). Such request will be supported by documentation from the U.S. Maritime Office confirming non-availability of a vessel. If the CO waives the applicable clause, the difference in cost between the U.S. Flag and Foreign Flag Vessel shipping costs will be deducted from the contract by modification as appropriate.

## **14.16 CONTRACTOR PERFORMANCE MEASURES**

Formal and informal systems which track contractors' long term performance are useful to continually improve the quality of supplies and services purchased by Bonneville. There are many such systems available. Informal systems may be no more complex than regular communications with the Bonneville 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.

### **14.16.1 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 BPI 21.3.2 for information on handling disagreements on contractor performance evaluations.

#### 14.16.2 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 Bonneville and are most critical to meet Bonneville'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

In general indirect cost rates are specific to cost-type contracts. Whatever method is used to ascertain the indirect cost rate, it should be equitable and consistently applied. When analyzing indirect cost rates the costs must be allowable, allocable and reasonable.

#### 14.17.2 Certificate of Indirect Costs

- (a) A proposal shall not be accepted and no agreement shall be made to establish final indirect cost rates unless the costs have been verified by the contractor.
- (b) Waiver may be appropriate when it is not feasible to have costs verified and the risk is relatively low when contracting with the following –
  - (1) A foreign government or international organization, such as a subsidiary body of the North Atlantic Treaty Organization;
  - (2) A State or local government;
  - (3) An institution of higher education; or
  - (4) A nonprofit organization.
- (c) If the contractor has not verified its proposal for final indirect cost rates and a waiver is not appropriate, the CO may unilaterally establish the rates.
- (d) Rates established unilaterally should be –
  - (1) Based on audited historical data or other available data as long as unallowable costs are excluded; and
  - (2) Set low enough to ensure that unallowable costs will not be reimbursed.

#### 14.17.3 Final Indirect Cost Rates

In general final indirect cost rates are determined at the end of the contract period. This is completed once the contractor submits the completion invoice and the indirect rate is confirmed, or adjusted to reflect the settled amounts and rate for the period of the contract. The objective is to ensure the final indirect rate is adequately supported by relevant data.

- (a) Final indirect cost rates shall be established within 120 days (or longer period, if approved in writing by the CO,) after settlement of the final annual indirect cost rates for all years of a



physically complete contract, the contractor must submit a completion invoice or voucher reflecting the settled amounts and rates. To determine whether a period longer than 120 days is appropriate, the CO should consider whether there are extenuating circumstances, such as the following –

- (1) Pending closeout of subcontracts awaiting Government audit;
  - (2) Pending contractor, subcontractor, or Government claims;
  - (3) Delays in the disposition of Government property;
  - (4) Delays in contract reconciliation; or
  - (5) Any other pertinent factors.
- (b) If the contractor fails to submit a completion invoice or voucher within the time specified the CO may –
- (1) Determine the amounts due to the contractor under the contract; and
  - (2) Record this determination in a unilateral modification to the contract.
- (c) If the CO conducts any negotiations in regards to the indirect rate the CO shall prepare and sign memorandum covering –
- (1) The disposition of significant matters in the advisory audit report;
  - (2) Reconciliation of all costs questioned, with identification of items and amounts allowed or disallowed in the final settlement as well as the disposition of period costing or allocability issues;
  - (3) Reasons why any recommendations of advisors (management, finance, auditors) were not followed; and
  - (4) Notify the contractor of the individual costs which were considered unallowable and the respective amounts of the disallowance.

#### 14.17.4 Educational Institutions

- (a) Indirect cost rates for all cost-reimbursement contracts with educational institutions should be based on an audit of the institution's costs for the year immediately preceding the year in which the rates are being negotiated.
- (b) If this is not possible, an earlier audit may be used, but appropriate steps should be taken to identify and evaluate significant variations in costs incurred or in bases used that may have a bearing on the reasonableness of the proposed rates. However, in the case of smaller contracts an audit made at an earlier date is acceptable if –
  - (1) There have been no significant changes in the contractor's organization; and
  - (2) It is reasonably apparent that another audit would have little effect on the rates finally agreed upon and the potential for overpayment of indirect cost is relatively insignificant.
- (c) The educational institution shall certify their indirect rate, unless a waiver is approved in writing by the HCA.
- (d) For determining allowable and unallowable costs for indirect rates see the BFAI.

#### 14.17.5 State and Local Governments

- (a) Final indirect cost rates should be used in the settlement of indirect costs for all cost reimbursement contracts with State or local governments. In general, the CO should use the indirect cost rate negotiated and approved by the cognizant federal agency.
- (b) State and local governments shall verify their indirect rate, unless a waiver is approved in writing by the HCA.

#### 14.17.6 Nonprofit Organizations Other Than Educational and State and Local Governments

- (a) Indirect cost rates for all cost-reimbursement contracts with nonprofit organizations should be based on an audit of the institution's costs for the year immediately preceding the year in which the rates are being negotiated.
- (b) If this is not possible, an earlier audit may be used, but appropriate steps should be taken to identify and evaluate significant variations in costs incurred or in bases used that may have a bearing on the reasonableness of the proposed rates. However, in the case of smaller contracts an audit made at an earlier date is acceptable if –
  - (1) There have been no significant changes in the contractor's organization; and
  - (2) It is reasonably apparent that another audit would have little effect on the rates finally agreed upon and the potential for overpayment of indirect cost is relatively insignificant.
- (c) The nonprofit organization shall verify their indirect rate, unless a waiver is approved in writing by the HCA.
- (d) For determining allowable and unallowable costs for indirect rates see the BFAI.

#### 14.17.7 Quick-Closeout Procedure

- (a) The CO may decide to perform a quick-closeout for the settlement of direct and indirect costs for a specific contract, task order, or delivery order to be closed, in advance of the determination of final direct and indirect rates. In general, the CO may perform this procedure when –
  - (1) The contract, task order, or delivery order is physically complete;
  - (2) If the amount of unsettled direct costs and indirect costs to be allocated to the contract, task order, or delivery order is relatively insignificant; and
  - (3) The CO shall perform a risk assessment and determine that the use of the quick-closeout procedure is appropriate. The risk assessment shall include –
    - (i) Consideration of the contractor's accounting, estimating, and purchasing systems;
    - (ii) Other concerns of the cognizant contract auditors; and
    - (iii) Any other pertinent information, such as, documented history of Federal Government approved indirect cost rate agreements, changes to contractor's rate structure, volatility of rate fluctuations during affected periods, mergers or acquisitions, special contract provisions limiting contractor's recovery of otherwise allowable indirect costs under cost reimbursement of time-and-materials contracts; and
    - (iv) Agreement can be reached on a reasonable estimate of allocable dollars.
- (b) Determinations of final indirect costs under the quick-closeout procedure provided in the clause 7-7, Allowable Cost and Payment shall be final for the contract is covers and no adjustment shall be made to other contracts for over- or under-recoveries of costs allocated or allocable to the contract covered by the agreement.
- (c) Indirect cost rates used in the quick closeout of a contract shall not be considered a binding precedent when establishing the final indirect cost rates for other contracts.

#### **14.18 [RESERVED]**

#### **14.19 BANKRUPTCY**

##### 14.19.1 Policy

The CO shall take prompt action to determine the potential impact of a contractor bankruptcy on Bonneville in order to protect the interests of Bonneville.

##### 14.19.2 Procedures

- (a) When notified of bankruptcy proceedings, COs shall, at a minimum –
  - (1) Furnish the notice of bankruptcy to the Office of General Counsel and other appropriate agency offices (e.g., contracting, financial, property) and affected buying activities;
  - (2) Determine the amount of Bonneville’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);
  - (3) Take actions necessary to protect Bonneville’s financial interest and safeguard Bonneville’s property; and
  - (4) Furnish pertinent contract information to the legal counsel representing Bonneville.
- (b) The CO shall consult with Office of General Counsel prior to taking any action regarding the contractor’s bankruptcy proceedings.

#### 14.19.3 Contract Clause

COs shall include the clause 14-18, Bankruptcy, in all solicitations and contracts exceeding \$150,000, except IGC’s.

### 14.20 PRODUCT/CONTRACTOR INFORMATION

- (a) The requisitioner and the CO form a partnership in obtaining the goods and services needed to execute Bonneville 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 Bonneville. Therefore, they are in a position to provide information that will help the CO in the selection of suppliers.
- (b) 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) 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 Bonneville 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 Bonneville CO;
  - (3) The firm is not authorized to expend any money based on this contract; and
  - (4) The firm is not authorized to expect an award.
- (d) 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.

### 14.21 COR CERTIFICATION PROGRAM REQUIREMENT

This subpart prescribes policies and procedures to train, certify and track contracting officer representative’s certification.

#### 14.21.1 Policy

The Director of Contracts and Strategic Sourcing shall establish and administer a certification program to train, certify and appoint CORs. The purpose of the COR program is to create a results oriented acquisition workforce focused on receiving the best value materials and services from contractors. This is accomplished through partnering, performance monitoring,

quality surveillance, and accountability that ensure entrusted resources are used and managed wisely throughout all phases of the acquisition and contract life cycles.

#### 14.21.2 Procedures

- (a) The certification program must be managed by a supervisor/manager equivalent. The program shall deliver and maintain the following:
- (1) Written interactive COR guidance on fundamentals of COR duties in contract administration and requisition development;
  - (2) Internal training to meet need for initial certification, refresher training, requirements development and continuous learning;
  - (3) Process to verify the credentials of the COR applicant;
  - (4) Process and management for recommending COR waivers to the HCA;
  - (5) Management of a COR certification database;
  - (6) Management of unauthorized commitments ensuring policies are followed per subpart 1.9;
  - (7) Annual submittal to HCA of COR demographic information, training completions and continuous learning status; and
  - (8) Initiatives as necessary to ensure COR skills in requisition development, acquisition planning, procurement processes, contracting policies, contract administration methods, and pertinent regulations, laws and leading practices.
- (b) Additionally, the Contracting Office COR program shall:
- (1) Establish and maintain definition of certification requirements, to include initial training, refresher training, continuous learning accreditation, and frequency to maintain certification. As requested by the HCA, the Contracting Office COR program shall perform analysis and lead initiatives to improve COR workforce skills and related processes.
  - (2) Ensure that delegations to act as a COR are only made to certified CORs. The COR shall perform contract administration functions only when and to the extent specifically authorized by the COR.
  - (3) Define requirements for training, content and frequency. At a minimum, the certification program shall include the following subjects –
    - (i) Introduction to the Bonneville Purchasing Instructions;
    - (ii) Roles, responsibilities and limitations;
    - (iii) Requisitioner role and responsibilities;
    - (iv) Contracting officers
    - (v) Contracting representatives;
    - (vi) Head of the Contracting Activity (HCA);
    - (vii) Integrity and ethics compliance;
    - (viii) Inherently governmental functions and personal services
    - (ix) Acquisition planning;
    - (x) Performing market research;
    - (xi) Developing contract specifications (i.e., SOW);
    - (xii) Planning quality assurance;
    - (xiii) Contract administration;
    - (xiv) Invoicing and payment;
    - (xv) Accrual and Prepaid Training;
    - (xvi) Acquisition methods;
    - (xvii) Acquisition types;
    - (xviii) Post award orientation;
    - (xix) Contractor performance monitoring;

- (xx) Subcontracting;
- (xxi) Problem resolution;
- (xxii) Modifications and change orders;
- (xxiii) Unauthorized commitments;
- (xxiv) Ratification process;
- (xxv) Acceptance of deliverables;
- (xxvi) Contract payments;
- (xxvii) Property administration;
- (xxviii) Contract termination;
- (xxix) Contract closeout.

## **14.22 COGNIZANT FEDERAL AGENCY**

This subpart prescribes policies and procedures for determining the cognizant federal agency. This subpart prescribes the responsibility of the cognizant Federal agency for establishing negotiating and approving indirect rates.

### **14.22.1 Policy**

- (a) For contractors the cognizant Federal agency normally will be the agency with the largest dollar amount of negotiated contracts, including options.
- (b) For educational institutions and nonprofit organizations, the cognizant Federal agency for indirect costs is established in the BFAI.
- (c) Once a Federal agency assumes cognizance for a contractor, it should remain cognizant for at least 5 years to ensure continuity and ease of administration. However, if circumstances warrant it, and the affected agencies agree, cognizance may transfer prior to the expiration of the 5-year period.

### **14.22.2 Responsibility of Indirect Rates**

When Bonneville is the cognizant Federal agency, Bonneville has the delegated authority to establish, negotiate and approve indirect rates on behalf of the CO.

## **14.23 FACTORY REPRESENTATIVE SERVICES**

### **14.23.1 Policy**

Bonneville may require the Contractor to furnish Factory Representatives that are responsible, competent, have a thorough technical knowledge of the equipment involved, and are well versed and can communicate in the English language. The Factory Representative will be responsible for monitoring and providing instructions during the assembly of the equipment. The direct responsibility for supervising and executing the work shall remain with Bonneville.

### **14.23.2 Contract Clause**

COs shall include the clause 14-25, Factory Representative Services, in all solicitations and contracts that may require installation assistance of high voltage electrical equipment.

## **14.24 EMERGENCY CONTINGENCY NOTICE**

### **14.24.1 Policy**

In the event of a locally declared emergency event, the Contracting Officer retains the authority to redirect the Contractor from services originally contracted to services in support of disaster relief that are within the Contractor's capabilities.

#### 14.24.2 Contract Clause

The CO shall include the clause 14-26, Emergency Contingency Notice, in all solicitation and contracts/agreements when a contractor may be required to redirect resources due to an emergency.

## 15 ENVIRONMENT, SAFETY, AND SECURITY

### 15.1 Pollution Control and Clean Air and Water

#### 15.1.1 Policy

Bonneville shall not contract with violators of the Clean Air and Water Act.

#### 15.1.2 Procedure

The CO shall not contract with suppliers listed on Environmental Protection Agency's (EPA) list of violators of the Clean Air and Water Act requirements.

#### 15.1.3 Contract Clause

The CO shall include Clause 15-1 Clean Air and Water, in solicitations and contracts for supplies and construction expected to exceed \$150,000.

### 15.2 DRUG-FREE WORKPLACE

#### 15.2.1 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 \$150,000, 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.

#### 15.2.2 Applicability

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.

#### 15.2.3 Penalties

- (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 the clause 15-2, 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 Bonneville's operations to the detriment of the Federal Government or the general public.

#### 15.2.3.1 Contract Clause

COs shall insert the clause 15-2, 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; except for commercial items and services, IGCs with other Federal agencies or with Tribes; or in contracts performed outside the United States, its territories, and its possessions.

### 15.3 CONTRACTOR COMPLIANCE WITH BONNEVILLE POLICIES

#### 15.3.1 General

- (a) Bonneville policies addressing personal behaviors apply to all Bonneville employees and to Bonneville contractors working or visiting on site. COs are responsible for assuring that Bonneville contractors are informed of these policies and that contractors are required to enforce these policies during all work performed at Bonneville.
- (b) The Bonneville work environment includes areas in and around Bonneville buildings, facilities, fitness centers, vehicles, food service areas and break locations, and any other areas or conveyances where Bonneville employees work or where work-related activities occur, including official travel.
- (c) Contractor personnel should be given copies and directed to provide, to employees and subcontractors, published information regarding Bonneville'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.

#### 15.3.1.1 Contract Clauses

- (a) COs shall include the clause 15-4, Contractor Compliance with Bonneville Policies, in solicitations and contracts requiring the contractor to perform work on Bonneville premises.
- (b) COs shall include the clause 15-14, Contractor Policy to Ban Text Messaging While Driving, in all solicitations and contracts.

### 15.4 HAZARDOUS MATERIALS AND SAFETY DATA

#### 15.4.1 Policy

- (a) 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) Bonneville 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 prescribed DOL Form OSHA-174 for use with Bonneville contracts.



#### 15.4.2 Contract Clause

The CO shall include the 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).

### 15.5 SUSTAINABLE PRODUCTS AND SERVICES

#### 15.5.1 Policy

It is Bonneville policy to advance procurement activities that are consistent with Bonneville's implementation of Executive Order 14057 and DOE Order 436.1A. 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.

##### 15.5.1.1 Procedure

It is the responsibility of the requesting organization/requisitioner to specify purchase requirements which comply with the Bonneville Sustainability Plan, and to identify services and products that meet such standards, where appropriate.

#### 15.5.2 Ozone-Depleting Substances

The Clean Air Act (CAA) is the comprehensive federal law that regulates air emissions from stationary and mobile sources. For the purposes of this subsection, ozone-depleting and refrigeration substances are discussed in section 608 and 609 of the CAA. For more information on Sections 608 and 609 see <http://www.epa.gov/ozone/title6/index.html>.

##### 15.5.2.1 Policy

It is the policy of Bonneville 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://epa.gov/ozone/strathome.html>.

##### 15.5.2.2 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.

##### 15.5.2.3 Contract Clauses

- (a) COs shall include the clause 15-7, Ozone-Depleting Substances, in all solicitations and contracts.
- (b) COs shall include the clause 15-8, Refrigeration Equipment, in all solicitations and contracts for services.

#### 15.5.3 Energy and Water Efficiency

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:

- (a) ENERGY STAR® at <http://www.energystar.gov/products>; and
- (b) FEMP at <http://energy.gov/eere/femp/energy-efficient-products-and-energy-saving-technologies>

#### 15.5.3.1 Policy

It is Bonneville 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.

#### 15.5.3.2 Procedure

When procuring energy-consuming products, services or construction that are listed in a product category covered under the Energy Star or FEMP, COs shall procure such products and services, when cost-effective and reasonably available, to meet the functional requirements of the program office.

#### 15.5.3.3 Contract Clause

COs shall include the clause 15-9, Energy Efficiency in Energy Consuming Products, in all solicitations and contracts.

#### 15.5.4 Recovered Materials and Bio-Based Products

- (a) Bonneville's Environment, Fish and Wildlife office promulgates Bonneville 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 and a list of suppliers is available at <https://www.epa.gov/smm/comprehensive-procurement-guideline-cpg-program>.
- (b) 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.biopreferred.gov>.

#### 15.5.4.1 Policy

It is Bonneville policy to advance the acquisition of products containing recovered materials and bio-based products in service and construction contracts. Contractors are required to report to SAMS, <http://www.sam.gov>, with a copy of the report to the CO, on the product types and dollar value of any USDA-designated biobased products purchased by the Contractor.

#### 15.5.4.2 Contract Clauses

- (a) COs shall include the clause 15-10, Recovered Materials in all solicitations and contracts for services or construction.
- (b) COs shall include the clause 15-11, Bio-Based Products, in all solicitations and contracts for services or construction.

## 15.6 SAFETY, HEALTH AND PROPERTY PROTECTION

The contractor is responsible for safety, health, and property protection. With regard to safety, Bonneville established additional requirements 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. Bonneville safety and health requirements are issued by the Bonneville Safety Office and included in the *Contractor Safety and Health Requirements for Prime and Subcontractors*, and incorporated by reference into construction contracts and service contracts as prescribed by the clause 15-13, Contractor Safety and Health Requirements. The full text of the *Contractor Safety and Health Requirements for Prime and Subcontractors* is available at <https://www.bpa.gov/energy-and-services/customers-and-contractors/contractor-safety>. The CO shall ensure the contract requestor provides the appropriate safety and health requirements are included in the construction specifications, the statement of work, or the exhibits in all solicitations and contracts for construction and contracts for non-construction when the contractor employees may encounter potentially hazardous working conditions. The program office, project manager, contract requestor, and the CO shall consult with the Bonneville Safety Office regarding the appropriate safety and health requirements to include in solicitations and contracts. Safety and health requirements may be incorporated by reference.

### 15.6.1 Notification of Imminent Danger and Worker's Right to Decline Work

- (a) All workers, including contractors' and Bonneville employees, are responsible for identifying and notifying other workers in the affected area of imminent danger at the site of work. Imminent danger is any condition or practice that poses a danger that could reasonably be expected to cause death or severe physical hardship before the imminence of such danger could be eliminated through normal procedures.
- (b) A contract worker has the right to ask, without reprisal, their onsite management, and other workers to review safe work procedures and consider other alternatives before proceeding with a work procedure. Reprisal means any action taken against an employee in response to, or in revenge for, the employee having raised, in good faith, reasonable concerns about a safety and health aspect of the work required by the contract.
- (c) A contract worker has the right to decline to perform tasks, without reprisal, that will endanger the safety and health of themselves or of other workers.
- (d) The contractor shall establish procedures that allow workers to cease or decline work that may threaten the safety and health of themselves or of other workers.

### 15.6.2 Stop Work Order

The authority to stop all work on the contract is reserved for the CO. Refer to subpart 14.12 and the clause 14-14, Stop Work Order, for construction and non-commercial acquisitions. For commercial acquisitions, refer to 28.3.3.5 and the clause 28-7, Stop Work Order.

### 15.6.3 Stopping a Work Activity for Safety and Health Concerns

#### 15.6.3.1 Policy

Any Bonneville employee may stop a work activity due to safety and health concerns as described in the clause 15-12, Contractor Safety and Health. This authority is limited to a specific work activity that the Bonneville employee identifies as a safety and health concern. The authority to stop all work on the contract or all work at the site of work is reserved for the CO. The contractor is prohibited from resuming the specific work activity that was stopped until the Bonneville Safety Office authorizes the contractor to resume work. The contractor may continue other unaffected activities at the site of work while Bonneville and the contractor investigate the stopped work activity.

#### 15.6.3.2 Responsibilities and Authorities to Stop a Work Activity

- (a) Any Bonneville employee:
  - (1) May stop a work activity due to safety and health concerns;
  - (2) Shall immediately identify the specific activity that is stopped to the contractor in writing; and
  - (3) Shall notify the Safety Office immediately by telephone or radio when a work activity is stopped.
- (b) Contracting officer:
  - (1) Shall notify the Safety Office when a work activity is stopped;
  - (2) Shall notify the COR when a work activity is stopped; and
  - (3) Additional responsibilities and authorities are described in the clause 15-12.
- (c) Safety Office:
  - (1) Shall notify the CO, when a Bonneville employee stops a work activity;
  - (2) Shall authorize the contractor to resume a stopped work activity after safety and health concerns are resolved;
  - (3) Shall notify the CO and COR when the contractor is authorized to re-start a stopped work activity; and
  - (4) Additional responsibilities and authorities are described in the clause 15-12.
- (d) COR:
  - (1) May stop a work activity due to safety and health concerns. Refer to (a)(1) above; and
  - (2) Shall communicate status, corrective action, and schedule information to the program office.
- (e) Contractor:
  - (1) Shall notify the CO when a Bonneville employee stops a work activity;
  - (2) Shall identify stopped work activity to employees and subcontractors and ensure that the work activity remains stopped until the Bonneville Safety Office authorizes the contractor to re-start the work activity; and
  - (3) Additional responsibilities and prohibitions are described in the clause 15-12.

#### 15.6.4 Identification and Resolution of Safety and Health Concerns

Bonneville encourages all contractor workers to raise safety and health concerns as a way to identify and control safety hazards. Contractors shall develop and communicate a formal procedure for submittal, resolution, and communication of resolution and corrective action for workers submitting safety or health concerns. Contractor workers are encouraged to identify safety and health concerns directly to their supervisor and employer using the employer's reporting process. Alternatively, contractor workers may identify safety concerns to Bonneville or the State OSHA. Contractor workers may notify the Safety Office at (360) 418-2397 if the employer's work process does not resolve the worker's safety and health concern. Bonneville may coordinate the response to a contractor worker's safety and health concerns with the State OSHA when necessary to facilitate resolution of a submitted concern.

#### 15.6.4.1 Contract Clauses

- (a) The CO shall include the clause 15-12, Contractor Safety and Health, in all solicitations and contracts, including commercial services, where work is performed on a Bonneville property, in a right-of-way, at a site leased by Bonneville, or on property owned by another party that has contracted with Bonneville to perform services at the site, but work does not require a Safety Plan (SP) to be reviewed by Bonneville.
- (b) The CO shall include the clause 15-13, Contractor Safety and Health Requirements, in all construction solicitations and contracts and in services solicitations and contracts for (1) vegetation management; or (2) when aircraft is used in the performance of the work; or (3) when the site of work or nature of the work involves potential hazards that require the contractor to develop and implement a safety plan; or (4) when the contractor has unescorted physical access to Bonneville Energized Facilities; or (5) as directed by the Bonneville Safety Office. This clause shall not be included in intergovernmental contracts (IGCs).
- (c) The CO shall include a clause similar to the clause 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 I 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 involved the use, handling or transportation of such materials in the text of this clause.
- (d) The CO shall include a clause similar to the clause 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.

### 15.7 SCREENING CONTRACTOR PERSONNEL

It is Bonneville 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 Bonneville facilities and/or computer resources.

#### 15.7.1 Background Screenings

- (a) Bonneville policy and procedures regarding security management are found in Bonneville Policy 430-1, Safeguards and Security Program, 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 15-15, Screening Requirements for Personnel Having Access to Bonneville Facilities.
- (b) Bonneville 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) Contractor personnel that require access to Bonneville facilities, and/or sensitive unclassified information and computer systems, must be screened in order to protect Bonneville property, information, and child day care attendees. The contractor must comply with the procedures established at Bonneville for screening of new hires, and current staff,

as prescribed in HSPD-12 and FIPS 201, as implemented at Bonneville. 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 Bonneville sponsor for processing. The Bonneville sponsor may be the COR or some other person designated to facilitate the contractor employees' entry into Bonneville facilities and computer systems.

#### 15.7.2 Pre-Registration of Foreign Nationals

- (a) 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 Bonneville facilities. This process is in addition to the screening process described above. Bonneville program offices determine the need for, and appropriate work duration, of all contract employees, including non-US Citizens.
- (b) The contract employee must complete Bonneville form 5632.08e – Foreign Nationals Registration (Short Form) or Bonneville form 5632.08a – Foreign Nationals Registration (Long Form) and submit it to the Bonneville Security office for processing.

##### 15.7.2.1 Contract Clause

The CO shall include the clause 15-15, Screening Requirements for Personnel Having Access to Bonneville Facilities, in all solicitations and contracts that require contractor personnel to have access to Bonneville information resources and/or facilities, including child day care centers, either on a continuing basis or during frequent visits.

## 15.8 ACCESS TO NERC CIP SITES AND COMPUTER SYSTEMS

- (a) Bonneville is subject to the North American Electric Reliability Corporation's (NERC) Critical Infrastructure Protection (CIP) standards. NERC may impose financial penalties on Bonneville for non-compliance with those standards. Bonneville's Grid Operations Information System Security Program (GOISSP) provides governance of the implementation of the NERC standards for physical and cyber access to BES Cyber Systems (BCS).
- (b) To assure Bonneville meets the requirements of the GOISSP, contractors must notify Bonneville within four (4) hours when a worker with physical or logical access to a Bonneville NERC CIP Site or BES Cyber Systems (BCS) components is re-assigned to non-Bonneville work or is no longer employed by the contractor or subcontractor. Upon receipt of notification, Bonneville may revoke that person's computing system or jobsite access.
- (c) Contractors and contract workers with access to a Bonneville NERC CIP Site or BCS components shall follow the procedures and requirements provided in the Bonneville Policy 434-1: Cyber Security Program and Bonneville Policy 430-2: Managing Access and Access Revocation for NERC CIP Compliance. Additional requirements and procedures may be included in the statement of work and the technical specifications.

### 15.8.1 Definitions

As used in this subsection –

*BES Cyber Assets (BCAs)* means a Cyber Asset that if rendered unavailable, degraded, or misused would, within 15 minutes of its required operation, misoperation, or non-operation, adversely impact one or more facilities, systems, or equipment, which, if destroyed, degraded, or otherwise rendered unavailable when needed, would affect the reliable operation of the bulk electric system.

*BES Cyber System (BCS)* means one or more Bulk Electric System Cyber Assets logically grouped by a responsible entity to perform one or more reliability tasks for a functional entity.

*Computer system* is through direct, or remotely, to Bonneville computer network or systems.

*Energized Access Permission* to enter energized facilities granted to qualified persons through the Bonneville Substation Operations permitting process. Entry into energized facilities is considered restricted access. Only the Substation Operations Group can grant energized access.

*Jobsite* means access to a Bonneville facility or Bonneville maintained facility.

*Information Owner* has the same meaning as in BPA Policy 236-300, 434-1, and 473-1. In procurement of systems operated on Bonneville's behalf, it is generally the manager of the group or organization requesting the procurement.

*Official* someone with operational authority for specified Bonneville information (including responsibility for establishing controls for its generation, collection, processing, dissemination, storage, and disposal); generally a business unit manager or designate.

*Unescorted Access* means a person possesses a valid permit for access into, out of, and movement within an energized facility, appropriate to the level of work or supervision of work to be performed and does not require a Bonneville employee with escort privileges to escort them.

#### 15.8.2 Contractor Compliance with Security Policies

- (a) Bonneville's Physical Security and Cyber Security organizations determine if access to a jobsite or a computing system, should be granted, denied, or revoked.
- (b) Contract workers with unescorted physical access to Bonneville Energized Facilities, including communication sites, shall follow the applicable procedures and requirements in Bonneville's Substation Operations Rules of Conduct Handbook – Policies and Procedures for Permits, Energized Access, and Clearance Certifications. Scheduling and Control Centers shall follow the applicable Rules of Conduct.
- (c) Contract workers with unescorted physical access and/or computer system access shall notify Security Services and the CO/COR of personnel changes within four (4) hours. The CO/COR shall ensure compliance procedures were followed and document the contract file with any security related performance issue as appropriate.
- (d) The contractor shall receive copies of the published information regarding Bonneville's Security Policies, and shall ensure that information is provided, to employees and subcontractors. The CO may take remedial action to enforce these policies.

#### 15.8.3 Contract Clause

The CO shall include the clause 15-16, Access to Bonneville Facilities and Computer Systems, in all solicitations and contracts when a contractor employee needs computer systems or unescorted access to a Bonneville facility, jobsite, or computer system to perform work.

### 15.9 SAFEGUARDING BONNEVILLE'S INFORMATION AND DATA

This subpart prescribes the policies and procedures of the information and information systems used by Bonneville. The information and information systems used by Bonneville are subject to the requirements of the E-Government Act (Public Law 107-347) of 2002, Title III Federal Information Security Management/Modernization Act (FISMA), as amended.

### 15.9.1 General

- (a) 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) Bonneville Power Administration is a federal agency and a balancing authority for the western United States electrical transmission grid. For this reason, Bonneville's cyber security requirements may exceed those of other Federal agencies, depending upon the product or services being procured and their intended use.

### 15.9.2 Policy

- (a) Determination of the level of risk and required care shall be made by Bonneville's Chief Information Security Officer. Any requirements shall be incorporated into the contract Statement of Work or specification document.
- (b) This policy applies to all solicitations and contracts for supplies, services, materials, equipment, construction, and intergovernmental contracts.
- (c) Bonneville requires that contracts subject to FISMA comply with the minimum requirements of protection as set forth by the National Institute of Standards and Technology (NIST) for national federal information systems. Bonneville, as a Federal agency, will contract in compliance with the requirements of FISMA as implemented by Bonneville. Any variations or deviations from the policies and standards therein must be approved by the CIO and the HCA.

### 15.9.3 Procedure

- (a) FISMA applies where a third party will maintain Bonneville data or information, or operate an automated system on Bonneville's behalf as determined by the Information Owner and CO.
- (b) The Information Owner and requisitioner are responsible for ensuring the Statement of Work, requirements document or specifications include additional requirements if FISMA is categorized at "low", "moderate" or "high" level.
- (c) For internally deployed materials with no third party matching the criteria for applicability, FISMA does not apply regardless of whether a CISO exemption memo exists or not.
- (d) The Cyber Security office shall provide assistance if the Information Owner or CO is unsure of FISMA applicability.

### 15.9.4 Contract Clause

In accordance with 15.9.3, the CO shall include the clause 15-17, Information Assurance, in all solicitations and contracts where a third party will maintain Bonneville data or information, or operate an automated system on Bonneville's behalf. The clause shall be included if any portion of the contracted activities would indicate that FISMA applies.

## 15.10 HOMELAND SECURITY

### 15.10.1 Definitions

As used in this subpart –

*Bulk Electric System Cyber System Information (BES CSI/BCSI)*: A category of BPA's CUI that requires security controls. BES CSI/BCSI is identified by these characteristics:

- (a) Information about Bulk Electric System (BES) Cyber Systems that could be used to gain unauthorized access or pose a security threat to BES Cyber Systems.



(b) BES CSI/BCSI may include, but is not limited to security procedures or security information related to safeguarding BES CSI/BCSI, Physical Access Control Systems, Electronic Access Control or Monitoring Systems that are not publicly available and could be used to allow unauthorized access or unauthorized distribution, collections of network addresses, and network topology of BES Cyber Systems. (NERC Glossary of Terms used in NERC Reliability Standards –Updated 8/12/2019).

(c) BES CSI/BCSI within BPA is marked as Critical Energy Infrastructure Information (CEII).

*Critical Energy Infrastructure Information (CEII):* Information related to critical energy infrastructure or proposed critical energy infrastructure, generated by or provided to the Federal Energy Regulatory Commission (Commission) or other Federal agency other than classified national security information, that is designated as critical energy infrastructure information by the Commission or the Secretary of the Department of Energy pursuant to section 215A (d) of the Federal Power Act. CEII was formerly known within BPA as Critical Cyber Asset Information (CCAI), and continues to be known as Bulk Electric System Cyber System Information (BES CSI/BCSI) which is a NERC CIP term. CEII is associated with specific engineering, vulnerability, or detailed design information about proposed or existing critical infrastructure (physical or virtual) that:

(a) BPA identifies CEII as Federal Information Processing Standards (FIPS) High Category rating as applying to each BES Cyber System used by or located at BPA’s Control Centers, and which perform functions pertaining to reliability, balancing, transmission, or generation authorities or operators, or:

(b) BPA identifies CEII as FIPS Moderate Category rating applying to BES Cyber Systems not included in High Impact installations, but associated with transmission facilities operating at more than 200kV per line, and which are connected to generation, transmission, or reactive facilities, the failure of which, within fifteen minutes of scheduled operation, could adversely affect the reliable operation of the Bulk Electric System.

(c) Relates details about the production, generation, transmission, or distribution of energy;

(d) Could be useful to a person planning an attack on critical infrastructure;

(e) Is exempt from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552; and

(f) Does not simply give the general location of the critical infrastructure.

*Critical Information (CI):* 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 Bonneville’s competitors or adversaries (including, but not limited to, other utilities, contractors, foreign interests, or disgruntled employees) to harm or embarrass Bonneville, or to gain an 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 word.

**Controlled Unclassified Information (CUI):** Information the government creates or possesses, or that an entity creates or possesses on behalf of the government or provides to the government, that Law, Regulation, or Government-wide Policy (LRGWP) requires or permits an agency to handle using safeguarding or dissemination controls. Unauthorized disclosure of CUI has the potential to damage governmental, commercial or private interests. CUI categories approved by National Archives and Records Administration (NARA), the CUI Executive Agent (EA), published in the CUI Registry, and authorized for DOE use, are the exclusive designations for identifying CUI within DOE. No other safeguarding and dissemination controls can be implemented for any Controlled Unclassified Information other than those permitted by the applicable LRGWP and as indicated in the CUI Registry. The CUI Registry can be found at <https://www.archives.gov/cui>.

**Cyber Security:** The physical, technical, and administrative controls and risk management processes for providing the required and appropriate level of confidentiality, integrity, availability and accountability for Department of Energy information stored, processed, or transmitted on electronic systems (and networks). This includes the protection of information systems against unauthorized access to, or modification of information, denial of service to authorized users and including those measures necessary to protect against, detect, and counter such threats.

**Data:** 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.

**Deemed Export:** The releasing or otherwise transferring “technology” or source code (but not object code) to a foreign person within the United States. Any release of “technology” or source code to a foreign person in the United States is deemed an export to the foreign person’s most recent country of citizenship or permanent residency.

**Export:** An actual shipment or transmission out of the United States, including the sending or taking of an item out of the United States, in any manner. The export of an item that will transit through a country or countries to a foreign destination is deemed to be an export to that destination. Items include - equipment, materials, proprietary software, information (CEII, CI, CUI), data and technology.

**Foreign Corporations:** Any corporation that is not incorporated in the United States. This is further defined as any company, contractor or subcontractor organized or existing under the laws of a country other than the United States.

**Foreign Nationals:** Foreign nationals do not possess permanent legal residence within the United States. Foreign nationals include foreign institutions or governments and foreign corporations that were not incorporated in the United States.

**Intangible Export:** Means technical information transmitted through electronic media (e.g. telephone, electronic mail and World Wide Web).

**Information Technology (IT):** Is any equipment, system or sub-system (hardware, software, contract or service) that creates, maintains, stores, accesses, shares, adds or changes Bonneville Data or information that is used by federal employees, contract staff, managed

services, or vendors in support of hardware or software to be accessed or used by Bonneville or operated on behalf of Bonneville.

*Operational Technology (OT):* Is a subset of IT software, hardware, or service whose function is to directly control or support the operation, maintenance, or monitoring of the electrical grid and that satisfies the following; (1) Accesses or contains memory or storage (2) Has logical access.

*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.

*Re-export:* An actual shipment or transmission of an item from one Foreign Country to another Foreign Country, including the sending or taking of an item to or from such countries in any manner. Items include - equipment, materials, proprietary software, information (CEII, CI, CUI), data and technology.

*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 Foreign Nation.* A country in which particular attention is given during the review and approval process for foreign visits and assignments. Countries may be designated as sensitive for reasons of national security, nuclear nonproliferation, regional instability, threat to national economic security, or terrorism support. Department of Energy Sensitive Countries/Nations are listed in: Appendix 15, Attachment 15-2, Export Control and Home Security Links. A Foreign National is considered to be from a Sensitive Foreign Nation if he/she is a citizen residing in a country or is employed by the government of an institution, or a corporation of a country on the Sensitive Foreign Nation list.

*State Sponsor of Terrorism:* A country designated by the U.S. Secretary of State as a State Sponsor of Terrorism. Countries designated by the U.S. Secretary of State as a State Sponsor of Terrorism are listed in: Appendix 15, Attachment 15-2, Export Control and Home Security Links.

*Technology:* Means both technical equipment, technical data and technical assistance and includes both Information Technology and Operational Technology.

*Temporary Export:* The transmission, shipping, carrying of equipment, materials, items, proprietary software, or protected information which is under physical control of a foreign national in some manner, which is returned to the U.S. or the country of origin after a specified period of time. Items being repaired or on loan in another country.

#### 15.10.2 Designation and Policy

- (a) It is Bonneville policy to protect the agency facilities, Critical Energy Infrastructure Information (CEII) and Critical Information (CI).
- (b) The U.S. Department of Homeland Security designates Bonneville as part of the critical national infrastructure. Information concerning the physical and technical infrastructure of Bonneville'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 Sensitive Foreign Nations list or to any country

designated as a State Sponsor of Terrorism by the U.S. Department of State. Any intended Export of this information must have the prior written approval of Bonneville's Export Control Office and Bonneville Cyber Security and be in accordance with all laws of the United States. Breach of this section shall be reported immediately to Bonneville's Export Control Office and Bonneville Cyber Security.

### 15.10.3 Contract Clause

COs shall include the clause 15-18, Homeland Security in solicitations and contracts when –

- (a) Bonneville is contracting for services, information technology, operational technology, or other hardware, software, maintenance, or support; or
- (b) The contractor may require access to any data, critical energy infrastructure information, or critical information for the performance of the work; or
- (c) An export, deemed export or temporary export may occur; or
- (d) A non-disclosure agreement has been included; or
- (e) Any other instance where the requisitioner, COR or CO determines it is necessary to protect Bonneville's interests.

## 15.11 EXPORT CONTROL

U.S. Export Control Regulations apply to the export, temporary export, deemed export or re-export of Bonneville equipment, materials, items, proprietary software, information (including CEII, CI and CUI), data, or technology to foreign nationals or foreign corporations whether within or outside the U.S. The intent of the export control regulations is to safeguard national and economic security. The transmission, shipping, or carrying of any Bonneville equipment, materials, items, proprietary software, information, data, or technology to a foreign national or foreign corporation outside the U.S. is an export. The transmission, shipping, or carrying of any Bonneville equipment, materials, items, proprietary software, information, data, or 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 classed as a "deemed export".

### 15.11.1 Policy

- (a) The transmission, shipping, or carrying of any Bonneville equipment, materials, items, proprietary software, information (Including CEII, CI and CUI), data or technology to foreign corporation's or foreign national's (non-U.S citizens) must be approved by the: (1) Bonneville Office of Personnel and Information Security pursuant to Bonneville Policy 430-1, and (2) Bonneville Export Control Office pursuant to Bonneville Policy 430-3, prior to the issuance of a solicitation or a contract award.
- (b) The transmission, shipping, or carrying of any Bonneville equipment, materials, items, proprietary software, information (including CEII, CI and CUI), data or technology to sensitive foreign nations or nationals of a country designated by the U.S. Secretary of State as a State Sponsor of Terrorism, within or outside the U.S is not permitted, unless authorized in writing on a case by case basis by the Export Control Office and the HCA.

### 15.11.2 Procedure

- (a) Requisitioners and CORs shall, (1) identify and mark, and (2) notify the CO and the Export Control Office of any solicitation or contract requirements that include the provision, transmission, shipping, or carrying of any Bonneville equipment, materials, items, proprietary software, information (including CEII, CI and CUI), data or technology.

- (b) CO's shall advise the Export Control Office of any intended solicitation recipient that is a foreign corporation or foreign national when the factors identified in 15.11.2(a) are included in the requirements.
- (c) The Export Control Office will review the factors identified in 15.11.2(a) and the details of the foreign corporation or foreign national being sent the solicitation or awarded the contract(s) and advise the CO of one or more of the following:
  - (1) No exceptions to the US Export Control Regulations are noted,
  - (2) The requirements, statement of work or statement of objectives do not meet the Export Control Office requirements or US Export Control Regulations,
  - (3) The solicitation recipients or contract awardee do not meet the Export Control Office requirements or US export control regulations, or
  - (4) A certificate of export or an end-user agreement is required.
- (d) Bonneville's Office of Personnel and Information Security and, Bonneville's Export Control Office shall approve, in advance, all foreign nationals, whether located within or outside the U.S. who may, as a part of a solicitation or in the performance of a contract:
  - (1) Receive Bonneville critical energy infrastructure information, critical information, or controlled unclassified information, and
  - (2) Receive Bonneville equipment, materials, items, proprietary software, information, data or technology;Either as a part of a solicitation or in the performance of a contract.
- (e) The Bonneville Office of Personnel and Information Security and Bonneville's Export Control Office shall determine if there is a risk of a deemed export or the need for an export license.

#### 15.11.3 Solicitation Provisions

- (a) The CO shall include the Provision 15-20, Export Control, in solicitations being issued to US Contractors or US Nationals and one or more of the following criteria exists:
  - (1) The requisitioner, COR, or CO identifies or determines that the solicitation includes or may require the disclosure of any criteria listed in 15.11.2(a), or
  - (2) An intangible export may occur or an export license, export end user agreement, or other export documentation may be required, or
  - (3) A non-disclosure agreement has been included, or
  - (4) Any other instance where the requisitioner, COR or CO determines it is necessary to protect Bonneville's interests.
- (b) The CO shall include the Provision 15-21 Re-export Control in solicitations being issued to a foreign corporation or foreign nationals and one or more of the following criteria exists:
  - (1) The requisitioner, COR, or CO identifies or determines that a solicitation includes or may require the disclosure of any criteria listed in 15.11.2(a), or
  - (2) An intangible re-export may occur or an export license, export end user agreement, or other export documentation may be required, or
  - (3) A non-disclosure agreement has been included, or
  - (4) Any other instance where the requisitioner, COR or CO determines it is necessary to protect Bonneville's interests.

#### 15.11.4 Contract Clauses

- (a) The CO shall include the Clause 15-22, Export Control, in solicitations and contracts being issued to US Contractors or US Nationals and one or more of the following criteria exists:
- (1) The requisitioner, COR or CO identifies or determines that the contract includes or may require the disclosure of any criteria listed in 15.11.2(a), or
  - (2) An Intangible Export may occur or an export license, export end user agreement, or other export documentation may be required, or
  - (3) A non-disclosure agreement has been included, or
  - (4) Any other instance where the requisitioner, COR or CO determines it is necessary to protect Bonneville's interests.
- (b) The CO shall include the Clause 15-23 Re-export Control, in solicitations or contracts being issued to a Foreign Corporation or Foreign National and one or more of the following criteria exists:
- (1) The requisitioner, COR or CO identifies or determines that the contract includes or may require the disclosure of any criteria listed in 15.11.2(a), or
  - (2) An Intangible re-export may occur or an export license, export end user agreement, or other export documentation may be required, or
  - (3) A non-disclosure agreement has been included, or
  - (4) Any other instance where the requisitioner, COR or CO determines it is necessary to protect Bonneville's interests.

### 15.12 RESTRICTIONS ON FOREIGN ENTITY AND SERVICE LOCATION

Performance, including research, design, development, maintenance and support, under Bonneville's information technology, operational technology or intellectual property contracts may not be located in countries identified on the sensitive foreign nation list, as described in 15.10.1, or a country designated by the U.S. Secretary of State as a state sponsor of terrorism.

#### 15.12.1 Policy

Bonneville will not contract, for IT and OT, or other research, design, development, and support and/or maintenance services, with entities located within the countries identified on the sensitive foreign nation list, or a country designated by the U.S. Secretary of State as a state sponsor of terrorism. Additionally, the location of contract performance for such services may not be within any country identified on the sensitive foreign nation list, or a country designated by the U.S. Secretary of State as a state sponsor of terrorism.

#### 15.12.2 Procedure

The Bonneville Export Control Office and Bonneville's Office of Cyber Security shall determine if there is a risk associated with contracting for IT and OT research, design, development, and support and/or maintenance services by foreign corporations or foreign nationals not physically located outside the United States. Additionally, any outsourcing of such services shall be approved by the Cyber Security and the Export Control Office. COs shall consult BPA Policy 432-1 Physical Security for guidance. In the event HCA issues a waiver for such services to be performed in a country listed as a sensitive foreign nation, the CO shall include in the official file

any waivers given by the HCA and the Export Control Office allowing such services to be performed in those countries.

### 15.12.3 Contract Clause

The CO shall include the clause 15-18, Homeland Security, and Clause 15-22 Export Control, in solicitations and contracts when:

- (a) Bonneville is contracting IT and OT research, design, development, and support and/or maintenance services; or
- (b) The contractor may require access to any data, CEII, CI, and CUI, for the performance of the work; or
- (c) An export, deemed export or temporary export may occur; or
- (d) A re-export may occur; or
- (e) A non-disclosure agreement has been included; or
- (f) Any other instance where the requisitioner, COR or CO determines it is necessary to protect Bonneville's interests.

## 16 BONDS AND INSURANCE

### 16.1 SCOPE OF PART

This part prescribes requirements for obtaining financial protection against losses under contracts. It also covers alternative payment protections, security for bonds, and insurance.

#### 16.1.1 Definitions

As used in this part –

*Attorney-in-fact* means an agent, independent agent, underwriter, or any other company or individual holding a power of attorney granted by a surety.

*Bond* means a written instrument executed by a bidder or contractor (the “principal”), and a second party (the “surety” or “sureties”) (except as provided in subsection 16.3.5), to assure fulfillment of the principal’s obligations to a third party (the “obligee” or “Government”), identified in the bond. If the principal’s obligations are not met, the bond assures payment, to the extent stipulated, of any loss sustained by the obligee. The types of bonds and related documents are as follows:

- (1) An advance payment bond secures fulfillment of the contractor’s obligations under an advance payment provision.
- (2) An annual bid bond is a single bond furnished by a bidder, in lieu, of separate bonds, which secure all bids (on other than construction contracts) requiring bonds submitted during a specific Government fiscal year.
- (3) An annual performance bond is a single bond furnished by a contractor, in lieu of separate performance bonds, to secure fulfillment of the contractor’s obligations under contracts (other than construction contracts) requiring bonds entered into during a specific Government fiscal year.
- (4) A patent infringement bond secures fulfillment of the contractor’s obligations under a patent provision.
- (5) A payment bond assures payment as required by law to all persons supplying labor or material in the prosecution of the work provided for in the contract.
- (6) A performance bond secures performance and fulfillment of the contractor’s obligations under the contract.

*Consent of surety* means an acknowledgement by a surety that its bond given in connection with a contract continues to apply to the contract as modified.

*Penal sum or penal amount* means the amount of money specified in a bond (or a percentage of the price in a bid bond) as the maximum payment for which the surety is obligated or the amount of security required to be pledged to the Government in lieu of a corporate or individual surety for the bond.

*Reinsurance* means a transaction which provides that surety, for a consideration, agrees to indemnify another surety against loss which the latter may sustain under a bond which it has issued.

### 16.2 BONDS AND OTHER FINANCIAL PROTECTIONS

#### 16.2.1 Scope of Subpart



This subpart prescribes requirements and procedures for the use of bonds and alternative payment protections.

#### 16.2.2 Bid Guarantees

A CO shall not require a bid guarantee by contractors in solicitations.

#### 16.2.3 Performance and Payment Bonds and Alternative Payment Protections for Construction Contracts

##### 16.2.3.1 General

- (a) 40 U.S.C. chapter 31, subchapter III, Bonds (formerly known as the Miller Act), requires performance and payment bonds for any construction contract exceeding \$150,000, except that this requirement may be waived –
  - (1) By the CO for as much of the work as is to be performed in a foreign country upon finding that it is impracticable for the contractor to furnish such bond;
  - (2) For cost-reimbursement contracts; or
  - (3) As otherwise authorized by the Bonds statute or other law.
- (b) Pursuant to 40 U.S.C. § 3132, for construction contracts greater than \$35,000, but less than \$150,000, the CO may include alternative payment protections when it is determined necessary for the protection of the Government.
- (c) The contractor shall furnish all bonds or alternative payment protection, including any necessary reinsurance agreements, before receiving a notice to proceed with the work or being allowed to start work.

##### 16.2.3.2 Amount Required

- (a) Definition. As used in this subsection –

*Original contract price* means the award price of the contract; or for requirements contracts, the price payable for the estimated total quantity; or, for indefinite-quantity contracts, and the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.

- (b) Contracts exceeding \$150,000
  - (1) Performance bonds. Unless the CO determines that a lesser amount is adequate for the protection of the Government, the penal amount of performance bonds must equal –
    - (i) 100 percent of the original contract price; and
    - (ii) If the contract price increases, an additional amount equal to 100 percent of the increase.
  - (2) Payment bonds
    - (i) Unless the CO makes a written determination supported by specific findings that a payment bond is this amount is impractical, the amount of the payment bond must equal –
      - (A) 100 percent of the original contract price; and
      - (B) If the contract price increases, an additional amount equal to 100 percent of the increase.
    - (ii) The amount of the payment bond must be no less than the amount of the performance bond.
- (c) Contracts exceeding \$35,000 but not exceeding \$150,000. Unless the CO determines that a lesser amount is adequate for the protection of the Government, the penal amount of the payment bond or the amount of the alternative payment protection must equal –

- (1) 100 percent of the original contract price; and
- (2) If the contract price increases, an additional amount equal to 100 percent of the increase.
- (d) Securing additional payment protection. If the contract price increases, the Government must secure any needed additional protection by directing the contractor to –
  - (1) Increase the penal sum of the existing bond;
  - (2) Obtain an additional bond; or
  - (3) Furnish additional alternative payment protection.
- (e) Reducing amounts. The CO may reduce the amount of security to support a bond, subject to the conditions in 16.3.5(b).

#### 16.2.3.3 Contract Clause

The CO shall include the clause 16-1, Performance and Payment Bonds - Construction, in solicitations and contracts for construction that contain a requirement for performance and payment bonds if the resultant contract is expected to exceed \$150,000. The CO may revise paragraphs (b)(1) and/or (b)(2) of the clause to establish a lower percentage in accordance with 16.2.3.2(b).

#### 16.2.4 Performance and Payment Bonds for Other than Construction Contracts

##### 16.2.4.1 General

- (a) Generally, COs shall not require performance and payment bonds for other than construction contracts. However, performance and payment bonds may be used as permitted in 16.2.4.2 and 16.2.4.3.
- (b) The contractor shall furnish all bonds before receiving a notice to proceed with the work.
- (c) No bond shall be required after the contract has been awarded if it was not specifically required in the contract, except as may be determined necessary for a contract modification.

##### 16.2.4.2 Performance Bonds

- (a) The CO shall not require performance bonds for other than construction contracts unless a written determination is made explaining why the bond is essential to protect Bonneville's interest and justifying the additional cost of the bonding requirement.
- (b) The CO shall require performance bonds for other than construction contracts exceeding \$150,000 for non-commercial and \$7 million for commercial services to Section 8(a) contractors.
- (c) The CO shall not require a performance bond for contracts awarded to workshops for the blind or other severely handicapped under the Javits-Wagner-O'Day Act, as amended (41 U.S.C. § 46-48c).
- (d) The CO shall consider the circumstances and determine the penal amount of the performance bond on a case-by-case basis.

##### 16.2.4.3 Payment Bonds

- (a) A payment bond is required only when a performance bond is required, and when the Director of Contracts and Strategic Sourcing determines, in writing, that such a requirement is in Bonneville's interest.
- (b) When a contract price is increased, Bonneville may require additional bond protection in an amount adequate to protect suppliers of labor and material.
- (c) The CO shall consider the circumstances and determine the penal amount of the payment bond on a case-by-case basis.

#### 16.2.4.4 Contract Clause

The CO shall insert a clause substantially the same as the clause 16-2, Performance and Payment Bonds – Other than Construction, in solicitations and contracts that contain a requirement for both payment and performance bonds. The CO shall determine the amount of each bond for insertion in the clause. The amount shall be adequate to protect the interest of Bonneville. The CO shall also set a period of time (normally 10 days) for return of executed bonds. Alternate I shall be used only when performance bonds are required.

#### 16.2.5 Annual Performance Bonds

- (a) Annual performance bonds only apply to non-construction contracts. They shall provide a gross penal sum applicable to the total amount of all covered contracts.
- (b) The CO shall not require annual performance bonds unless a written determination is made explaining why the bond is essential to protect Bonneville's interest and justifying the additional cost of the bonding requirement.
- (c) When the penal sums obligated by contracts are approximately equal to or exceed the penal sum of the annual performance bond, an additional bond will be required to cover additional contracts.

#### 16.2.6 Other Types of Bonds

The HCA may approve using other types of bonds in connection with acquiring particular supplies or services. The CO shall obtain approval from the HCA for use of any other bond type not listed within this Part 16 prior to contract award.

##### 16.2.6.1 Advance Payment Bonds

Advance payment bonds may be required only when the contract contains an advance payment provision and a performance bond is not furnished. The CO shall determine the amount of the advance payment bond necessary to protect Bonneville.

##### 16.2.6.2 Patent Infringement Bonds

- (a) Contracts providing for patent indemnity may require these bonds only if –
  - (1) A performance bond is not furnished; and
  - (2) The financial responsibility of the contractor is unknown or doubtful.
- (b) The CO shall determine the penal sum.

#### 16.2.7 Administration

##### 16.2.7.1 Bonds and Bond-related Forms

The following Standard Forms (SF's) shall be used, except in foreign countries, when a performance or payment bond is required. The bond forms shall be used as indicated in the instruction portion of each form:

- (a) SF 25, Performance Bond (see 16.2.7.3(b)).
- (b) SF 25A, Payment Bond (see 16.2.7.3(b)).
- (c) SF 25B, Continuation Sheet (for SF's 25 and 25A).
- (d) SF 28, Affidavit of Individual Surety (see 16.3.4).
- (e) SF 35, Annual Performance Bond (see 16.3.5).
- (f) SF 273, Reinsurance Agreement for a Bonds Statute Performance Bond (see 16.3.3(a)(4)).
- (g) SF 274, Reinsurance Agreement for a Bonds Statute Payment Bond (see 16.3.3(a)(4)).
- (h) SF 275, Reinsurance Agreement in Favor of the United States (see 16.3.3(a)(4)).

- (i) SF 1414, Consent of Surety (see 16.2.7.5).
- (j) SF 1415, Consent of Surety and Increase of Penalty (see 16.2.7.3).
- (k) SF 1416, Payment Bond for Other Than Construction Contracts (see 16.2.4.4 and 16.2.7.3(b)).
- (l) SF 1418, Performance Bond for Other Than Construction Contracts (see 16.2.4.4).

#### 16.2.7.2 Substitution of Surety Bonds

- (a) A new surety bond covering all or part of the obligations on a bond previously approved may be substituted for the original bond if approved by the HCA.
- (b) When a new surety bond is approved, the CO shall notify the principal and surety of the original bond of the effective date of the new bond.

#### 16.2.7.3 Additional Bond and Security

- (a) When additional bond coverage is required and is secured, in whole or in part by the original surety or sureties, Bonneville shall use Standard Form 1415, Consent of Surety and Increase of Penalty.
- (b) When additional coverage is required and is secured in whole or in part by a new surety or by one of the alternatives described in 16.3.5 in lieu of corporate or individual surety, Bonneville shall use Standard Form 25, Performance Bond; Standard Form 25A, Payment Bond; or Standard Form 1416, Payment Bond for Other than Construction Contracts.

#### 16.2.7.4 Contract Clauses

- (a) The CO shall insert the clause 16-3, Additional Bond Security, in solicitations and contracts when bonds are required.
- (b) The CO shall insert the clause 16-4, Prospective Subcontractor Requests for Bonds, in solicitations and contracts with respect to which a payment bond will be furnished pursuant to 40 U.S. C. Chapter 31, subchapter III, Bonds (see 16.2.3.1), except for contracts for the acquisition of commercial services and items as defined in subpart 2.2.

#### 16.2.7.5 Consent of Surety

- (a) When a contract is modified, the CO shall obtain the consent of surety if -
  - (1) An additional bond is obtained from other than the original surety;
  - (2) No additional bond is required and –
    - (i) The modification is for new work beyond the scope of the original contract; or
    - (ii) The modification does not change the contract scope but changes the contract price (upward or downward) by more than 25 percent or \$50,000; or
  - (3) Consent of surety is required for a novation agreement (see subpart 14.13).
- (b) When a contract for which performance or payment is secured by any of the types of security listed in 16.3.5 is modified as described in paragraph (a) of this subsection, no consent of surety is required.
- (c) Bonneville shall use Standard Form 1414, Consent of Surety, for all types of contracts.

#### 16.2.7.6 Furnishing Information

- (a) The surety on the bond, upon its written request, 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.
- (b) When a payment bond has been provided, the CO shall, upon request, furnish the name and address of the surety or sureties to any subcontractor or supplier who has furnished or been requested to furnish labor or material for the contract. In addition, general information

concerning the work progress, payments, and the estimated percentage of completion may be furnished to persons who have provided labor or materials and have not been paid.

- (c) When a payment bond has been provided for a contract, the CO shall furnish a copy of the bond and the contract for which it was given to any person who makes a request therefore and who furnishes an affidavit that the requestor has supplied labor or materials for such work and payment therefor has not been made or that the requestor is being sued on such bond. The person who makes the request shall be required to pay such costs of preparation as determined by the HCA or designee to be reasonable and appropriate (see 40 U.S.C. § 3133).
- (d) Bonneville, in accordance with federal statute [Section 806(a)(2) of Pub. L. 102-190, as amended by Sections 2091 and 8105 of Pub. L. 103-355 (1 U.S.C. § 2302 note)], shall provide information to subcontractors on payment bonds under contracts for other than commercial items as defined in subpart 2.2. Upon the written or oral request of a subcontractor/supplier, or prospective subcontractor/supplier, under a contract with respect to which a payment bond has been furnished pursuant to the Bonds statute, the CO shall promptly provide to the requester, either orally or in writing, as appropriate, any of the following:
  - (1) Name and address of the surety or sureties on the payment bond;
  - (2) Penal amount of the payment bond; and
  - (3) Copy of the payment bond. The CO may impose reasonable fees to cover the cost of copying and providing a copy of the payment bond.

#### 16.2.7.7 Withholding Contract Payments

- (a) During contract performance, Bonneville shall not withhold payments due to contractors or assignees because subcontractors or suppliers have not been paid.
- (b) If, after completion of the contract work, Bonneville 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 Bonneville 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.

#### 16.2.7.8 Payment to Subcontractors or Suppliers

The CO will only authorize payment to subcontractors or suppliers from an irrevocable letter of credit (or any other cash equivalent security) upon a judicial determination of the rights of the parties, a signed statement by the contractor that the payment is due and owed, or a signed agreement between the parties as to amount due and owed.

### 16.3 SURETIES AND OTHER SECURITY FOR BONDS

#### 16.3.1 Scope of Subpart

This subpart prescribes procedures for the use of sureties and other security to protect Bonneville from financial losses.

#### 16.3.2 Requirements for Sureties

- (a) Bonneville shall obtain adequate security for bonds (including coinsurance and reinsurance agreements) required or used with a contract for supplies or services (including construction). Acceptable forms of security include -
  - (1) Corporate or individual sureties; or

- (2) Any other types of security authorized in lieu of sureties by 16.3.6.
- (b) Solicitations shall not preclude offerors from using the types of surety or other security permitted by this subpart, unless prohibited by law or regulation.

### 16.3.3 Acceptability of Corporate Sureties

- (a) Corporate sureties offered for bonds furnished with contracts performed in the United States or its outlying areas 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."
- (1) 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:
- (i) The amount exceeding the specified limit is coinsured or reinsured; and
  - (ii) The amount of coinsurance or reinsurance does not exceed the underwriting limit of each coinsurer or reinsurer.
- (2) 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.
- (3) When specified in the solicitation, 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 on the bid form, which may not exceed 45 calendar days after the execution of the bond. The contractor shall use Standard Form 273, Reinsurance Agreement for a Bonds Statute Performance Bond, and Standard Form 274, Reinsurance Agreement for a Bonds Statute Payment Bond, when reinsurance is furnished with the required performance or payment bonds. Standard Form 275, Reinsurance Agreement in Favor of the United States, is used when reinsurance is furnished with bonds for other purposes.
- (b) Corporate surety bonds must be manually signed by the Attorney-in-Fact or officer of the surety company.
- (c) For contracts performed in a foreign country, sureties not appearing on Treasury Department Circular 570 are acceptable if the CO determines that it is impracticable for the contractor to use Treasury listed sureties.
- (d) The Department of 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 Bonneville, including where appropriate, securing new bonds with acceptable sureties in lieu of outstanding bonds with the named company.
- (e) The Department of the Treasury Circular 570 may be obtained from the –

U.S. Department of Treasury  
 Bureau of the Fiscal Service  
 Surety Bond Branch  
 3700 East West Highway, Room 6F01  
 Hyattsville, MD 20782  
 Or via the internet at <https://www.fms.treas.gov/c570/>

#### 16.3.3.1 Procedure

The CO shall retain the bond in the contract files. The CO may only use the Notice to Proceed to the Contractor after receipt of acceptable bond(s).

#### 16.3.4 Acceptability of Individual Sureties

- (a) An individual surety is acceptable for all types of bonds except position schedule bonds. The CO shall determine the acceptability of individuals proposed as sureties, and shall ensure that the surety's pledged assets are sufficient to cover the bond obligation. (See 16.3.5.2 for information on excluded individual sureties.)
- (b) An individual surety must execute the bond, and the unencumbered value of the assets (exclusive of all outstanding pledges for other bond obligations) pledged by the individual surety, must equal or exceed the penal amount of each bond. The individual surety shall execute the Standard Form 28 and provide a security interest in accordance with 16.3.4.1. One individual surety is adequate support for a bond, provided the unencumbered value of the assets pledged by that individual surety equal or exceeds the amount of the bond. An offeror may submit up to three individual sureties for each bond, in which case the pledged assets, when combined, must equal or exceed the penal amount of the bond. Each individual surety must accept both joint and several liability to the extent of the penal amount of the bond.
- (c) A contractor submitting an unacceptable individual surety in satisfaction of a performance or payment bond requirement may be permitted a reasonable time, as determined by the CO, to substitute an acceptable surety for a surety previously determined to be unacceptable.
- (d) When evaluating individual sureties, COs may obtain assistance from the office identified in 16.3.3(e).
- (e) COs shall obtain the opinion of legal counsel as to the adequacy of the documents pledging the assets prior to accepting the payment and performance bonds.
- (f) Evidence of possible criminal or fraudulent activities by an individual surety shall be referred to the appropriate agency official in accordance with agency procedures.
- (g) Notification of suspected criminal or fraudulent activities, with all supporting documentation, shall be submitted to OGC and the DOE Office of Inspector General.

##### 16.3.4.1 Security Interests by an Individual Surety

- (a) An individual surety may be accepted only if a security interest in assets acceptable under 16.3.4.2 is provided to Bonneville by the individual surety. The security interest shall be furnished with the bond.
- (b) The value at which the CO accepts the assets pledged must be equal to or greater than the aggregate penal amounts of the bonds required by the solicitation and may be provided by an escrow account with a federally insured financial institution in the name of Bonneville Power Administration. Acceptable securities for deposit are discussed in 16.3.4.2. While the offeror is responsible for establishing the escrow account, the terms and conditions must be acceptable to the CO. At a minimum, the escrow account shall provide the following:
  - (1) The account must provide the CO the sole and unrestricted right to draw upon all or any part of the funds deposited in the account. A written demand for withdrawal shall be sent to the financial institution, after obtaining the concurrence of legal counsel, by the CO with a copy to the offeror/contractor and to the surety. Within the time period specified in the demand, the financial institution would pay Bonneville the amount demanded up to the amount on deposit. If any dispute should arise between Bonneville and the offeror/contractor, the surety, or the subcontractors or suppliers with respect to the offer or contract, the financial institution would be required, unless precluded by order of a court of competent jurisdiction, to disburse monies to Bonneville as directed by the CO.

- (2) The financial institution would be authorized to release to the individual surety all or part of the balance of the escrow account, including any accrued interest, upon receipt of written authorization from the CO.
- (3) Bonneville would not be responsible for any costs attributable to the establishment, maintenance, administration, or any other aspect of the account.
- (4) The financial institution would not be liable or responsible for the interpretation of any provisions or terms and conditions of the solicitation or contract.
- (5) The financial institution would provide periodic account statements to the CO.
- (6) The terms of the escrow account could not be amended without the consent of the CO.

#### 16.3.4.2 Acceptability of Assets

- (a) Bonneville will accept only cash, readily marketable assets, or irrevocable letters of credit from a federally insured institution from individual sureties to satisfy the underlying bond obligations.
- (b) Acceptable assets include –
  - (1) Cash, or certificates of deposit, or other cash equivalents with a federally insured financial institution;
  - (2) United States Government securities at market value. (An escrow account is not required if an individual surety offers Government securities held in book entry form at a depository institution. In lieu thereof, the individual shall provide evidence that the depository institution has –
    - (i) Placed a notation against the individual's book entry account indicating that the security has been pledged in favor of Bonneville;
    - (ii) Agreed to notify Bonneville prior to maturity of the security; and
    - (iii) Agreed to hold the proceeds of the security subject to the pledge in favor of Bonneville until a substitution of securities is made or the security interest is formally released by Bonneville.
  - (3) Stocks and bonds actively traded on a national U.S. security exchange with certificates issued in the name of the individual surety. National security exchanges are – (i) the New York Stock Exchange; (ii) the American Stock Exchange; (iii) the Boston Stock Exchange; (iv) the Cincinnati Stock Exchange; (v) the Midwest Stock Exchange; (vi) the Philadelphia Stock Exchange; (vii) the Pacific Stock Exchange; and (viii) the Spokane Stock Exchange. These assets will be accepted at 90 percent of their 52-week low, as reflected at the time of submission of the bond. Stock options and stocks on the over-the-counter (OTC) market or NASDAQ Exchanges will not be accepted. Assistance in evaluating the acceptability of securities may be obtained from the –
 

Securities and Exchange Commission  
 Division of Enforcement  
 450 Fifth Street NW  
 Washington, DC 20549
  - (4) Irrevocable letters of credit (ILC) issued by a Federally insured financial institution in the name of Bonneville and which identify Bonneville Power Administration and contract number for which the ILC is provided.
- (c) Unacceptable assets include but are not limited to –
  - (1) Notes or accounts receivable;
  - (2) Foreign securities;
  - (3) Personal property (e.g., jewelry, furs, antiques);
  - (4) Stocks and bonds of the individual surety in a controlled, affiliated, or closely held concern of the contractor;



- (5) Corporate assets (e.g., plant and equipment);
- (6) Speculative assets (e.g., mineral rights); and
- (7) Letters of credit, except as provided in 16.3.6.3.

#### 16.3.4.3 Acceptance of Real Property

Bonneville does not have the ability to accept real property for an individual surety. If a CO receives a request to accept real property in lieu of bonds, or any alternatives provided in this part, the CO shall immediately contact the HCA and the OGC for a determination of acceptance.

#### 16.3.4.4 Substitution of Assets

An individual surety may request Bonneville to accept a substitute asset for that currently pledged by submitting a written request to the responsible CO. The CO may agree to the substitution of assets upon determining, after consultation with OGC, that the substitute assets to be pledged are adequate to protect the outstanding bond or guarantee obligations. If acceptable, the substitute assets shall be pledged as provided for in 16.3.5.1.

#### 16.3.5 Release of Lien

- (a) *Contracts subject to the Bonds statute.* The security interest shall be maintained for the later of –
  - (1) 1 year following final payment;
  - (2) Until completion of any warranty period (applicable only to performance bonds); or
  - (3) Pending resolution of all claims filed against the payment bond during the 1-year period following final payment.
- (b) *Contracts subject to alternative payment protection (16.2.3.1(b)).* The security interest shall be maintained for the full contract performance period plus one year.
- (c) *Other contracts not subject to the Bonds statute.* The security interest shall be maintained for 90 days following final payment or until completion of any warranty period (applicable only to performance bonds), whichever is later.
- (d) Upon written request by the individual surety, the CO may release a portion of the security interest on the individual's surety's assets based upon substantial performance of the contractor's obligations under its performance bond. Release of the security interest in support of a payment bond must comply with the subparagraphs (a)(1) through (3) of this subsection. In making this determination, the CO will give consideration as to whether the unreleased portion of the lien is sufficient to cover the remaining contract obligations, including payments to subcontractors and other potential liabilities. The individual surety shall, as a condition of the partial release, furnish an affidavit agreeing that the release of such assets does not relieve the individual surety of its obligations under the bond(s).

##### 16.3.5.1 Contract Clause

The CO shall insert the clause 16-5, Pledge of Assets, in solicitations and contracts which require the submission of performance or payment bonds.

##### 16.3.5.2 Exclusion of Individual Sureties

- (a) An individual may be excluded from acting as a surety on bonds submitted by offerors on procurement by the executive branch of the Federal Government. The exclusion shall be for the purpose of protecting the Government.
- (b) An individual may be excluded for any of the following causes:
  - (1) Failure to fulfill the obligations under any bond.
  - (2) Failure to disclose all bond obligations.

- (3) Misrepresentation of the value of available assets or outstanding liabilities.
- (4) Any false or misleading statement, signature or representation on a bond or affidavit of individual suretyship.
- (5) Any other cause affecting responsibilities as a surety of such serious and compelling nature as may be determined to warrant exclusion.
- (c) The CO shall provide recommendation and referrals to the HCA. Include the following, as a minimum, in referrals for consideration of exclusion:
  - (1) The basis of exclusion (see paragraph (b) above).
  - (2) A statement of facts.
  - (3) Copies of supporting documentary evidence.
  - (4) The individuals' names and current or last known home and or business addresses, including zip codes.
  - (5) A statement of Bonneville's history with such individuals, if any.
  - (6) A statement concerning any known active or potential criminal investigations or court proceedings.
- (d) OGC review and consultation shall be obtained for the proposed exclusion.
- (e) COs shall not accept the bonds of individual sureties whose names appear in the System for Award Management Exclusions.
- (f) An exclusion of an individual surety under this subsection will also preclude such party from acting as a contractor.

#### 16.3.6 Alternatives in Lieu of Corporate or Individual Sureties

- (a) Any person required to furnish a bond to Bonneville may furnish any of the types of security listed in 16.3.6.1 through 16.3.6.3 instead of a corporate or individual surety for the bond. When any of those types of security are deposited, a statement shall be incorporated in the bond form pledging the security in lieu of execution of the bond form by corporate or individual sureties. The contractor shall execute the bond forms as the principal. Bonneville shall establish safeguards to protect against loss of the security and shall return the security or its equivalent to the contractor when the bond obligation has ceased.
- (b) Upon written request by any contractor securing a performance or payment bond by any of the types of security listed in 16.3.6.1 through 16.3.6.3, the CO may release a portion of the security only when the conditions allowing the partial release of lien in 16.3.5 are met. The contractor shall, as a condition of the partial release, furnish an affidavit agreeing that the release of such security does not relieve the contractor of its obligations under the bond(s).
- (c) The contractor may satisfy a requirement for bond security by furnishing a combination of the types of security listed in 16.3.6.1 through 16.3.6.3 or a combination of bonds supported by these types of security and additional surety bonds under 16.3.3 or 16.3.4. During the period for which a bond supported by security is required, the contractor may substitute one type of security listed in 16.3.6.1 through 16.3.6.3 for another, or may substitute, in whole or combination, additional surety bonds under 16.3.3 or 16.3.4.

##### 16.3.6.1 United States bonds or notes

- (a) Any person required to furnish a bond to Bonneville 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 in the event of default of the principal on the bond shall accompany the deposited bonds or notes.
- (b) The CO shall turn securities over to the Finance Office.

### 16.3.6.2 Certified or cashier's checks, bank drafts, money orders, or currency

- (a) 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 draw them to the order of Bonneville Power Administration.
- (b) The CO shall turn over checks, drafts, money orders, and/or to the Finance office.

### 16.3.6.3 Irrevocable Letter of Credit

- (a) Any person required to furnish a bond has the option to furnish a bond secured by an irrevocable letter of credit (ILC) in an amount equal to the penal sum required to be secured. A separate ILC is required for each bond.
- (b) The ILC shall be irrevocable, require presentation of no document other than a written demand and the ILC (and letter of confirmation, if any), expire only as provided in paragraph (f) of this subsection, and be issued/confirmed by an acceptable federally insured financial institution as provided in paragraph (g) of this subsection.
- (c) To draw on the ILC, the CO shall use the sight draft set forth in the clause at 16-6, Irrevocable Letter of Credit, and present it with the ILC (including letter of confirmation, if any) to the issuing financial institution or the confirming financial institution (if any).
- (d) If the contractor does not furnish an acceptable replacement ILC, or other acceptable substitute, at least 30 days before an ILC's scheduled expiration, the CO shall immediately draw on the ILC.
- (e) If, after the period of performance of a contract where ILCs are used to support payment bonds, there are outstanding claims against the payment bond, the CO shall draw on the ILC prior to the expiration date of the ILC to cover these claims.
- (f) If used as an alternative to corporate or individual sureties as security for a performance or payment bond, the offeror/contractor may submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or an ILC with an initial expiration date that is a minimum period of one year from the date of issuance. The ILC shall provide that, unless the issuer provides the beneficiary written notice of non-renewal at least 60 days in advance of the current expiration date, the ILC is automatically extended without amendment for one year from the expiration date, or any future expiration date, until the period of required coverage is completed and the CO provides the financial institution with a written statement waiving the right to payment. The period of required coverage shall be:
  - (1) For contracts subject to the Bonds statute, the later of –
    - (i) One year following the expected date of final payment;
    - (ii) For performance bonds only, until completion of any warranty period; or
    - (iii) For payment bonds only, until resolution of all claims filed against the payment bond during the one-year period following final payment.
  - (2) For contracts not subject to the Bonds statute, the later of –
    - (i) 90 days following final payment; or
    - (ii) For performance bonds only, until completion of any warranty period.
- (g) Only federally insured financial institutions rated investment grade shall issue or confirm the ILC. Unless the financial institution issuing the ILC had letter of credit business of at least \$25 million in the past year, ILCs over \$5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least \$25 million in the past year.
  - (1) The offeror/contractor is required by paragraph (d) of the clause 16-6, Irrevocable Letter of Credit, to provide the CO a credit rating from a recognized commercial rating service that indicates the financial institution has the required rating(s) as of the date of issuance of the ILC.

- (2) To support the credit rating of the financial institution(s) issuing or confirming the ILC, the CO shall verify the following information:
- (i) Federal insurance: Each financial institution is federally insured. Verification of Federal insurance is available through the Federal Deposit Insurance Corporation (FDIC) institution directory at the website <http://www2.fdic.gov/idasp/index.asp>.
  - (ii) Current credit rating. The current credit rating for each financial institution is investment grade and that the credit rating is from a Nationally Recognized Statistical Rating Organization (NRSRO). NRSROs can be located at the website <http://www.sec.gov/answers/nrsro.htm> maintained by the SEC.
- (3) The rating services listed in the website <http://www.sec.gov/answers/nrsro.htm> use different rating scales (e.g., AAA, AA, A, BBB, BB, B, CCC, CC, C, and D; or Aaa, Aa, A, Baa, Ba, B, Caa, Ca, and C) to provide evaluations of institutional credit risk; however, all such systems specify the range of investment grade ratings (e.g., BBB-AAA or Baa-Aaa in the examples in this section) and permit evaluation of the relative risk associated with a specific institution. If the CO learns that a financial institution's rating has dropped below investment grade level, the CO shall give the contractor 30 days to substitute an acceptable ILC or shall draw on the ILC using the sight draft in paragraph (g) of the clause 16-6.
- (h) A copy of the Uniform Customs and Practice (UCP) for Documentary Credits, 2006 Edition, International Chamber of Commerce Publication No. 600, is available from:
- ICC Books USE,  
 1212 Avenue of the Americas, 21<sup>st</sup> Floor  
 New York, NY 100036;  
 Phone: 212-703-5066;  
 Fax: 212-391-6568;  
 Via the Internet at <https://www.uscib.org/icc-books-usa-under-new-management-ud-3366/>

#### 16.3.6.4 Contract Clause

Insert the clause 16-6, Irrevocable Letter of Credit, in solicitations and contracts for services, supplies, or construction, when a bid guarantee, or performance bonds, or performance and payment bonds are required.

## 16.4 INSURANCE

### 16.4.1 Policy

- (a) Contractors shall carry insurance under the following circumstances:
- (1) Bonneville requires any contractor subject to Cost Accounting Standard (CAS) 416 (48 CFR 9904.416) to obtain insurance by purchase or self-coverage, for the perils to which the contractor is exposed, except when:
    - (i) Exempted by other parts of the BPI; or
    - (ii) The contract specifically relieves the contractor of liability for loss of or damage to government property.
  - (2) Bonneville reserves the right to disapprove the purchase of any insurance coverage not in the government's interest.
  - (3) Allowability of the insurance program's costs shall be determined in accordance with the criteria in Appendix 13 section 8.19.

- (b) Contractors, whether or not their contracts are subject to CAS 416, are required by law and this policy to provide insurance for certain types of perils (e.g., workers' compensation). Insurance is mandatory also when commingling of property, type of operation, circumstances of ownership, or condition of the contract make it necessary for the protection of Bonneville. The minimum amounts of insurance required by this regulation (see 16.4.5.1) may be reduced when a contract is to be performed outside the United States and its outlying areas. When more than one agency is involved, the agency responsible for review and approval of a contractor's insurance program shall coordinate with other interested agencies before acting on significant insurance matters.
- (c) Contractors awarded non-personal services contracts for healthcare services are required to maintain medical liability insurance and indemnify Bonneville for liability producing acts or omissions by the contractor, its employees and agents.
- (d) Insurance requirements must be adequate, just and reasonable. They should be predicated on potential loss or damage, not necessarily on the value of the contract.
- (e) When insurance is required contractors must furnish proof of insurance to the Contracting Officer prior to the start of any onsite work. Contractors must maintain sufficient insurance during contract performance and notify the Contracting Officer of any changes, renewals or cancelations to the insurance policy. Additionally, Contracting Officers must comply with BPI 4.4.2(c)(16) requirements.

#### 16.4.2 Notice of Cancellation or Change

When Bonneville requires the contractor to provide insurance coverage, the policies shall contain a notice of cancellation endorsement that any cancellation or material change in the coverage adversely affecting Bonneville's interest shall not be effective unless the insurer or the contractor gives written notice of cancellation or change as required by the CO. When the coverage is provided by self-insurance, the contractor shall not change or decrease the coverage without the CO's prior approval.

#### 16.4.3 Insurance against Loss of or Damage to Bonneville Property

When Bonneville requires or approves insurance to cover loss of or damage to government property, it may be provided by specific insurance policies or by inclusion of the risks in the contractor's existing policies. The policies shall disclose Bonneville's interest in the property.

#### 16.4.4 [Reserved]

#### 16.4.5 Insurance under Fixed-Price Contracts

- (a) Although Bonneville is not ordinarily concerned with the contractor's insurance coverage if the contract is a fixed-price contract, in special circumstances Bonneville may specify insurance requirements under fixed-price contracts. Examples of such circumstances include the following:
  - (1) The contractor is, or has a separate operation, engaged principally in Government work.
  - (2) Bonneville, or another Government agency's, property is involved.
  - (3) The work is to be performed on Government property.
  - (4) Bonneville elects to assume risks for which the contractor ordinarily obtains commercial insurance.
- (b) Work on Government property.
  - (1) When the clause 16-7, Insurance – Work on a Government Installation, is required to be included in a fixed-price contract (see 16.4.8.1), the coverage specified in 16.4.5.1 is the minimum insurance required and shall be included in the contract schedule or elsewhere in the contract. The CO may require additional coverage and higher limits.

- (2) When the clause 16-7, Insurance – Work on a Government Installation, is not required (see 16.4.8.1), but is included because the CO considers it to be in Bonneville’s interest to do so, any of the types of insurance specified in 16.4.5.1 may be omitted or the limits may be lowered, if appropriate.

#### 16.4.5.1 Liability

- (a) **Workers’ compensation and employer’s liability.** Contractors are required to comply with applicable Federal and State workers’ compensation and occupational disease statutes. If occupational diseases are not compensable under those statutes, they shall be covered under the employer’s liability section of the insurance policy, except when contract operations are so commingled with a contractor’s commercial operations that it would not be practical to require this coverage. Employer’s liability coverage of at least \$1,000,000 shall be required, except in States with exclusive or monopolistic funds that do not permit workers’ compensation to be written by private carriers.
- (b) **General liability.** The CO shall require bodily injury and property liability insurance coverage written on the comprehensive policy form acceptable to Bonneville of at least \$1,000,000 per occurrence.
- (c) **Property damage liability.** Additional property damage liability insurance shall be required when the contractor is engaged in the handling and/or transportation and/or disposal of hazardous wastes.
- (d) **Automobile liability.** The CO shall require automobile liability insurance written on the comprehensive form of policy. The policy shall provide for bodily injury and property damage liability covering the operation of all automobiles used in connection with performing the contract. Policies covering automobiles operated in the United States shall provide coverage of at least \$2,000,000 per occurrence. The amount of liability coverage on other policies shall be commensurate with any legal requirements of the locality and sufficient to meet normal and customary claims.
- (e) **Aircraft liability.** When aircraft are used in connection with performing the contract, the CO shall require aircraft liability insurance. Coverage shall be at least at least \$10,000,000 per occurrence, other than for voluntary settlement. The insurance policy shall include coverage for owned, non-owned and hired aircraft.
- (f) **Vessel liability.** When contract performance involves use of vessels, the CO shall require vessel collision liability and protection and indemnity liability insurance. Coverage shall be at least \$1,000,000 per occurrence. The insurance policy shall include coverage for owned, non-owned and hired watercraft.
- (g) **Professional liability.** The CO shall require professional liability insurance which involves rendering a professional opinion upon which the Government 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, architect-engineer services, and medical professionals. Coverage shall be at least \$1,000,000 per occurrence for claims arising out of negligent acts, errors or omissions.
- (h) **Contractor’s pollution liability.** 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 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.

#### 16.4.5.2 Insurance for aircraft services contracts

- (a) **Policy.** The CO shall insert minimum insurance requirements in aircraft services contracts in order to protect Bonneville and its contractors.

- (b) **Applicability.** The clause prescribed in section 16.4.8.4 is applicable to all fixed-price contracts involving use of aircraft except when Bonneville exposure is minimal and time limitations are present.

#### 16.4.6 Insurance under Cost-Reimbursement Contracts

Cost-reimbursement contracts (and subcontracts, if the terms of the prime contract are extended to the subcontract) ordinarily require the types of insurance listed in 16.4.5.1, with the minimum amounts of liability indicated. (See 16.4.7 for self-insurance.)

##### 16.4.6.1 Group insurance plans

- (a) *Prior approval requirement.* Under cost-reimbursement contracts, before buying insurance under a group insurance plan, the contractor must submit the plan for approval by the CO. Any change in benefits provided under an approved plan that can reasonably be expected to increase significantly the cost to Bonneville requires similar approval.
- (b) *Premium refunds or credits.* The plan shall provide for Bonneville to share in any premium refunds or credits paid or otherwise allowed to the contractor. In determining the extent of Bonneville's share in any premium refunds or credits, any special reserves and other refunds to which the contractor may be entitled in the future shall be taken into account.

##### 16.4.6.2 Liability

- (a) Refer to 16.4.5.1 for the minimum required coverage in cost reimbursement contracts.
- (b) Nonprofit, educational, or State institutions performing cost-reimbursement contracts often do not carry insurance. They may claim immunity from liability for torts, or, as State institutions, they may be prohibited by State law from expending funds for insurance. The clause 16-9, Insurance – Liability to Third Persons, shall be used for appropriate clause coverage.

#### 16.4.7 Self-insurance

- (a) When it is anticipated that 50 percent or more of the self-insurance costs to be incurred at a segment of a contractor's business will be allocable to negotiated Bonneville contracts, and the self-insurance costs at the segment for the contractor's fiscal year are expected to be \$200,000 or more, the contractor shall submit, in writing, information on its proposed self-insurance program to the CO and obtain approval of the program. The submission shall be by segment or segments of the contractor's business to which the program applies and shall include –
- (1) A complete description of the program, including any resolution of the board of directors authorizing and adopting coverage, including types of risks, limits of coverage, assignments of safety and loss control, and legal service responsibilities;
  - (2) If available, the corporate insurance manual and organization chart detailing fiscal responsibilities for insurance;
  - (3) The terms regarding insurance coverage for any Government property;
  - (4) The contractor's latest financial statements;
  - (5) Any self-insurance feasibility studies or insurance market surveys reporting comparative alternatives;
  - (6) Loss history, premiums history, and industry ratios;
  - (7) A formula for establishing reserves, including percentage variations between losses paid and losses reserved;
  - (8) Claims administration policy, practices, and procedures;
  - (9) The method of calculating the projected average loss; and

- (10) A disclosure of all captive insurance programs, reinsurance agreements and excess insurance carriers, including methods of computing cost.
- (b) To qualify for a self-insurance program, a contractor must demonstrate ability to sustain the potential losses involved. In making the determination, the CO shall consider the following factors:
- (1) The soundness of the contractor's financial condition, including available lines of credit.
  - (2) The geographic dispersion of assets, so that the potential of a single loss depleting all the assets is unlikely.
  - (3) The history of previous losses, including frequency of occurrence and the financial impact of each loss.
  - (4) The type and magnitude of risk, such as minor coverage for the deductible portion of purchased insurance or major coverage for hazardous risks.
  - (5) The contractor's compliance with Federal and State laws and regulations.
- (c) Programs of self-insurance covering a contractor's insurable risks, including the deductible portion of purchased insurance, may be approved when examination of a program indicates that its application is in Bonneville's interest. Bonneville shall not approve a program of self-insurance for workers' compensation in a jurisdiction where workers' compensation does not completely cover the employer's liability to employees, unless the contractor –
- (1) Maintains an approved program of self-insurance for any employer's liability not so covered; or
  - (2) Shows that the combined cost to Bonneville of self-insurance for workers' compensation and commercial insurance for employer's liability will not exceed the cost of covering both kinds of risk by commercial insurance.
- (d) Once the CO has approved a program, the contractor must submit to that CO for approval any major proposed changes to the program. Any program approval may be withdrawn if a CO finds that either –
- (1) Any part of a program does not comply with the requirements of this subpart and/or the criteria at Appendix 13 section 8.19; or
  - (2) Conditions or situations existing at the time of approval that were a basis for original approval of program have changed to the extent that a program change is necessary.
- (e) Self-insurance programs to protect a contractor against the costs of correcting its own defects in materials or workmanship shall not be approved. For these purposes, normal rework estimates and warranty costs will not be considered self-insurance.

#### 16.4.7.1 Procedures

- (a) Upon receipt of a request by a contractor for self-insurance program approval, the CO shall present the request and supporting evidence to the Office of Transacting & Credit Risk Management (CBC) for review and determination of acceptability.
- (b) The Office of Transacting & Credit Risk Management will make a recommendation to the CO. If accepted, the CO shall inform the contractor of acceptance and insert the clause 16-12, Self-Insurance, in the contract.

#### 16.4.8 Contract Clauses

##### 16.4.8.1 Work on a Government Installation

The CO shall insert the clause 16-7, Work on a Government Installation, in solicitations and contracts that will require work on a government installation, unless only a small amount of work is required on the government installation (e.g., few brief visits per month). The CO may insert the clause in solicitations and contracts if it is in Bonneville's interest to do so.



#### 16.4.8.2 Minimum Insurance Coverage

The CO shall insert a clause substantially the same as 16-8, Minimum Insurance Coverage, in solicitations and contracts requiring performance on a government installation. The CO should modify the clause to require additional coverage and higher limits if appropriate for a particular acquisition.

#### 16.4.8.3 Liability to Third Persons

Use the clause 16-9, Insurance—Liability to Third Persons, in solicitations and contracts, other than those for construction and those for architect-engineer services, when a cost-reimbursement contract is contemplated, unless the successful offeror represents in its offer that it is totally immune from tort liability such as a State agency or as a charitable institution or the HCA waives the requirement for use of the clause.

#### 16.4.8.4 Aircraft Liability Insurance

The CO shall insert the clause 16-10, Aircraft Liability Insurance, in solicitations and contracts when a fixed-price contract for operation of aircraft is anticipated and where Bonneville is using a contractor-furnished pilot.

#### 16.4.8.5 Insurance of Leased Motor Vehicles

The CO shall insert the clause 16-11, Liability and Insurance—Leased Motor Vehicles, in solicitations and contracts for the leasing of motor vehicles (see subpart 11.3).

#### 16.4.8.6 Self-Insurance

If a contractor's self-insurance program is approved, the CO shall insert the clause, 16-12, Self-insurance, in contracts.

## **17 INFORMATION TECHNOLOGY AND OPERATIONAL TECHNOLOGY PROCUREMENT**

### **17.1 SOURCING REQUIREMENTS**

Because of the critical nature of Bonneville'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 Bonneville's ability to successfully achieve its mission. Such procurements include, but are not limited to, Information Technology (IT), Operational Technology (OT) and IT/OT services. Many of these additional responsibilities are reflected in contract clauses which have their origins in Executive Orders, or Department of Energy Directives, as well as Bonneville specific policy requirements. Deviations requiring waivers are identified below.

#### **17.1.1 Buy American Act**

Bonneville 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.

##### **17.1.1.1 Policy**

The Buy American Act shall not apply to the purchase of information technology equipment and information technology supplies that are commercial off the shelf products, as set forth in 41 U.S.C. §1907.

##### **17.1.1.2 Procedures**

The CO shall comply with the requirements of the Buy American Act for non-commercial procurements as set forth in subpart 9.1. IT/OT procurements for commercial software and commercial IT/OT hardware and equipment, including COTS software, hardware and equipment are exempt from the requirements of the Act.

### **17.2 ASSEST LIFESTYLE COSTS**

#### **17.2.1 Asset Lifestyle Costs**

When procuring IT/OT solutions or licenses, Bonneville should ensure that lifecycle costs, in addition to the initial project or licenses prices, are considered when determining an award. Proposals with complete lifecycle prices ensure the CO is able to select the best buy for Bonneville based on asset lifecycle costs not just project price or initial license, hardware or service price. Lifecycle costs should be considered in accordance with the selected Trade Off / Lowest Price Technically Acceptable award model. This requires assessment of license types proposed (for example, annual versus perpetual, named versus seat licenses), maintenance prices, software update prices, as charged or required over the asset lifecycle.

##### **17.2.1.1 Policy**

IT/OT solicitation statements of work (SOW), statements of objective (SOO) or Performance Work Statements (PWS) should consider operations, maintenance and support requirements over the anticipated asset lifecycle. In such cases the CO should ensure solicitations include multiyear price schedules for the contractor to submit as a part of their proposal or ensure a

solicitation proposal structure which allows the CO to compare asset lifecycle costs between proposals rather than just project or upfront software/services prices.

### 17.2.2 Standardization

It is in Bonneville's best interest to standardize commercial IT/OT hardware or equipment. Standardization allows Bonneville to achieve efficiencies 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 items.

#### 17.2.2.1 Policy

Bonneville may procure commercial IT/OT hardware or equipment that conforms to Bonneville standardization determination when the CIO, has determined in writing that Bonneville 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; if commercial or COTS software is purchased, a unique source justification must be provided for such procurements.

### 17.2.3 Open Architecture

It is generally in Bonneville's best interest to acquire Open Architecture IT or OT hardware, software and systems. Open Architecture helps achieve efficiencies when multiple organizations utilize Open Architecture solutions. It allows Bonneville to expand its existing systems and interface with other systems at a lower cost because the software, hardware and equipment uses common architecture. Acquiring Open Architecture solutions also allows Bonneville's to solicit proposals from multiple sources rather than only one source or the same source. The increased competition between sources generally results in lower prices and improved support over the asset lifecycle. Business Line Cyber and Data Security requirements should be considered as a part of the decision to acquire Open Architecture IT or OT hardware, software and systems.

#### 17.2.3.1 Policy

CO's shall ensure that Open Architecture factors are considered when procuring IT/OT software, hardware or equipment. Open Architecture considerations should commence during the acquisition strategy phase, be incorporated in the solicitation and include; system expansion, system interface and system modification costs that may occur in the future. This consideration should include how Open Architecture might reduce costs for Bonneville over the asset lifecycle. This assessment should be undertaken in coordination with the COR or Integrated Product Teams and with the relevant factors and results recorded in the DAD. Business Line Cyber and Data Security requirements should be considered as a part of the decision to acquire Open Architecture IT or OT hardware, software and systems.

## 17.3 TRANSACTION TYPE AND DOCUMENT ORDER OF PRECEDENCE

### 17.3.1 General Considerations

- (a) The Bonneville Project Act grants the Administrator the power to "acquire . . . such Real Property and Personal Property, or any interest therein . . . as the administrator finds necessary or appropriate" to carry out Bonneville's mission (16 U.S.C. § 832a(c)).
- (b) Part 17 addresses the most common transactions COs encounter, which gives rise to intellectual property issues and other IT/OT specific contracting issues as identified in 17.8.

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 Bonneville IT and OT procurements, identified as either commercial or non-commercial.

- (c) Definitions. Bonneville procures IT/OT software, hardware (items) and services that are noncommercial, commercial, or commercially available off-the-shelf (COTS). Definitions for noncommercial, commercial, and COTS are provided under subpart 2.2.

### 17.3.2 Commercial Items and Services

It is in Bonneville's best interest to procure IT/OT items and services that provide the best value to Bonneville's ratepayers. Procuring in the commercial marketplace results in lower cost, shorter lead times and increased product availability. Some of the benefits to Bonneville of procuring commercial or COTS IT/OT items and services include potentially lower lifecycle costs, ease of contract administration, and increased competition. When possible, Bonneville should procure IT/OT items and services that meet the definition of "commercial" as provided for in section 2.2.

#### 17.3.2.1 Policy

Contractors of commercial IT/OT products typically require the use of their contract document(s) for the sale of their products and/or services. These commercial products generally represent minimal risk to Bonneville. Even with the lower risk, the procurement of commercial IT/OT products (software, services, hardware, equipment) using Bonneville contracts and terms is required. The BPI requires the Bonneville contract documents to have precedence over the contractor's contract documents. The inclusion of 'clause 28-21 Alternate I Order of Precedence - IT/OT Contracts' in the Bonneville contract establishes this and ensures that Bonneville's risk management and protections are in place and enforceable.

### 17.3.3 Noncommercial Items

Some Bonneville requirements may be referred to as "custom" or unique to Bonneville, such as a software system which cannot be utilized by other utilities. Noncommercial items are items that are needed to meet specific Bonneville requirements and as such, they are not found in the commercial marketplace.

#### 17.3.3.1 Policy

CO's shall perform market research before soliciting and procuring non-commercial items/services, in order to determine whether or not commercial items/services are available to meet Bonneville's requirement. Only when Bonneville is unable to obtain its requirement(s) from the commercial marketplace, can noncommercial items be solicited and procured.

### 17.3.4 Order of Precedence for IT/OT Contracts

The procurement of non-commercial IT/OT products (software, services, hardware, equipment) using Bonneville contracts and terms is required. The BPI requires the Bonneville contract documents to have precedence over the contractor's contract documents. The inclusion of 'clause 28-21 Alternate I Order of Precedence - IT/OT Contracts' in the Bonneville contract establishes this and ensures that Bonneville's risk management and protections are in place and enforceable. For commercial software which is provided to Bonneville without a contractor's software license agreement, Bonneville 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.

#### 17.3.4.1 Policy

CO's may use a contractor's contract documents for the purchase of commercial software in conjunction with Bonneville's required commercial terms and conditions. The contractor's contract documents should be attached sequentially after Bonneville terms and conditions, utilizing clause 28-21 Alternate I Order of Precedence - IT/OT Contracts. If the contractor's agreement is not acceptable as written or Bonneville 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. The Office of General Counsel or HCA may be consulted, as needed.

#### 17.3.4.2 Procedures

The CO shall include the clause 28-21 Alternate I Order of Precedence - IT/OT Contracts, in all solicitations and contracts for IT, OT, commercial and COTS software and services. Clause 28-21 Alternate I, requires that Bonneville's contract and terms shall have precedence over the contractor software license or contract.

### 17.4 COMMERCIAL SOFTWARE (COPYRIGHT)

#### 17.4.1 Policy

- (a) Bonneville shall procure licenses to commercial software whenever doing so represents the best value to Bonneville. Procuring licenses to commercial software represents potentially significant savings and efficiencies to Bonneville and its ratepayers.
- (b) Bonneville'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 Bonneville in their license documents.
- (c) Certain clauses are required to ensure Bonneville's ability to comply with the contract terms and conditions and with federal law. Therefore, Bonneville'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 be approved by the HCA.
- (d) Bonneville will contract for either fixed term or perpetual software licenses in accordance with requirements. Where Bonneville's contract expires prior to the term of the contractor's software license, the contractor's software license shall survive the expiration of the Bonneville contract and shall be implemented in the same manner it would have been if the Bonneville contract had not expired.

#### 17.4.1.1 Procedures

Only COs with an IT/OT contracting warrant may commit Bonneville funds for the procurement of software licenses, regardless of the way in which the license terms are presented, i.e., document break the seal or click through (see discussion in BPI 17.2.3 on COTS software policy). Any unauthorized commitments by unwarranted individuals are subject to subpart 1.9, Ratification of Unauthorized Contract Commitments.

#### 17.4.1.2 Contract Clauses

- (a) The CO shall include clause 28-21 Alternate I Order of Precedence - IT/OT Contracts, in all solicitations and contracts for commercial software, including COTS software.
- (b) The CO shall include 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 Bonneville's commercial terms and conditions.

- (c) The CO shall include 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 Bonneville’s commercial terms and conditions. 17-6 shall not be used if Contractor’s license or lease agreement is included in the Bonneville contract.
- (d) If Contractor’s software license or lease agreement is used, then the CO may include 17-10, Commercial Software – Contractor License. Clause 17-6 shall not be included in solicitations and contracts for the acquisition of COTS software.
- (e) The CO shall include clause 17-19, Survival of Perpetual Licenses, in all solicitations and contracts where Bonneville receives a perpetual use license.

#### 17.4.2 Commercial Off-the-Shelf (COTS) Software

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.

##### 17.4.2.1 Policy

It is in Bonneville’s best interest to procure COTS software where the products can be utilized by Bonneville in the same form as available to the general public. Licenses for COTS are drafted to reflect industry practices eliminating any need for negotiation.

##### 17.4.2.2 Procedures

COs may accept a contractor’s license agreements for COTS software without negotiating the terms and conditions, provided Bonneville can comply with the requirements therein. COTS procurements must meet all other BPI procurement requirements for commercial procurements, including competition, price reasonableness. Source Code Escrow is not required for COTS products.

#### 17.4.3 GSA Schedule Contracts – Commercial Software

The CO may utilize available government contracts, such as GSA Schedule contracts, to fulfill Bonneville’s IT/OT software and equipment requirements (see Part 29).

#### 17.4.4 Limited Rights Licensing – Commercial Software

Many software contractors are concerned that by licensing to Bonneville they are licensing the entire Federal government, or conversely that their software has just entered the public domain.

Software licensed to Bonneville will not be shared with other federal government entities and that contractors’ ownership and rights in the software are preserved.

#### 17.4.5. Commercial Software Documentation

Commercial software, at times, is provided with documentation or manuals either electronically or in hard copy. For procurement purposes, if the documentation is procured separately from the software, it is considered a commercial item and procured in the same manner as the software.

#### 17.4.6 Support and Maintenance

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.

#### 17.4.6.1 Procedures

- (a) 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/maintenance agreements should 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.
- (b) 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 Bonneville’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.
- (c) The CO will utilize Software as a Service and similar IT/OT service delivery models such as Infrastructure as a Service, and Cloud computing, when the service meets the sourcing requirements in subsection 17.6.1. With any solution allowing storage of information offsite, such as with Infrastructure as a Service and Cloud computing, risk associated with data security during performance and data return at the end of the contract must be addressed in the contract. These services are considered commercial services; see subpart 17.4, Commercial IT/OT Services as well as subsection 17.4.6, Software as a Service.

#### 17.4.7 Warranty – Commercial Software

##### 17.4.7.1 Policy

- (a) Contractors shall warrant to Bonneville that their product shall perform substantially in accordance with the express warranties as presented to Bonneville.
- (b) Bonneville’s IT and OT systems support the region’s critical transmission and power systems. All software procured by Bonneville must be virus and mal-ware free at the time of initial procurement.
- (c) Bonneville honors the intellectual property rights of others and expects that commercial software delivered to Bonneville does not infringe upon others’ copyright or patent rights. In addition to Indemnifying Bonneville for any copyright or patent infringement, by offering their products to Bonneville, contractors are representing that they have the rights to license and/or sublicense the software being delivered to Bonneville.

##### 17.4.7.2 Contract Clause

CO’s shall include clause 28-11, Warranty, in solicitations and contracts for the acquisition of commercial items.

#### 17.4.8 Rights in Data – Commercial Software

Bonneville will not pursue rights in technical data for commercial software except as provided to the general public in the contractor’s standard commercial license.

#### 17.4.9 Perpetual Software Use Licenses

When a contractor’s software license agreement is included in the Bonneville contract as an attachment, the Bonneville contract, having a definite term, may expire while the contractor’s

software license exceeds the term of the Bonneville contract. In these cases, the contractor's perpetual license shall survive any expiration of the Bonneville contract, and Bonneville may continue to use the software within the terms of the rights granted in the contractor's software license agreement.

#### 17.4.9.1 Policy

Bonneville will comply with the terms of a perpetual software license agreement, notwithstanding any requirements of the expired fixed term Bonneville contract and as if the expired contract was still in effect.

#### 17.4.9.2 Procedures

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 Bonneville 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. In the event of financial liability beyond the program office's acceptable length of financial liability the CO shall limit the duration of the contract accordingly.

#### 17.4.9.3 Contract Clause

The CO shall include the clause 17-19, Survival of Perpetual Licenses, in all solicitations and contracts where Bonneville receives a perpetual use license.

#### 17.4.10 Modification to Commercial Software

At times, commercial software must be modified to meet Bonneville's needs. If commercial software is customarily modified for licensee use, per the commercial item definition in subpart 2.2, 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 Bonneville pays for a modification to a contractor's commercial software, it is in Bonneville's best interest to be granted use rights to that modification without any additional license fees.

##### 17.4.10.1 Policy

Bonneville treats a modification to commercial software as a commercial item. Where Bonneville pays for a modification of commercial software, Bonneville should receive a fully paid-up, nonexclusive, irrevocable world-wide license for the use of the modified software.

##### 17.4.10.2 Contract Clause

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 Bonneville's needs, regardless of whether the modification is initiated in the initial acquisition or in a later modification/request by Bonneville. 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 17-12 at the time of modification.

#### 17.4.11 Development of New Software Products

If a new software product is developed it is classed as noncommercial. The development of new software products, including resulting ownership rights, is discussed in noncommercial products.



The development of a new software product should be distinguished from modifications to commercial software, in that the modification is considered to be commercial.

#### 17.4.11.1 Procedure

CO shall consult with OGC where there may be difficulty determining whether a new product may result from a Bonneville contract.

#### 17.4.12 Ownership Rights for New Software Products

If there is a likelihood that a new software product may be developed by the contractor as a result of a Bonneville commercial procurement, the CO shall determine in advance the ownership and license rights of the new product, per subsection 17.5.4 Rights in Data.

### **17.5 COMMERCIAL IT/OT HARDWARE AND EQUIPMENT (PATENTS)**

#### 17.5.1 Policy

- (a) Bonneville purchases commercial IT/OT hardware and equipment whenever such a purchase represents the best value to Bonneville. Procuring commercial IT/OT hardware and equipment represents potentially significant savings and efficiencies.
- (b) Bonneville 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. Bonneville considers these procurements commercial.
- (c) Commercial IT/OT hardware and equipment are products offered for sale to the general public as described in the definition of "commercial" at subpart 2.2. 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, and generally eliminating the need for negotiation.

#### 17.5.1.1 Procedure

The CO shall review any terms and conditions included in the contractor's sales agreement or quote to determine if the agreement is in Bonneville's best interest and whether Bonneville will have the ability to use the IT/OT hardware and equipment in a manner that fulfills the need for which the products are being purchased. The CO may incorporate the contractor's sales agreement into Bonneville's contract or purchase order as an attachment. If the CO incorporates the contractor's sales agreement into Bonneville's contract, the CO shall also include clause 28-21 Alternate I Order of Precedence - IT/OT Contracts in the Bonneville contract. If the contractor's terms and conditions are not acceptable as written, the CO should negotiate specific terms to be included in the contract. OGC or HCA may be consulted, as needed.

#### 17.5.2 Acquisition of Commercial Hardware and Equipment

##### 17.5.2.1 Policy

Bonneville shall procure commercial IT/OT hardware and equipment whenever such a purchase represents the best value to Bonneville. Bonneville's policy is to acquire commercial IT/OT hardware and equipment under the same sales or lease agreements that contractors offer to the general public. Bonneville 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/OT equipment.

#### 17.5.2.2 Procedure

The CO shall review any terms and conditions included in the contractor's sales agreement or quote to determine if they give Bonneville the ability to use the IT hardware and equipment in a manner that fulfills the need for which the products are being purchased. The CO may incorporate the contractor's sales agreement into Bonneville contract or purchase order as an attachment. If the CO incorporates the contractor's sales agreement into Bonneville's contract, the CO shall use clause 28-21 Alternate I Order of Precedence - IT/OT Contracts in the Bonneville contract. If the contractor's terms and conditions are not acceptable as written, the CO should negotiate specific terms to be included in the contract. OGC or HCA may be consulted, as needed.

#### 17.5.2.3 Contract Clause

If clause 28-21 Alternate I Order of Precedence - IT/OT Contracts is not included in the Bonneville contract 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 identify their place in the order of precedence.

#### 17.5.3 [Reserved]

#### 17.5.4 Commercial Off-the-Shelf (COTS) Hardware and Equipment

The CO may accept a contractor's sales agreements or quotes for COTS hardware and equipment without negotiating the terms and conditions, per BPI 17.3.2 Acquisition of Commercial Hardware and Equipment, provided Bonneville can comply with the terms and conditions. Maintenance and maintenance renewals for COTS products are also considered COTS products.

#### 17.5.5 GSA Schedule Contracts – Commercial Hardware and Equipment

The CO may utilize available government contracts, such as GSA schedule contracts, to fulfill its IT/OT hardware and equipment requirements (see Part 29).

#### 17.5.6 Modifications to Commercial Hardware or Equipment

- (a) Modifications to commercial hardware and equipment are considered commercial with no intellectual property rights for Bonneville in the modification.
- (b) Minor modifications to commercial equipment done at Bonneville's request or expense, or which result in a modification which is Bonneville exclusive and/or specific, are considered commercial with no ownership rights for Bonneville.

#### 17.5.7 Modifications that Result in New Hardware Products

Bonneville may request a modification of such scope that an entirely new hardware product results. Per the definition of commercial items, subpart 2.2, 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 documented prior to contract award.

#### 17.5.7.1 Procedure

COs must evaluate the extent of the modification against the definition of commercial items in subpart 2.2 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 subpart 17.5, Noncommercial Intellectual Property, for guidance and appropriate contract clauses.

#### 17.5.8 Support and Maintenance of Embedded Software

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.

##### 17.5.8.1 Procedures

- (a) 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 Bonneville's commercial terms and conditions, with the contractor's support agreement. If the CO incorporates the contractor's maintenance agreement into Bonneville's contract, the CO shall also include clause 28-25 Order of Precedence - IT/OT Contracts in the Bonneville contract.
- (b) Procurements of support and maintenance of embedded software in either IT/OT hardware or equipment must meet the sourcing requirements as set forth in subsection 17.1

#### 17.5.9 Warranty – Commercial Hardware and Equipment

##### 17.5.9.1 Policy

- (a) Contractors shall warrant to Bonneville that their product shall be free of defects and fit for the particular purpose for which Bonneville is procuring it, if identified in the contract, as well as comply with any express warranties identified for the product.
- (b) Bonneville honors the intellectual property rights of others and expects that commercial hardware or equipment and its embedded software delivered to Bonneville does not infringe upon others' copyright or patent rights.

##### 17.5.9.2 Contract Clause

The CO shall include a clause similar to clause 28-11, Warranty, in solicitations and contracts for commercial acquisitions. COs may modify 28-11 only to reflect commercial market practices. Modifications must be reviewed by OGC per subpart 4.9.

## 17.6 COMMERCIAL IT/OT SERVICES

### 17.6.1 General

- (a) Commercial IT/OT services at Bonneville include IT/OT supplemental labor, IT/OT subscription services, software support and maintenance services and other services such as modifying commercial software products for Bonneville use. Contracts for commercial services also include such IT/OT services such as cabling and utility installation services and IT/OT training as examples.

- (b) “Commercial IT/OT 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/OT services are those services (1) 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 (2) where the source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to Bonneville.
- (c) Where Bonneville is contracting for commercial IT/OT 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/OT services contract to protect Bonneville’s rights in the resulting product.
- (d) 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.

#### 17.6.1.1 Policy

Bonneville shall procure commercial IT/OT services, as defined in subpart 2.2, whenever such a purchase represents the best value to Bonneville. Bonneville’s policy is to acquire commercial services under the same terms and conditions that contractors offer to the general public.

#### 17.6.1.2 Contract Clauses

- (a) The CO shall include the clause 17-2.1, Patent Rights – Ownership by Contractor, in all solicitations and contracts when procuring commercial IT/OT 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) The CO shall include the clause 17-2.2, Patent Rights – Ownership by Bonneville Power Administration, in all solicitations and contracts when procuring commercial IT/OT 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 Bonneville.
- (c) The CO shall include the 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 the clause 17-12, Modifications to Commercial Software, in all solicitations and contracts when procuring services to modify commercial software to meet Bonneville’s specific needs.
- (e) The CO shall include the clause 15-18, Homeland Security, in solicitations and contracts when:
  - (1) Bonneville 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 Bonneville’s interests.

#### 17.6.2 [Reserved]

#### 17.6.3 Warranty – IT/OT Services

##### 17.6.3.1 Policy

Bonneville requires that IT/OT services shall be performed in a competent manner in conformity with generally acceptable industry standards for the services provided. Bonneville is entitled to recover the costs of the nonconforming services as identified in the Bonneville contract.

#### 17.6.3.2 Contract Clause

The CO shall include a clause similar to clause 28-11, Warranty, in solicitations and contracts for commercial acquisitions. COs may modify 28-11 only to reflect commercial market practices. Modifications to warranty clauses must be reviewed by OGC in accordance with subpart 4.9.

#### 17.6.4 [Reserved]

#### 17.6.5 IT/OT Support and Maintenance

Most software requires support/maintenance services to keep the software up to date and free from defects. Bonneville contracts 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 payment is due for a predetermined 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/OT support sourcing is subject to the requirements set forth in subsection 17.6.1, Sourcing Requirements.

##### 17.6.5.1 Advanced Payment of Support or Maintenance Subscriptions

Licensed software typically requires a support or maintenance subscription to receive technical assistance, bug fixes, updates, and upgrades. It is Bonneville's preference to pay for these types of services via monthly or quarterly invoices after such services have been delivered. This ensures Bonneville only pays for actual services received. It also reduces the risk of financial loss when these services are paid for in advance and are subsequently not delivered, or when these services are not well-defined including quality or quantity which may be subsequently short delivered or under delivered. If the CO determines the financial risk to Bonneville is low or acceptable (for example - if the contractor has an acceptable credit rating, or has an acceptable past performance), then the CO, at their sole discretion, has the discretion to contract for support or maintenance that are billed on a monthly, quarterly or annual basis in advance. However, as advance payments increase Bonneville's financial risk and can affect its financial position, they are at least preferred payment arrangement. For more information see section 22.1.4.(6).

###### 17.6.5.1.1 Policy

Advance payment for software support and maintenance service is authorized without review and approval by the HCA under 22.1.4.1 and shall not be subject to the limitations against advance payment for commercial acquisitions under subsection 22.1.4.

##### 17.6.5.2 Competition Requirement

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.

###### 17.6.5.2.1 Policy

Pursuant to subsection 11.9.1, 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 rationale for the source selection. Additionally, the CO must verify at each contract renewal including any option years.

#### 17.6.5.3 Price Reasonableness

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. Bonneville has a responsibility to its ratepayers to verify price reasonableness for new awards as well as option years/renewals and extensions of support and maintenance contracts.

##### 17.6.5.3.1 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.

#### 17.6.6 Software as a Service

Software as a Service (SaaS), and other "...as a Service" delivery methods such as Platform as a Service (PaaS) (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 which, at the CO's discretion, may be 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.

##### 17.6.6.1 Policy

Bonneville may use cloud computing and SaaS methods, provided Bonneville Security and Cyber Security requirements are met. Requirements specific to each service must be included in the contract requirements document or Statement of Work. Special attention must be given to safeguarding IT/OT information and data, including the return of the information upon termination of the service. The Statement of Work must identify Bonneville's requirements for the particular cloud computing or SaaS method being used. The CO must work closely with the program office to determine the appropriate approach and special requirements and to ensure accuracy and compliance with the safeguarding and return of IT/OT information and data at the end of the contract.

## 17.7 NONCOMMERCIAL INTELLECTUAL PROPERTY

### 17.7.1 General

- (a) When Bonneville issues contracts 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 resolve title or ownership rights prior to commencement of

development or creation puts Bonneville at risk of not having the requisite legal rights to use the product or work as originally anticipated.

- (b) A new product may result from a commercial IT/OT 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 solicitation or contract award. In the event 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 in accordance with the requirements of the contract.
- (c) Noncommercial products may be either patented or copyrighted, depending on the nature of the product. Patent and Rights in Data clauses address whether Bonneville or the contractor owns the rights to the product and what uses are permitted.

#### 17.7.1.1 Policy

A product of work paid for using Bonneville funds resulting from either of the above scenarios is noncommercial as defined in subpart 2.2. The resulting work product maybe so Bonneville-specific or custom that use is limited to Bonneville. 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.

#### 17.7.1.2 Procedures

- (a) 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.
- (b) If Bonneville contracts for a service under a commercial IT/OT 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.

#### 17.7.2 Patents

Patent rights become an issue in procurement when work performed under federal funding results in a patentable item or a new invention. Bonneville has the right to retain title to inventions developed with its funds and to prosecute patents for its inventions. Bonneville 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)

##### 17.7.2.1 Policy

- (a) Bonneville encourages the maximum practical commercial use of inventions made under Bonneville contracts. Bonneville will exercise the rights available to the Federal government to ensure that contractors meet their responsibilities to commercialize inventions.
- (b) Bonneville supports the commercialization of inventions arising from Bonneville-funded research and development. Bonneville encourages the maximum practical commercial utilization of inventions made during the performance of Bonneville contracts.
- (c) Bonneville invests in research and development to return benefits to its ratepayers through improvements in the generation, transmission, and conservation of electricity.
- (d) Bonneville 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.

- (e) Bonneville ensures that it obtains sufficient rights in Bonneville-funded inventions to meet the needs of Bonneville and protect the public against nonuse or unreasonable use of inventions.

#### 17.7.2.1.1 Contract Clause

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 Bonneville which meets the definition of noncommercial as set forth in subpart 2.2.

#### 17.7.2.2 Confidentiality of Patentable 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, Bonneville 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).

##### 17.7.2.2.1 Policy

As necessary to avoid any bar to a valid patent, Bonneville will only withhold information concerning inventions for a reasonable time to allow for a patent application to be filed. Once filed in any patent office, Bonneville is not required to release copies of any document that is a part of a patent application for those subject inventions.

#### 17.7.2.3 Title to Inventions

A contract may require the contractor to assign to Bonneville 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.

#### 17.7.2.4 License Rights to Inventions

When Bonneville 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 CO 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.

##### 17.7.2.4.1 Policy

- (a) If a contractor retains title to the invention, the contractor must grant Bonneville at least a nonexclusive, nontransferable, irrevocable, paid-up license to use, or have used for or on behalf of the United States, any subject invention throughout the world. Bonneville 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.
- (b) Bonneville 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 –



- (i) Does not elect to retain rights or fails to elect to retain rights to the invention within the time specified in the clause;
  - (ii) Has not filed a patent application within the time specified in the clause;
  - (iii) Decided not to continue prosecution of patent application, pay maintenance fees, or defend in a re-examination or opposition proceeding on the patent; or
  - (iv) No longer desires to retain title;
- (3) If the contractor is a foreign entity; or
- (4) If the subject invention results in disclosure of Bonneville Critical Infrastructure, Cyber Security or Physical Security information.

#### 17.7.2.5 Third Party Application

##### 17.7.2.5.1 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 Bonneville's 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.

#### 17.7.2.6 Invention Utilization Reports

##### 17.7.2.6.1 Policy

Bonneville 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.

#### 17.7.2.7 March-In Rights

##### 17.7.2.7.1 Policy

Pursuant to 35 U.S.C. § 203, Federal 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, Bonneville can grant the license itself. March-in rights may be exercised only if Bonneville 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.

##### 17.7.2.7.2 Procedure

Bonneville 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 Bonneville action should not be taken. Bonneville 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 OGC and assist counsel with any required proceedings and notices.

#### 17.7.2.8 Administration

##### 17.7.2.8.1 Policy

Bonneville and the contractor should know and exercise their rights in subject inventions.

Contracts having subject inventions should be administered so that –

- (a) Inventions are identified, disclosed, and reported as required by the contract and elections are made;
- (b) The rights of the Government in such inventions are established;
- (c) Patent applications are filed in a timely manner and prosecuted by contractors or by Bonneville;
- (d) The rights of the Government in filed patent applications are documented by formal instruments such as licenses or assignments; and
- (e) Expedient commercial utilization of such inventions is achieved.

##### 17.7.2.8.2 Procedure

- (a) 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.
- (b) 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.

##### 17.7.2.8.3 Contract Clauses

- (a) The CO shall determine whether the title to the patent shall be owned by the contractor or by Bonneville 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 Bonneville IT staff prior to including this clause in contracts for software developed solely for Bonneville's use.
- (c) The CO shall include clause 17-2.2, Patent Rights – Ownership by Bonneville Power Administration, 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 IT/OT staff or the CO determine that Bonneville shall hold title to the resultant patent. The CO shall consult with Bonneville IT/OT staff prior to including this clause in contracts for software developed solely for Bonneville's use.
- (d) The CO shall include clause 17-2.2, Patent Rights – Ownership by Bonneville Power Administration, 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.

#### 17.7.2.9 Contractor Follow-up

Contractors are required by the 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.

##### 17.7.2.9.1 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.

#### 17.7.2.10 Royalties

It may be appropriate for Bonneville to collect royalties from the successful grant of a patent resulting from a project or invention completed or developed with Bonneville 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.

##### 17.7.2.10.1 Procedure

When a CO determines that royalties are appropriate, the CO shall contract the HCA for advice and assistance.

#### 17.7.3 Copyrights

##### 17.7.3.1 General

- (a) Copyright is a type of intellectual property that protects original works of authorship as soon as an author fixes the work in a tangible form of expression. 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. Contractors may assert and register a copyright for an original work, with the retention of a license to the work for its own use.
- (b) Prior to delivery, contractors are required to obtain permission to use any copyrighted materials to be delivered to Bonneville. Contractors are expected to defend and indemnify Bonneville from any third-party claim arising from contractor - supplied software that infringes on any patent, copyright, or trade secret.

##### 17.7.3.2 Policy

Bonneville may own a license to use, reproduce, perform, display, or make derivative works of copyrighted material.

##### 17.7.3.3 Permissions

Bonneville requires that contractors obtain permission from copyright owners before including copyrighted works in deliverables to Bonneville.

#### 17.7.3.3.1 Contract Clause

The CO shall include the clause 17-7.1, Infringement Indemnifications – Noncommercial Software, in all solicitations and contracts where noncommercial software will be delivered to Bonneville.

#### 17.7.3.4 Noncommercial Copyright

##### 17.7.3.4.1 Policy

- (a) For noncommercial copyrights, Bonneville’s policy is to determine those rights in advance by including rights in data clauses in the procurement contract. Bonneville addresses noncommercial copyright through its Rights in Data clauses.
- (b) It is Bonneville policy to allow contractors to assert copyright for their original works of authorship including software. This includes allowing contractors to register the copyright, without Bonneville approval, except that Bonneville must retain a license to copy, display, perform, or create derivative works for its own use.
- (c) Bonneville may exercise its rights in data for noncommercial intellectual property goods and services including noncommercial software. When a contractor licenses noncommercial software to Bonneville, Bonneville 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 Bonneville acquires in their software.
- (d) Bonneville will contract for either fixed term or perpetual software licenses in accordance with requirements. Where Bonneville’s contract expires prior to the term of the contractor’s software license, Bonneville shall comply with the terms of the contractor’s software license notwithstanding any expiration of the Bonneville contract.

##### 17.7.3.4.2 Contract Clauses

- (a) The CO shall include clause 17-19, Survival of Perpetual Licenses, in all solicitations and contracts where Bonneville 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, or configuring software specifically for Bonneville.

#### 17.7.4 Rights in Data

##### 17.7.4.1 General

- (a) “Rights in Data” is an intellectual property right and is used in contracts for development of products and services specifically for government use. Under Rights in Data the Federal Government acquires rights to the data associated with noncommercial goods and services. Rights in Data does not apply to commercial software.
- (b) While the government must respect the rights of private parties in their intellectual property, the government may have special needs when contracting for development of products and services specifically for government use.
- (c) When a contract results in a newly 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, Bonneville may need access to product specifications, software code or other information or data in order to carry out its mission or to ensure that

its competition requirements are met. By acquiring rights in data, Bonneville can ensure that competition for the support and maintenance function can occur.

#### 17.7.4.2 Policy

Bonneville's will determine data rights to products developed under a contract in advance by including patent or copyright (rights in data) clauses in the solicitation and procurement contract. Generally, the contractor will own the work product and Bonneville 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, Bonneville could regain ownership of the work product by exercising "march-in" rights, see 17.5.2.7.

#### 17.7.4.3 Procedures

The CO shall consult with OGC in procurements where Bonneville shall take title to developed software and work products.

##### 17.7.4.3.1 Contract Clauses

- (a) The CO shall include clause 17-3, Rights in Data – Noncommercial Software, in solicitations and contracts where Bonneville is contracting for the creation of noncommercial software per definition of subpart 2.2, and the contractor owns the resultant software and will provide support with Bonneville receiving use rights. COs shall include either clause 17-8, Source Code Escrow – Third Party Agent, or clause 17-9, Source Code Escrow – Bonneville as Agent, in the contract. The CO may supplement the Rights in Data clauses to require specific periodic reporting and periodic certification of Bonneville rights.
- (b) The CO shall include clause 17-4, Rights in Data – Use of Existing Work, in solicitations and contracts where Bonneville is contracting for use rights (no modifications) for existing work already created by the contractor.
- (c) The CO shall include clause 17-5.1, Rights in Data – Creation of New Work, in solicitations and contracts where Bonneville is contracting for the creation of new work where the contractor will own the resultant work but grant a use license to Bonneville. The CO may supplement the Rights in Data clauses to require specific periodic reporting and periodic verification of Bonneville rights.
- (d) The CO shall include clause 17-5.2, Rights in Data – Creation of New Work, Restricted, in solicitations and contracts where Bonneville is contracting for the creation of new work where the contractor will own the resultant work with a use license for Bonneville. Through this clause, the contractor agrees to restrict its use rights as identified by Bonneville. The CO may supplement the Rights in Data clauses to require specific periodic reporting and periodic verification of Bonneville rights.

#### 17.7.4.4 Assertion of Rights

##### 17.7.4.4.1 Policy

- (a) Bonneville recognizes rights in data, including trade secrets and other proprietary information, developed at private expense, and limits its demands for delivery of that data. Bonneville will acquire only those rights essential to Bonneville's needs.
- (b) Bonneville will only assert its rights in data when contracting for non-commercial items or for research, development, or demonstration of new technologies. When Bonneville asserts its rights to data, Bonneville will do so in a way that respects trade secrets and other proprietary information. For example, for data (other than computer software) that includes trade secrets or is otherwise confidential or privileged, and not developed with government

funds, Bonneville 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, Bonneville will negotiate only for “restricted rights.”

#### 17.7.4.5 Administration

Bonneville and the contractor should know and exercise their rights in subject data. Contracts having data should be administered so that –

- (a) Data is identified, disclosed, and reported as required in the contract and elections are made;
- (b) The rights of the Government in such data are established;
- (c) Patent or copyright applications are filed in a timely manner and prosecuted by contractors or by Bonneville;
- (d) The rights of the Government in filed patent applications are documented by formal instruments such as licenses or assignments; and
- (e) Expedient commercial utilization of such data is achieved.

##### 17.7.4.5.1 Procedure

- (a) 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.
- (b) 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.
- (c) 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.

## 17.8 OTHER REQUIREMENTS FOR IT/OT AND INTELLECTUAL PROPERTY

### 17.8.1 Nondisclosure – Safeguarding of Information

Confidential information includes but is not limited to Proprietary Information and Trade Secret Information. Safeguarding of confidential information including Proprietary Information and Trade Secret Information is required. Responses to pre-solicitation research, solicitation and performance under a Bonneville contract may require disclosure of either contractor proprietary information, or Bonneville information, including critical energy infrastructure information (CEII), critical information (CI), or controlled unclassified information (CUI) as defined in subsection 15.10.1. 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.

#### 17.8.1.1 Policy

The timing of information disclosure and who is making the disclosure determines the documentation necessary to protect the information. Bonneville 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. Disclosure of Bonneville information, including CEII, CI and CUI requires a stand-alone Nondisclosure Agreement drafted and approved by OGC. See subpart 11.6. Any disclosure of Bonneville

information, including CEII, CI and CUI to a foreign national or foreign corporation shall be in accordance with sections 15.10, 15.11 and 15.12.

#### 17.8.1.2 Contractor Information

Bonneville will protect contractor information from unauthorized disclosure by informing Bonneville 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.

##### 17.8.1.2.1 Policy

- (a) Any confidential or proprietary contractor information disclosed by the contractor in the performance of a contract must be marked appropriately and disclosed pursuant to the terms of the nondisclosure clause to avoid improper handling.
- (b) Contractors may ask Bonneville to sign nondisclosure agreements or to include confidentiality agreements in contracts to protect their proprietary information or trade secrets Bonneville will limit disclosure of contractor's proprietary, sensitive, or financial information pursuant to provisions of clause 17-21, Nondisclosure for RFP, and clause 17-22, Nondisclosure During Contract Performance.
- (c) Bonneville employees may be asked to sign nondisclosure agreements before potential contractors will disclose information about new products. Bonneville employees should understand whether the contractor is asking the employee to sign on their own behalf, or on behalf of Bonneville. If the contractor requires the employee to sign on behalf of Bonneville, the employee must either be a warranted CO or obtain approval from OGC.

##### 17.8.2.2.2 Provision and Contract Clause

- (a) The CO shall include the provision 17-21, Nondisclosure for RFP, in solicitations where the Offeror may reasonably expect to include proprietary or confidential information in the offer.
- (b) The CO shall include the clause 17-22, Nondisclosure during Contract Performance in the RFO/RFQ, solicitations and contracts in all procurements where the contractor's proprietary or confidential information may be received by Bonneville during the performance of the contract.

#### 17.8.3 Bonneville Information

As a government entity, any Bonneville information which is considered critical or sensitive will be marked accordingly. To maintain appropriate system integrity and security, information regarding current IT/OT system architecture, platforms, operating systems, and specific software applications will only be disclosed on a need to know basis, under the guidance of the Bonneville Program Cyber Security Plan issued by the Office of the Chief Information Officer.

##### 17.8.2.3.1 Procedure

- (a) COs and their designees shall not disclose to any outside source, including IT/OT businesses, corporate survey firms, consultants, publications, potential offerors, or current contractors, any information pertaining to Bonneville IT/OT system architecture, platforms, operating systems, specific software applications, hardware, or any portion of the general Bonneville IT/OT 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/OT need.
- (b) Should the CO and requisitioner determine there is an appropriate rationale to disclose such information to offerors and/or contractors, CO's shall consult with OGC prior to any

disclosure for guidance on appropriate markings, nondisclosure agreements and procedures.

- (c) The CO shall refer to Bonneville Policy 433-1 for guidance and policy on safeguarding Confidential Unclassified Information.
- (d) IT and OT procurements which require disclosure of information pertaining to Bonneville system architecture, platforms, operating systems, specific software applications, hardware, or any portion of the general Bonneville environment must adhere to the disclosure requirements as set forth in 17.6.2. Procurements which require disclosure of Bonneville critical information or Data should be referred to OGC for preparation of a nondisclosure agreement as set forth in subpart 11.6. Additionally, any publication of IT or OT requirements must comply with subpart 11.3.

## 17.8.2 Royalties

Bonneville shall only procure royalty-free - IT/OT hardware, software, services or licenses. All proposals or offers for any IT/OT hardware, software, services or licenses shall be royalty free. Bonneville will not consider for award any IT/OT hardware, software, services or licenses requiring royalty payments.

### 17.8.2.1 Policy

Bonneville will not issue RFP's, receive proposals evaluate for award, or enter into any contract or license requiring royalty payment, including but not limited to; single fee, fixed period re-occurring or evergreen royalty payments. Contractors shall not submit quotes or proposals for any IT/OT hardware, software, services, or licenses requiring a royalty payment single fee, fixed period re-occurring or evergreen royalty payments.

### 17.8.2.2 Solicitation Provisions and Contract Clauses

- (a) The CO shall include the provision 17-16, Royalty Payment or Fees, in all solicitations for IT/OT hardware, software or service contracts or licenses.
- (b) The CO shall include the clause 17-17, Royalty Payment or Fees, in the RFO/RFQ, solicitations and contracts for IT/OT hardware, software or service contracts or licenses.

## 17.8.3 [Reserved]

## 17.8.4 Infringement Indemnification

### 17.8.3.1 Commercial Procurements

- (a) Contractor Indemnification of Bonneville: Contractors offering commercial items or services represent that they have the appropriate ownership and distribution rights in the items being delivered to Bonneville. For commercial items, contractor shall indemnify Bonneville for any patent or copyright infringement resulting from the delivery of contractors' products or services. Indemnification obligations for commercial products procured through third party distributors is passed through the distributor from the manufacturer to Bonneville.
- (b) Bonneville Indemnification of Contractors: Bonneville will not agree to indemnify a contractor for patent or copyright infringement on commercial software, goods or services.

#### 17.8.3.1.1 Policy

Bonneville requires infringement indemnification for commercial hardware, IT/OT items and services, and commercial software, including COTS.



### 17.8.3.1.2 Contract Clause

The CO shall include clause 28-14, Indemnification, in solicitations and contracts for commercial hardware, IT/OT items and services, and commercial software, including COTS.

### 17.8.4.2 Noncommercial Procurements

#### 17.8.4.2.1 Injunction/Work Stoppage and Authorization and Consent

It is Bonneville policy to require contractors to license copyrighted materials to be included in deliveries to Bonneville. In the event that usage rights are challenged, under Federal patent and copyright law, the contractor is protected from suit for patent or copyright infringement when the use of a patented invention or if a copyrighted work is for the Federal Government and with the authorization and consent of the Federal Government. The exclusive remedy for owners of patents or copyrights alleging infringement by a Bonneville contractor is a suit against Bonneville in the U.S. Court of Federal Claims when injunctive relief is not available. The purpose of this provision of law (28 U.S.C. § 1498) is to allow Federal agencies discretion to allow progress to continue on contracts in spite of litigation.

##### 17.8.4.2.1.1 Policy

Under 17 U.S.C. § 1498 a patent or copyright owner is not entitled to injunctive relief should Bonneville authorize use of patented or copyrighted material. Bonneville, at its discretion, may award a contract if there is a possibility of unauthorized use of a patent or copyright, by allowing contracts to be awarded even with the possibility of an allegation of infringement, Bonneville can avoid unsuccessful Offerors alleging infringement as grounds for protest.

##### 17.8.4.2.1.2 Contract Clauses

- (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 17-13, Patent and Copyright Infringement Notice, when using the 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 procurements of noncommercial items or services. The CO shall also include 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.

#### 17.8.4.2.2 Indemnification

- (a) Preparation of certain types of work requires permission from the patent and/or copyright owners. Contractors are expected to develop products without infringing intellectual property rights.
- (b) Bonneville can protect itself from liability for patent or copyright infringement by requiring indemnification by the contractor who develops the product. If Bonneville is found liable for the infringement, Bonneville can seek to recover its losses from the contractor.

##### 17.8.4.2.2.1 Policy

- (a) Contractors shall indemnify Bonneville for any patent or copyright infringement resulting from the contractors' product development or licensing pursuant to a Bonneville contract.

- (b) Where it is in Bonneville'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 the Office of General Counsel to determine if appropriate and what clause to utilize.

#### 17.8.4.2.2.2 Procedure

It may be in Bonneville'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.

#### 17.8.4.2.2.3 Contract Clauses

- (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 Bonneville.

#### 17.8.3.3 Notice of Infringement

##### 17.8.3.3.1 Research and Development

- (a) In contracts for research, development, demonstration projects, or for procurement of noncommercial items, Bonneville 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, demonstration projects or for procurement of non-commercial items, Bonneville may choose to indemnify the contractor for patent or copyright infringement when it is in the best interest of Bonneville to do so. This allows Bonneville to extend the protections against patent infringement suits to its contractors.
- (b) In contracts for the purchase of non-commercial items or for research, development, or demonstration projects, Bonneville has discretion to award a contract even when a prospective contractor may infringe a patent or a copyright. Bonneville, as a Federal government entity, has certain protections against suits for unauthorized use of items protected by patent and copyright.
- (c) In the event that the CO is considering either, expressly authorizing and consenting to a contractor's use or manufacture of inventions covered by U.S. patents and copyrights, or to indemnify the contractor for patent or copyright infringement, the CO must consult with and receive approval from both the HCA and OGC before doing so.

##### 17.8.3.3.1.1 Procedure

Bonneville requires notice and assistance from its contractors regarding any claim against a contract for patent or copyright infringement where Bonneville has given its authorization and consent to infringe upon a patent or copyright.

##### 17.8.3.3.1.2 Contract Clauses

- (a) The CO shall include clause 17-13, Patent and Copyright Infringement Notice, in all solicitations and contracts that include 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 17-1.2 Authorization and Consent – Noncommercial Items or Services.

#### 17.8.4.3.2 Third-Party Rights

It is Bonneville policy that if the software infringes a third party's rights, the contractor who infringed during performance of the Bonneville contract will be liable for all expenses that Bonneville 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 Bonneville, and Bonneville is at greater risk for an infringement claim.

##### 17.8.4.3.2.1 Procedures

- (a) Bonneville will not refuse or suspend a contract award pending notification to the patent owner.
- (b) When questions arise regarding the notice requirements or other matters relating to indemnifications, the CO should consult with OGC.

#### 17.8.5 Source Code Escrow

By securing rights to the source code of a software product, Bonneville is able to protect itself by providing continuity of operations if the software is no longer maintained or supported by the contractor. If a contractor stops developing or maintaining the software product as specified in the contract, or goes out of business, an escrow arrangement permits Bonneville to access the source code, source materials and documentation necessary to maintain the software or modify the source code.

##### 17.8.5.1 Policy

- (a) It is Bonneville policy that source code escrow agreements shall be used for both noncommercial, and commercial contracts where software is developed by a contractor and the contractor goes out of business, or ceases support of the software in accordance with the contract.
- (b) In procurements for noncommercial software resulting in Bonneville ownership, Bonneville requires delivery of source code, and all materials and documentation as a contract deliverable.

##### 17.8.5.2 Procedures

- (a) 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 the CO determines there is a risk that the contractor will cease support of the software in accordance with the contract terms.
  - (1) 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 hardware or equipment and an integral part of a critical business system. Source code escrow is not required on COTS software or for software that has been embedded in COTS hardware or COTS equipment.
  - (2) COs shall include the appropriate contract provisions in a solicitation or 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 protections for Bonneville. COs must obtain CIO and HCA approval of critical business system solicitation and contracts that do not include source escrow provisions.

- (b) COs shall consider including clause 14-18, Bankruptcy, when clauses 17-8, Source Code Escrow – Third Party Agent, or 17-9, Source Code Escrow – Bonneville as Agent are prescribed.

#### 17.8.5.3 Third Party Agent

##### 17.8.5.3.1 Policy

Where necessary to secure source code through third party escrow, the escrow arrangement must be documented through a separate source code escrow agreement. Bonneville requires a separate fully executed source code escrow agreement that designates Bonneville as a named beneficiary. The third-party agent for a source code escrow agreement must be a U.S. company located in the U.S. and the escrow account must be located within the United States. The escrow agent may not be a parent, subsidiary or affiliate of the contractor.

##### 17.8.5.3.2 Procedures

- (a) COs must obtain CIO and HCA approval for the use of a third-party source code escrow agent.
- (b) 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 Bonneville's rights in such data;
  - (3) When required by the CO, deliver the source code in electronic form or in other specific media and documentation in electronic or paper form to Bonneville.
  - (4) Be responsible for maintaining the currency of the source code and documentation delivered directly by Bonneville contractors or subcontractors to the repository;
  - (5) Authorize Bonneville 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 Bonneville 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 offers, employees, agents, or representatives.

##### 17.8.5.3.3 Contract Clause

- (a) 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 Bonneville's benefit in support of Bonneville's critical business systems.
- (b) The CO shall also include clause 17-8 where the CO determines it is in Bonneville's best interest to assure continuity of operations from a contractor's failure to support the software.
- (c) The CO shall also include in the official file a fully executed third party source code escrow agreement which includes Bonneville as a named beneficiary of the escrow account. The term of the third-party source code escrow agreement must match the term of the Bonneville contract or license agreement and have notice provisions requiring Bonneville be notified of any termination or expiration of the escrow agreement.

(d) The CO shall not include Clause 17-8 in acquisitions of COTS software.

#### 17.8.5.4 Bonneville as Escrow Agent

##### 17.8.5.4.1 Policy

Bonneville requires that source code escrow for commercial and noncommercial software be maintained by Bonneville, with Bonneville as the escrow agent. Under these circumstances, Bonneville will negotiate an on-site source code escrow directly with the contractor, wherein the source code is held in a secure Bonneville location in lieu of an independent third-party escrow account.

##### 17.8.5.4.2 Procedure

When contracting with new or small technology companies, the CO shall obtain source code escrow rights with Bonneville as the escrow agent. Bonneville 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, Bonneville shall have the right to periodically verify that the source code materials are accurate and current.

##### 17.8.5.4.3 Contract Clause

- (a) The CO shall include the clause 17-9, Source Code Escrow – Bonneville as Agent, in all solicitations and contracts for commercial and noncommercial software solicitations and contracts for software utilized in support of Bonneville’s critical business systems.
- (b) The CO shall also include clause 7-9 where the CO determines it is in Bonneville’s best interest to assure continuity of operations from a contractor’s failure to support the software.
- (c) The CO shall not include clause 17-9 in acquisitions of COTS software.

#### 17.8.6 Trademarks

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, allows Bonneville to hold title to a trademark for its own goods or services. The Lanham Act also waives sovereign immunity, allowing Bonneville to be sued for infringing on a trademark.

##### 17.8.6.1 Policy

Bonneville is subject to, and will comply with, the Lanham Act requirements.

##### 17.8.6.2 Procedure

The CO shall consult with OGC on any issues of trademark law.

#### 17.8.7 Audit Rights

Many software licenses 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 Bonneville’s usage should be distinguished from Bonneville’s right to audit under clauses 28-20.1, Requirements Unique to Government Contracts – Supplies, or 28-20.2 Requirements Unique to Government Contracts - Services.

##### 17.8.7.1 Policy

Due to the critical nature of Bonneville's information technology and operational technology systems as well as the restricted access inherent in critical systems operations, Bonneville will not allow access to its IT/OT systems for license compliance verification or usage purposes. Bonneville may agree to self-report its compliance and usage to contractors, when the contractor' has submitted a written request or as negotiated within the contract documents.

#### 17.8.7.2 Procedure

The CO shall not agree to allow a contractor or third party to audit Bonneville information technology, operational technology systems or data for license compliance verification or data usage purposes. The CO may agree to self-reporting, certification or periodic true-ups for compliance and usage verification purposes.

## 18 QUALITY ASSURANCE

### 18.1 RESPONSIBILITY FOR QUALITY

#### 18.1.1 Policy

The contractor is responsible for quality. Bonneville 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

*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 Bonneville. 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 Contract Clauses

- (a) The CO shall include a clause similar to the clause 18-2, Inspection – Supplies, in solicitations and contracts for noncommercial supplies which will be manufactured in accordance with a Bonneville 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 Bonneville's costs.
- (b) The CO shall include a clause similar to the clause 18-3, Acceptance – Supplies, in solicitations and contracts for noncommercial supplies which will be manufactured in accordance with a Bonneville specification. The CO should consider increasing the 60 day constructive acceptance period cited in the clause if freight terms are "free on board" (FOB) origin and shipment will require more than a few days.
- (c) The CO shall include a clause similar to the clause 18-5, Inspection and Acceptance - Construction, in all contracts for construction.

### 18.4 RESPONSIBILITY FOR DAMAGE OR LOSS OF SUPPLIES

Where FOB destination is specified, the contractor retains responsibility for damage or loss of supplies until delivery to Bonneville. Bonneville 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 Bonneville where loss or damage of the supplies would result in substantial cost to Bonneville, 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 Policy

The CO shall specify the FOB point in supply contracts based on the particular risks associated with the purchase.

#### 18.4.2 Contract Clause

The CO shall include a clause similar to the 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.

### 18.5 WARRANTIES

- (a) 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. Bonneville 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 Bonneville contracts.
- (b) 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 Bonneville 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) 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 Contract Clauses**

- (a) The CO shall include a clause similar to the clause 18-8, Warranty – Supplies, in solicitations and contracts for noncommercial 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.
- (b) The CO shall include a clause similar to the clause 18-9, Warranty – Heavy Electrical Equipment, in solicitations and contracts for noncommercial heavy electrical equipment or other circumstances where Bonneville 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 Bonneville 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 Bonneville overhead percentages).
- (c) The CO shall include a clause similar to the clause 18-10, Warranty – Tower Steel, in solicitations and contracts for noncommercial tower steel.
- (d) The CO shall include a clause similar to the clause 18-11, Warranty – Services, in solicitations and contracts services exceeding \$50,000.
- (e) The CO shall include a clause similar to either the clause 18-12, Warranty – Construction, or the clause 18-13, Warranty – Small Construction Contracts, in solicitations and contracts for construction.

**18.6 DEFECTS AND CONSEQUENTIAL DAMAGES****18.6.1 Definitions**

As used in this subsection –

*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, Bonneville 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, Bonneville 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 Bonneville 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 Bonneville 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.

#### 18.6.2 Policy

Unless Bonneville has another contract with a vendor from which to offset the costs, or access to another administrative offset, in most cases, Bonneville 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, whichever occurs first. A clause is not required in the contract in order for Bonneville 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.

#### 18.6.3 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.

#### 18.6.4 Contract Clauses

- (a) The CO may include a clause similar to the clause 18-14, Limitation of Liability for Latent Defects, in noncommercial contracts if, during negotiations, the offeror raises the issue and the CO agrees that their liability should be limited.
- (b) The CO may include a clause similar to the clause 18-15, Limitation of Liability for Consequential Damages, in noncommercial contracts if, during negotiations, the offeror raises the issue and the CO agrees that their liability should be limited.

## 19 PROPERTY MANAGEMENT

### 19.1 GENERAL

This part prescribes policies and procedures for providing Government--herein after referred to as the Bonneville Power Administration (Bonneville)--personal property to contractors, for contractor's use and management of Bonneville personal property, and for reporting, redistributing, and disposing of contractor inventory.

### 19.2 DEFINITIONS

As used in this subpart –

*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 Bonneville to be responsible for managing a particular category of equipment, i.e. ADP, office equipment, communication equipment, etc.

*Bonneville-furnished Property* means property in the possession of or directly acquired by Bonneville and subsequently made available to the contractor.

*Bonneville Property* means all property and materials owned by or leased to Bonneville, or acquired by Bonneville under the terms of the contract. It includes both Bonneville-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:

- (1) Any property acquired by and in the possession of a contractor or subcontractor under a contract for which title is vested in Bonneville.
- (2) Any property to which Bonneville 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
- (3) Bonneville-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 contract, to which Bonneville 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 Bonneville.

*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.

*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 Bonneville contracts. However, if contractors possess Bonneville property, Bonneville shall minimize to the extent practical any competitive advantage that might arise from using such property. Bonneville shall also consider the following:

- (a) Require contractors to use available Bonneville property to the maximum practical extent in performing Bonneville contracts to avoid duplicate and unwarranted purchases;
- (b) Permit the property to be used on non-Bonneville contracts only when prior written consent of the CO is obtained, and such use is in the best interest of Bonneville;
- (c) Require contractors to be responsible for, and to keep official records of, Bonneville 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 Bonneville property will be returned to Bonneville 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 COR to maintain a file of all invoices and supporting receipts identifying all contractor-acquired property; and
- (f) Require contractors to use all government furnished and contractor acquired property for official business only.

#### **19.4 CONTRACT CLAUSE**

The CO shall include a clause similar to 19-1, Bonneville-Furnished/Contractor-Acquired Property, in solicitations and contracts when Bonneville will furnish property for use on the contract, or when Bonneville will reimburse the contractor for the cost of purchasing property as an item of direct cost. See subpart 19.9 for the clause 19-4, Bonneville Property to be Transferred to the Contractor, to be used when transferring Bonneville property to contractors.

#### **19.5 CONTRACTING OFFICER RESPONSIBILITY**

- (a) The CO should advise the contractor prior to award regarding its responsibility for managing Bonneville-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, 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 Bonneville 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 Bonneville-furnished property that is no longer available as a result of loss, theft, or damage.

#### **19.6 BONNEVILLE-FURNISHED MATERIALS**

- (a) Bonneville contractors shall ordinarily furnish all material for the performance of Bonneville contracts. However, Bonneville will provide material to a contractor when necessary to achieve significant economy, standardization, expedited production, or when it is otherwise in Bonneville's interest.
- (b) Solicitations shall specify material that Bonneville will furnish in sufficient detail to enable offerors to evaluate it accurately.

#### **19.7 PROVIDING BONNEVILLE PROPERTY “AS IS”**

Ordinarily when Bonneville provides material (property) to a contractor for the performance of a Bonneville 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, Bonneville-Furnished/Contractor-Acquired Property). However, the contractor may benefit in the performance of the contract from Bonneville-furnished property for which Bonneville makes no warranty with respect to its condition, and is furnished “as is.”

#### 19.7.1 Contract Clause

The CO shall include the clause 19-2, Bonneville Property Furnished “As Is”, in solicitations and contracts when Bonneville 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, Bonneville 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

Contractors shall not be furnished Government motor vehicles for use in the performance of Bonneville contracts, due to potential liability against Bonneville in the event of an accident, unless the CO has determined that it is in the best interest of Bonneville to do so. Such a determination shall be documented in the official file.

#### 19.8.1 Contract Clause

The CO shall include the clause 19-3, Contractor Use of Government-Owned Vehicles, in solicitations and contracts where the contractor will be permitted to use Government-use vehicles. See 16.4.5.1 for insurance requirements for automobile liability.

### 19.9 TRANSFER OF BONNEVILLE PROPERTY TO THE CONTRACTOR

- (a) It may be in Bonneville's interest to authorize the transfer of title of Bonneville-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 Bonneville, etc.
- (b) When Bonneville property is transferred to other federal agencies, Bonneville 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 Policy

Contractor-acquired Bonneville 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 Bonneville'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.

#### 19.9.2 Contract Clause

The CO shall include a paragraph similar to Clause 19-4 Bonneville Property to be Transferred to the Contractor, when Bonneville 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**

The contractor may be directed or authorized by the CO to dispose of Bonneville property in the following sequence:

- (a) Deliver the contract inventory to Bonneville.
- (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 Bonneville for reutilization, or disposal in accordance with the Bonneville Personal Property Instruction. The CO shall provide the appropriate 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 Bonneville;
  - (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**

Occasionally a Bonneville 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, Bonneville 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 Center or HazMat, as appropriate, for advice concerning the disposal of such materials.

#### **19.11.1 Policy**

It is Bonneville'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.

#### **19.11.2 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 Part 24 for additional procedural guidance. If hazardous materials may be involved, see BPI 15.4. If the project

manager and the CO mutually decide that Bonneville should retain title to the removed materials and equipment, the CO shall document the decision in the official file.



## 20 CONTRACT TERMINATION

### 20.1 GENERAL

#### 20.1.1 Policy

- (a) This part establishes policies and procedures relating to the complete or partial termination of contracts. All reasonable efforts shall be made to achieve complete performance on contracts. However, when circumstances dictate that contract performance is not possible or not in Bonneville's best interest, contract termination is appropriate.
- (b) This part does not apply to commercial products and commercial services awarded using Part 28 procedures. For commercial contract terminations, refer to subpart 28.3.3.7. This part may be used as guidance to the extent that Part 20 does not conflict with the termination policies of Part 28.
- (c) Termination actions shall be reviewed by the Office of General Counsel (OGC) for a legal review prior to the issuance of a formal termination, refer to subpart 20.1.4.
- (d) Termination actions shall be in writing. Oral terminations may be used when there is an exigency, but a written notice must be provided as soon as possible, even if at the issuance of the contract modification. The written notice shall be sent by any method which provides a written acknowledgement of electronic receipt or acknowledgement of receipt.
- (e) If circumstances change after the original termination notice was issued, an Amendment of Termination Notice is required.
- (f) In rare circumstances, a contract may be reinstated in part or full, with mutual consent. The reasons for reinstatement shall be documented in the official file.

#### 20.1.2 Termination Types

- (a) Termination by mutual consent (see subpart 20.2);
- (b) Reserved
- (c) Termination for the convenience of Bonneville (see subpart 20.4); and
- (d) Termination for default (see subpart 20.5).

#### 20.1.3 Considerations Prior to Termination

- (a) Impact on the project completion schedule;
- (b) Impact on the contractor's work force, financial position, reputation, etc.;
- (c) Whether Bonneville 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 the continued performance will result in a successful project; and
- (f) Maintenance of long-term Bonneville-supplier relationships.

#### 20.1.4 Legal Review

All termination actions, excluding partial terminations, shall be reviewed by the Office of General Counsel (OGC) for a legal review prior to issuance of a formal termination. The request for a legal review should be made in writing to OGC. The CO shall document relevant discussions with OGC in the official file. The request may be transmitted on paper or electronically, summarizing the OGCs counsel and that a review was performed.

### 20.2 TERMINATION BY MUTUAL CONSENT

A termination by mutual consent is an agreement between Bonneville 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 Bonneville under the contract, it must be negotiated between the parties, and no contract clause is used.

#### 20.2.1 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 Bonneville Power Administration arising under the terminated portion of the contract or by reason of its termination, including, without limitation, all obligations of Bonneville Power Administration to make further payments or to carry out any further undertakings under the terminated portion of the contract.
- (4) Bonneville Power Administration 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 [RESERVED]**

**20.4 TERMINATION FOR THE CONVENIENCE OF BONNEVILLE**

If Bonneville’s need for a contract has changed since award, a complete or partial termination for the convenience of Bonneville may be used, if termination is in Bonneville’s best interest. When a contract is terminated for the convenience of Bonneville, the CO shall negotiate a settlement which compensates the contractor for work performed, and reimburses the contractor’s termination expenses.

20.4.1 Contract Clause

The CO shall include the clause 20-2, Termination for the Convenience of Bonneville, in all solicitations and contracts for noncommercial acquisitions.

20.4.2 Fixed-Price Contracts

20.4.2.1 Policy

- (a) Profit is allowable for the terminated portion of the contract only.
- (b) The following items are not allowable in the calculation of profit;
  - (1) settlement expenses; and
  - (2) anticipatory profits and;
  - (3) consequential damages; and
  - (4) material or services that, as of the effective date of termination, have not been delivered by a subcontractor, regardless of the percentage of completion.
- (c) The CO may use any reasonable method to arrive at a fair profit consistent with the policy above.

- (d) 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 Procedures

- (a) Promptly after the effective date of termination the CO shall:
- (1) Have all undelivered completed end items inspected and accepted if they comply with the contract requirements; and
  - (2) 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.
- (b) 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.
- (c) Work in place accepted by Bonneville 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

##### 20.4.3.1 Policy

- (a) 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.
- (b) 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

##### 20.4.4.1 Procedures

- (a) Consistent with the termination clause and the notice of termination, the CO shall –
- (1) Consider holding a conference with the contractor to develop a definite program for effecting the settlement.
  - (2) Direct the action required of the prime contractor;
  - (3) Examine the settlement proposal of the prime contractor and, when appropriate, the settlement proposals of subcontractors;
  - (4) Determine disposition of Bonneville-furnished property and other property to which Bonneville is entitled;
  - (5) Promptly negotiate settlement with the contractor and enter into a settlement agreement; and
  - (6) Promptly settle the contractor's claim by determination of the elements that cannot be agreed on, if unable to negotiate a complete settlement.

- (b) 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.
- (c) The CO shall maintain the termination documentation in the contract file, unless the volume requires that a separate case file be established.
- (d) 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.

#### 20.4.4.2 General Termination Settlement Principles

- (a) 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) 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) 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.

#### 20.4.4.3 Audit of Settlement Proposals

- (a) The CO may refer settlement proposals to the Bonneville Internal Audit 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 Bonneville, the prime contractor, or a higher-tier subcontractor. Consistent with this, and when in Bonneville's interest, the CO may furnish audit reports to prime and higher-tier subcontractors for their use in settling subcontract claims.

#### 20.4.4.4 Settlement of Subcontract Claims

- (a) A subcontractor has no contractual rights against Bonneville upon the termination of a prime contract. A subcontractor may have rights against the prime contractor or intermediate subcontractor with whom it has contracted.
- (b) 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.

#### 20.4.4.5 Settlement Agreements

- (a) Before execution of a settlement agreement, the CO shall determine the accuracy of the Bonneville 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 Bonneville'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 Bonneville has against the contractor that may be applied against the terminated contract this includes all claims of subcontractors, except claims that are specifically excluded 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 Bonneville or the contractor in disposing of the unsettled part of the claim.

#### 20.4.5 Settlement by Determination

- (a) 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 the procedures in this subsection and those in subsection 21.3.8 as guides in making a settlement by determination. Copies of determinations shall receive the same distribution as other contract modifications.
- (b) 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) After reviewing the available information, the CO shall determine the amount due and transmit a copy of the determination to the contractor in writing. The 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 to 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 termination portion of the contract that was ratified or approved by the CO or another CO.
- (d) 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. The settlement agreement template may be tailored as appropriate.

#### 20.4.6 Documentation of Settlement or Determination

- (a) The CO shall document the following in the Settlement and/or Determination:
- (1) Include evidence and data relied upon in making a settlement or determination.
  - (2) Include the conclusion of negotiations and document the principal elements of the settlement or determination.
  - (3) Identify the settlement or determination for individual or lump-sum basis:
    - (i) For individual item basis, the CO should describe the factors considered for each item; or
    - (ii) For 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.
  - (4) Include explanations involving differences and doubtful questions settled by the agreement, and the factors considered; and
  - (5) Include any other matters that will assist reviewers in understanding the basis for the settlement.

#### 20.4.6.1 Sample Settlement Agreement

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 Bonneville, or otherwise properly accounted for, and that all procedures 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 Bonneville, 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 CO 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 Bonneville 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. Bonneville 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, Bonneville 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 Bonneville 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 Bonneville 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, 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.)
- (iii) 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.



- (iv) 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 Bonneville by the contractor under the contract or this agreement.
- (v) All rights and liabilities of the parties under the contract relating to any contract termination inventory stored for Bonneville.
- (vi) All rights and liabilities of the parties under agreements relating to the future care and disposition by the contractor of Bonneville-owned property remaining in the contractor's custody.
- (vii) All rights and liabilities of the parties relating to Bonneville property furnished to the contractor for the performance of this contract.
- (viii) 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 Bonneville

- (a) Initial notice of a termination for the convenience of Bonneville may be given to the contractor by email or verbal notification, but must be followed up with a written Notice of Termination.
- (b) This written notice may be the contract modification used to document the termination.
- (c) The following example notice should be tailored to the specific situation. The Notice of Termination should address:
  - (i) Termination type i.e. complete or partial;
  - (ii) Contract type i.e. fixed price or cost reimbursement; and
  - (iii) Type of purchase i.e. supplies, services, construction, and A &E.

## NOTICE OF TERMINATION

(Example)

(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 Bonneville Power Administration's oral (or fax) notice to you dated ....., 20...., terminating .....(insert "completely" or "in part") Contract No. ....(referred to as "the contract") for Bonneville Power Administration'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 the Bonneville Power Administration. (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 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 Bonneville Power Administration. 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 Bonneville Power Administration, 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.

(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 this notice on \_\_\_\_\_, and the signed contract modification is returned electronically.

(DATE)

.....  
 (Name of Contractor)

By.....  
 (Name)

.....  
 (Title)

(End of notice)

**20.5 TERMINATION FOR DEFAULT**

- (a) Bonneville 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, Bonneville 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 Bonneville 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 Bonneville 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, Bonneville 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 or force majeure; 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 Bonneville, 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 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 subsection 20.5.4).
- (h) Notwithstanding the provisions of this subpart, the contract may be reinstated by mutual agreement if such action is in Bonneville's best interest.

#### 20.5.1 Contract Clauses

- (a) The CO shall include the clause 20-3, Termination for Default, in all solicitations and contracts, for noncommercial acquisitions, including cost-reimbursement or time and materials contracts, unless the CO otherwise determines that Bonneville'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.
- (b) The CO shall insert the clause 20-4, Excusable Delays, in solicitations and contracts for non-commercial supplies and services, construction; and research and development on a fee basis, when a cost-reimbursement contract is contemplated. The CO shall also insert the clause in time-and-materials contracts, and labor-hour contracts. When used in construction contracts, the CO shall substitute the words "completion time" for "delivery schedule" in the last sentence of the clause.

#### 20.5.2 Effect of Termination for Default

Under a termination for default, Bonneville 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. Bonneville may elect, under the Default clause, to require the contractor to transfer title and deliver to Bonneville completed supplies and manufacturing materials, as directed by the CO.

#### 20.5.3 Procedures for Default

- (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 OGC 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 subsection 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:
  - (1) Provide a copy of the decision to the contractor; and
  - (2) Provide a copy to the decision to the contractor’s surety, if any, when the notice is furnished to the contractor. The surety should be requested to advise Bonneville if it desires to arrange for completion of the work; and
  - (3) For 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 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 Bonneville, the CO may terminate the contract for the convenience of Bonneville.
- (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 subsection 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 Bonneville reserves the 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

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 Bonneville Power Administration 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, Bonneville Power Administration 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

- (a) If the time remaining in the contract delivery schedule is not sufficient to permit a realistic cure period (see subsection 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 subpart 14.12 regarding 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 the letter of .....(date)"), Bonneville Power Administration 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 Bonneville Power Administration 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 Bonneville Power Administration of delinquent goods or services will be solely for the purpose of mitigating damages. It is not the intention of Bonneville Power Administration to condone any delinquency or to waive any rights Bonneville Power Administration 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 Contracting Officer’s Decision

- (a) When a contract is terminated for default, the CO shall prepare a written decision to include:
  - (1) Description of the claim or dispute;
  - (2) Reference and explain the pertinent contract terms;
  - (3) Description of the factual areas of agreement and disagreement;
  - (4) Statement of the contracting officer’s decision, with clear supporting rationale; and
  - (5) If applicable, 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 –
  - (i) Items(s) or purpose;
  - (ii) Date;
  - (iii) Amount; and
  - (iv) Applicable modifications, if any.
- (2) A description of the acts or omissions constituting the default, including where applicable-
  - (i) A brief statement of the claim or problem requiring decision;
  - (ii) A statement of all relevant facts and incidents leading up to claim;
  - (iii) A recital of, or reference to, all applicable contract and specification provisions; and
  - (iv) 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 yet determined whether the failure to perform is excusable, a statement that in the event the failure to perform is not excusable, 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 Bonneville 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)

- (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. Bonneville 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 Bonneville'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 Bonneville'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

- (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 Bonneville is entitled under the contract. If the contract includes provisions for liquidated damages (see subpart 6.15), these damages are in addition to any excess repurchase costs.
- (b) If Bonneville 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 Bonneville's claim for the damages.

#### 20.5.9 Termination of Cost-Reimbursement Contracts for Default

- (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

- (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:
  - (1) Consider proposals by the surety concerning completion of the work; and
  - (2) Decide on the basis of Bonneville's best interests, including the possible effect of the action upon Bonneville's rights against the surety.
- (c) If the surety does not complete the contract, the CO normally will arrange the 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.



## 21 PROTESTS AND DISPUTES

### 21.1 GENERAL

#### 21.1 Policy

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

#### 21.1.2 Applicable Law

Procurement contracts entered into by Bonneville, a federal agency, are subject to, construed under, and interpreted according to federal laws of the United States.

#### 21.1.3 Contract Clause

The CO shall include the clause 21-5, Applicable Law, in all solicitations and contracts, including Intergovernmental Contracts (IGCs), except for commercial acquisitions.

### 21.2 PROTESTS

#### 21.2.1 Authorities

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 Administrator has developed procedures, as contained in this part, 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 HCA under Bonneville Policy 140-1. 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

As used in this subpart –

*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 Bonneville.

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

#### 21.2.3 Pre-Protest Resolution

- (a) It is Bonneville 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 CO 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 the 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 Court of Federal Claims

It is Bonneville 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 Bonneville with two copies of its complete protest and any other materials filed in these venues. Such copies shall be sent to (1) the CO and (2) the HCA within one day of filing with the GAO.

#### 21.2.5 GAO Recommendation

The HCA, in consultation with and on advice from the CO and OGC, shall review and consider GAO's recommendations. The HCA shall determine Bonneville'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

- (a) An interested party may file a written protest with the Bonneville 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) identify 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 Bonneville.
- (c) The HCA shall immediately send an acknowledgement of any written protests received to the protester along with a statement that filing a protest with Bonneville 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 Bonneville'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 Bonneville's Information Officer to receive copies of requested documents relating to their protest action.

#### 21.2.7 Award Pending Protest Resolution

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 subsection 21.2.9(a). On the basis of this statement and other considerations, including those listed in subsection 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

- (a) When a protest is received by the HCA or GAO after contract award, the HCA shall notify the interest 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 Contracting Officer Responsibilities

- (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) Documents 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 contracts 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

- (a) Upon receipt of a written protest and a complete statement from the CO as described under BPI 21.2.9(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. The HCA's decision will include the grounds for the decision.

- (b) The HCA shall consider and balance the needs of Bonneville with the requirements of fairness to all interested parties. The HCA shall determine the appropriate agency action, which may include re-competing the requirements, 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.

#### 21.2.11 Solicitation Provision

The CO shall insert the provision 21-1, Protests Against Award, in solicitations exceeding \$100,000.

#### 21.2.12 Other Protests

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

As used in this subpart –

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

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

*Issue in controversy* means a material disagreement between Bonneville 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

- (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 COs 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 judgement.
- (c) Bonneville 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 Bonneville will not respond except to the extent required under FOIA (see subpart 5.2).

### 21.3.3 Contract Disputes Act

- (a) Bonneville'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. Bonneville encourages the use of ADR procedures to the maximum extent practicable. Any agreement between the parties to pursue binding arbitration shall comply with Bonneville's arbitration policy, "Bonneville Power Administration's Guidance for the Use of Binding Arbitration for Bonneville Contracts," dated October 9, 2009.
- (b) Subpart 21.3 implements Bonneville'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) Certifications of contractor claims; and
  - (3) A civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.

### 21.3.4 Applicability

- (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

- (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 Bonneville 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 Bonneville claim based on a contractor claim involving fraud.

#### 21.3.7 Contractor Certification

- (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 Bonneville Power Administration 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 judgement 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

- (a) Bonneville 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 subsection 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

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 OGC through the HCA.

### 21.3.10 Contracting Officer's Authority

- (a) Except as provided in this section, COs are authorized, within the specific limitations of their warrant, to decide or resolve all claims arising under or relating to a contract subject to the CDA (see subsection 1.8.2). In accordance with subsection 21.3.14, COs are authorized to use ADR procedures to resolve claims.
- (b) The authority to decide or resolve claims does not extend to:
  - (1) A claim or dispute for penalties or forfeitures prescribed by statute or regulations 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 Contract Clause

The CO shall include the clause 21-4 Release of Claims in solicitations and contracts unless the conditions in subsection 21.3.4 apply.

### 21.3.11 Contracting Officer's Decision

- (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; and
  - (4) Prepare a written decision that shall include –
    - (i) A description of the claim or dispute;
    - (ii) A reference to the pertinent contract terms;
    - (iii) A statement of the factual areas of agreement and disagreement;
    - (iv) A statement of the CO's decision, with supporting rationale, and
    - (v) 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;” and

“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.”

- (5) Prepare, when appropriate, a demand for payment prepared as follows:
- (i) A description of the debt owned by the contractor to Bonneville, including the debt amount and the basis for an amount of any accrued interest or penalty;
  - (ii) For debt 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 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).
  - (iii) 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 –
- (i) To contact the CO if the contractor believes the debt is invalid or the amount is incorrect, and
  - (ii) 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.
- (h) 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. The requirement shall apply to decisions on claims initiated by or against the contractor.
- (i) The CO shall issue the decision within the following statutory 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; or
  - (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.
- (j) 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.
- (k) 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.
- (l) 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.
- (m) 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

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) In general, before passage of the CDA, the obligation to continue performance applied only to claims arising under the contract. However, at 41 U.S.C. § 7103, 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 paragraph (i).
- (b) In all contracts that include the Disputes clause, 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 Bonneville's interest is properly secured.

#### 21.3.14 Alternative Dispute Resolution

- (a) 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 elective 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) Notwithstanding any other provision of this part, a contractor and a CO may use alternative means of dispute resolution under CDA.
- (c) When appropriate, a neutral person may be sued to facilitate resolution of an issue in controversy using procedures chose 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) 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) 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 Bonneville Policy 140-1 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 Bonneville for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.
- (f) 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

- (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 OGC.
- (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 Contract Clause

The CO shall include the clause 21-2, Disputes, in solicitations and contracts unless the conditions in 21.3.4 apply.

## 22 PAYMENTS AND TAXES

### 22.1 BASIS OF PAYMENT

- (a) Payment provisions shall balance the equities of the protection of Bonneville's interests against adequately compensating the contractor for supplies delivered or services performed.
- (b) 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) Single payments are one (lump sum) payment made after completion and acceptance of all work.
- (b) 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 Bonneville 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 Bonneville contracts.
- (c) 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; and
  - (2) When partial delivery of individual components does not constitute a usable item on its own.

#### 22.1.2 Progress Payments

- (a) Where progress payments are authorized, Bonneville 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 Bonneville 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.
- (b) Progress payments shall not be used for the acquisition of commercial items and services.
- (c) The CO may provide for progress payments if the contractor:
  - (1) 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
  - (2) Will make expenditures for contract performance during the pre-delivery period that have a significant impact on the contractor's working capital.
- (d) 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.
- (e) 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 Contract Clauses

- (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.
- (b) The CO may include a clause similar to Clause 22-3 Basis of Payment – Progress Payments, in –
  - (1) Solicitations and contracts that will provide progress payments in cost-reimbursement contracts; and
  - (2) Fixed-price solicitations and contracts for other than construction when progress payments are anticipated, except for commercial acquisitions.
  - (3) If the award is made to a small business concern, the CO shall utilize Alternate I of the basic clause.
- (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, except for commercial acquisitions
- (d) The CO shall include Clause 22-7 Contract Ceiling Limitation, in intergovernmental contracts and other solicitations and contracts, except for commercial acquisitions, if a cost-reimbursement or time-and-materials contract is contemplated.

### 22.1.4 Advance Payments

- (a) “Contract financing,” as defined in 22.2.1, shall be provided by Bonneville only to the extent actually needed for prompt and efficient performance, considering the availability of private financing. Any undue risk of monetary loss to Bonneville 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. Bonneville 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 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

- (a) 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.
  - (1) Rent (leases, and rental agreements, including meeting and lodging room rentals);
  - (2) Tuition and conference registration fees;
  - (3) Insurance premiums;
  - (4) Extension or connection of public utilities for Bonneville buildings or installations;
  - (5) Subscriptions and publications – may be electronic or physical copy;
  - (6) Software subscription services;

- (7) 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; and
- (8) Advance payments to Federal, State, Local agencies and Federally recognized tribes.
- (b) Payments under time-and-material or cost-reimbursement contracts made to small businesses in advance of their payment to their suppliers or subcontractors are not considered advance payments under this subsection.

#### 22.1.4.2 Requirements for Approval of Other Advance Payments

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 Bonneville from providing advance payments;
- (c) CO's proposed actions to minimize Bonneville'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

- (a) Bonneville will charge interest daily on the amount of advance payments received by the contractor in excess of the contractor's current needs. Interagency acquisitions, as defined in Part 25, will not be required to repay interest earned on advanced payments. The interest will be charged at the higher of Department of Treasury current value of funds rate or the Bonneville cost of borrowing rate.
- (b) The HCA may authorize advance payments without requiring repayment of interest if advantageous to Bonneville.

#### 22.1.4.4 Payment of Advances

- (a) Letters of Credit are not authorized at Bonneville. Payments will be made by electronic funds transfer. Payment will only be made by direct Treasury check when electronic funds transfer is not possible.
- (b) Advance payments shall be processed in the following manner:
  - (1) 30-Day Advance: The contractor is authorized to request, in writing, Bonneville 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 Bonneville 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, Bonneville will deposit funds in the contractor's designated account within 5 working days after Bonneville receipt of the request. The request shall be made to Bonneville's Accounts Payable 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.
- (c) Bonneville 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 Bonneville funds until the contractor's checks are ready to be forwarded to the payees.

#### 22.1.4.5 Contract Clauses

- (a) Where the CO wants advances to cover the next 30 days and accumulated interest to be repaid to Bonneville: The CO shall include the 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 Bonneville: 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 Bonneville has been waived in accordance with subsection 22.1.4.3: the CO shall substitute paragraphs (a) and (I) shown in Alternate II.
- (d) Where the CO wants advances to cover the next 30 days and payment of accumulated interest to Bonneville has been waived in accordance with 22.1.4.3, the CO shall substitute paragraph (I) shown in Alternate III.
- (e) See subsection 25.2.4 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) 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 Bonneville has no verifiable record of past performance.
- (b) 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) 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 Bonneville.
- (d) Upon completion of all contract requirements, withheld amounts shall be promptly released for payment.

##### 22.1.5.1 Contract Clause

The CO may include the clause 22-9, Withholding, in all solicitations and contracts, except for commercial acquisitions. 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.

## 22.2 PROMPT PAYMENT

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 property invoice requirements.

#### 22.2.1 Definitions

As used in this subpart –

*Certified Invoice* means, as used within this subpart, written evidence which indicates Bonneville 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 Bonneville 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 Bonneville's Accounts Payable 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 Bonneville ERP system that indicates Bonneville acceptance of supplies delivered.

#### 22.2.2 Procedures

- (a) Payment will be based on receipt of a proper invoice (as defined in 22.2.1), satisfactory contract performance, and receipt of the recipient's Taxpayer Identification Number (TIN) and other banking information required to process payment (see subparts 4.5 and 22.6).
- (b) When specifying the frequency of billing, full consideration should be given to the time and resources required by Bonneville 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.
- (c) Except as provided by 22.6(d), disagreements shall be referred to the CO for final decision after consulting with such other Bonneville offices as determined necessary by the CO.
- (d) Questions concerning delinquent payments should be directed to the designated billing office.

#### 22.2.3 Prompt Payment Discounts

- (a) COs are encouraged to negotiate meaningful discounts for prompt payment whenever possible.

- (b) Decisions to accept or not accept a prompt payment discount are made by Bonneville Cash Manager based on the value of the discount offered compared to Bonneville 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 Bonneville Cash Manager. When Bonneville cost of money exceeds the value of the discount, the discount will not be taken.
- (c) Information on this policy can be obtained from the Bonneville Cash Manager.

#### 22.2.4 Payment Due Dates

- (a) 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 and no longer than 30 days after the contractor has delivered supplies or performed services in accordance with the terms and conditions of the contract.
- (b) The due date for most transactions, (e.g. lump sum payments, partial payments, etc.) shall not be later than the 30<sup>th</sup> day after Bonneville receives a proper invoice in the designated billing office, or not later than the 30<sup>th</sup> day after Bonneville acceptance of supplies delivered or services rendered, whichever is later.
- (c) For all progress payments except construction, the due date shall be not later than the 30<sup>th</sup> day after Bonneville 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, Bonneville approval shall be deemed to have occurred constructively on the 7<sup>th</sup> day after the contractor estimates are received by Bonneville.
- (d) Progress payments under construction contracts shall be due not later than the 14<sup>th</sup> 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 Bonneville a reasonable opportunity to adequately inspect the work and to determine the adequacy of the contractor's performance under the contract.
- (e) For payment of any amounts retained by the CO, the due date shall not be later than the 30<sup>th</sup> day after approval by the CO for release to the contractor.
- (f) Final payments shall be due not later than the 30<sup>th</sup> day after Bonneville acceptance of the work or services, designated billing office, or not later than the 30<sup>th</sup> day after Bonneville 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.

#### 22.2.5 Interest Penalties

- (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 Bonneville and the contractor;
  - (5) Bonneville paid the contractor after the due date; and
  - (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 one year.
- (d) Interest penalties are not required on payment delays due to defective invoices, disagreement between Bonneville 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 subsection 22.2.1) for definition of “contract financing payments”).

#### 22.2.6 Documentation of Acceptance

- (a) For payment purposes, Bonneville acceptance will be documented on either a receiving report or by a contractor invoice certified by the COR. The invoice may be transmitted electronically, provided that the CO 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 Bonneville 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.
- (b) The following information is on the receiving report, or added by the COR to the invoice:
  - (1) Date supplies or services were accepted by the designated Bonneville official (or progress payment request was approved); and
  - (2) Signature, printed name, and title of the designated Bonneville official responsible for acceptance or approval.
- (c) The designated billing office, as indicated in the contract, shall mark each invoice with the date the invoice is received.

#### 22.2.7 Contract Clauses

- (a) The CO may include the clause 22-10, Discounts for Prompt Payment, in fixed price solicitations and contracts, except for commercial acquisitions.
- (b) The CO shall include the clause 22-11, Prompt Payment for Construction Contracts, in solicitations and contracts for construction (see Part 24). When progress payments are anticipated the 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.
- (c) The CO shall include the 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); except for commercial acquisitions. Do not use this clause when contract financing will be used (see definition at 22.2.1). 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 22.2). The face

page of the award form shall indicate the address to which invoices are to be sent for processing.

### **22.3 INTEREST ON AMOUNTS DUE TO BONNEVILLE**

- (b) Bonneville 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;
  - (2) The contract type is excluded under subsection 22.3.1; or
  - (3) The contract or debt has been exempted from interest charges under Bonneville Financial Operations procedures.
- (c) 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 Contract Clause**

The CO shall include the clause 22-13, Interest on Amounts Due to Bonneville, in solicitations and contracts in excess of \$150,000 for non-commercial goods or services.

### **22.4 ASSIGNMENT**

- (a) Normally Bonneville will permit assignments in order to aid contractors in obtaining independent financing. As assignments are common practice in the commercial marketplace, Bonneville 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) "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 Bonneville for contract performance.
- (c) An assignment of contract payments relinquishes 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.
- (d) Extent of assignee's protection. Bonneville 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.
- (e) A contractor may assign payments due or to become due under a contract if all the following conditions are met:
  - (1) The assignment is made to a bank, trust company, or other financing institution, including any Federal lending agency;
  - (2) The assignment covers all unpaid amounts payable under the contract; and
  - (3) The contract terms do not expressly prohibit the assignment.

#### **22.4.1 Procedures**

- (a) Upon notification of a request for an assignment, the CO shall:
  - (1) Notify the disbursing officer of the pending assignment;
  - (2) Use the Bonneville approved form to complete the action, or the bank generated forms if they contain the same content as the Bonneville form; and

- (3) 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).
- (b) 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 has been satisfied and a balance remains due under the contract.
- (c) See BPI 28.3.3.15 for assignment of contracts for commercial acquisitions.

## 22.5 TAXES

- (a) COs shall consult OGC 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, Bonneville 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 Bonneville for any such taxes.
- (c) When the constitutional immunity of Bonneville 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 Bonneville.
- (e) COs should solicit prices on a tax-exclusive basis when it is known that Bonneville is exempt from these taxes and the exemption is at least \$250.
- (f) Bonneville 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 Bonneville for use in the manufacture of any article.

### 22.5.1 General

- (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 Bonneville is exempt from these taxes.

### 22.5.2 Federal Excise and Use Taxes

- (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 States.
- (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) Generally, purchases and leases made by and for Bonneville's use are exempt from State and local taxation. For specific advice and assistance, COs shall contact OGC.
- (b) Bonneville 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 OGC.
- (c) Bonneville shall take maximum advantage of all available exemptions in excess of \$250 from State and local taxation.
- (d) The applicability of State and local taxes to purchases by Bonneville 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.
- (e) The CO shall not designate prime contractors or subcontractors as agents of Bonneville for the purpose of claiming an exemption from Federal, State or local sales or use taxes.
- (f) Contractor Purchase of Goods and Services for Use on Bonneville Contracts: Bonneville's rights to a sales or use tax exemption based on Bonneville's exemption from Federal, State and local taxes does not automatically extend to purchases of goods and services by Bonneville prime and subcontractors for use on the Bonneville contract. The CO shall protect Bonneville's interests by following the instructions at BPI 22.5.
- (g) The contractor shall independently determine the contractor's sales and use tax liabilities and exemptions based on applicable Federal, State, and local laws. The contractor shall comply with all applicable Federal, State and local tax laws.
- (h) Frequently, property (including property acquired under the progress payments clause or under the Bonneville property clause of cost-reimbursement contracts) owned by Bonneville is in the possession of a contractor or subcontractor. Situations may arise in which states or localities assert the right to tax Bonneville property directly or to tax the contractor's or subcontractor's possession of interest in, or use of that property. OGC shall review such cases and advise the CO on the appropriate course of action.
- (i) The imposition of State and local taxes may result in special contract considerations including the following:
  - (1) With coordination of OGC, 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; and
  - (2) Indefinite-delivery contracts (including those for lease 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 of other taxes, the CO shall consider the risk to Bonneville 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) 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 Bonneville as the buyer;
  - (3) A State or local form indicating that the supplies or services are for the exclusive use of Bonneville;
  - (4) Any other State or locally required document for establishing general or specific exemption; and
  - (5) Shipping documents indicating that shipments are in interstate or foreign commerce.
- (b) 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; or
  - (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, and consents to a reduction in the contract price.

#### 22.5.3.2 State of Washington Sales and Use Taxes

- (a) The State of Washington has enacted legislation subjecting materials to be incorporated into construction projects and Bonneville-owned property, and materials and equipment used by contractors in construction projects located 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, Bonneville 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 Bonneville, and the State specifically recognizes the federal exemption at RCW 82.38.80.

#### 22.5.3.3 State of Idaho Use Tax

The State of Idaho has enacted legislation subjecting Bonneville-owned property, materials and equipment used by contractors in construction projects for Bonneville 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.

#### 22.5.3.4 State of Oregon Corporate Activity Tax

##### Definitions

Commercial activity is the total amount realized by a taxpayer from the transactions and activity in the regular course of their business in Oregon, without deduction for expenses incurred by the business [ORS 317A.100(1)(a)]. Commercial activity is realized according to the method of accounting used for federal income tax purposes. Oregon Administrative Rules provides detailed information and examples regarding the definition of commercial activity (OAR 150-317-1000).

A unitary group is a group of business entities or separate parts of a single entity that are united by more than 50 percent direct or indirect common ownership and engaged in a unitary business enterprise in which members share or exchange value [ORS 317A.100(19)].

The State of Oregon has enacted a Corporate Activity Tax (CAT), imposed on businesses for the privilege of doing business in Oregon. It is measured on a business's commercial activity, which is the total amount a business realizes from transactions and activity in Oregon. Certain items are excluded from the definition of commercial activity and, therefore, will not be subject to the CAT. In addition, Oregon's CAT allows a 35 percent subtraction for certain business expenses.

The CAT is applied to taxable Oregon commercial activity more than \$1 million. The tax is computed as \$250 plus 0.57 percent of taxable Oregon commercial activity of more than \$1 million. Only taxpayers with more than \$1 million of taxable Oregon commercial activity will have a payment obligation.

The CAT sets four thresholds to determine whether a business or unitary group has CAT obligations. These thresholds are based on the amount of commercial activity the business or unitary group earns in Oregon over the course of the year.

Threshold	Amount	Explanation
<b>Excluded–No Requirement</b>	\$750,000 or less	Business or unitary group with \$750,000 or less of Oregon commercial activity is excluded from all CAT requirements.
<b>Registration Threshold</b>	\$750,000+	Business or unitary group with Oregon commercial activity of \$750,000 must register for the CAT.
<b>Filing Threshold</b>	\$1 million +	Business or unitary group with Oregon commercial activity of more than \$1 million must file a return.
<b>Tax Payment Threshold</b>	More than \$1 million	Business or unitary group with taxable Oregon commercial activity of more than \$1 million must file a return and pay tax.

The CAT is imposed on the entity doing business in Oregon and is considered part of the business's expenses. Contractors are permitted to pass the CAT to BPA through their contract pricing.

#### 22.5.4 Contracts with Individuals

- (a) Prior to entering into a contract with an individual, Bonneville, or an independent party, shall determine if the contractor qualifies as an independent contractor.

- (b) If the analysis by Bonneville, or an independent party, determines a proposed individual is an independent contractor, Bonneville may contract directly with that individual and will issue an IRS Form 1099 to the individual that is an independent contractor.
- (c) If the analysis determines a proposed individual is not an independent contractor, Bonneville will contract for the services of that individual through one of its third party supplemental labor contractors who will issue an IRS tax form W-2 to that employee.

#### 22.5.5 Tribal Employment Rights Ordinance (TERO) Fees

##### 22.5.5.1 General

- (a) TERO fees are levied on a contractor doing business on a reservation. The TERO fee applies only to the portion of the project located on an Indian Reservation.
- (b) For purposes of this section, Indian Reservation means land within the boundaries of a reservation or tribal lands held in trust by the federal government.

##### 22.5.5.2 TERO Fees

- (a) The CO shall validate the applicability of the TERO fee and may consult OGC regarding the validity of the TERO.
- (b) While tribal governments are prohibited from directly levying fees against the Federal government, Bonneville shall reimburse all applicable TERO fees imposed on contractors. Contractor shall submit an invoice for reimbursement as a separate line item. Bonneville will not reimburse the contractor for the following: (1) any increase in TERO fees after the time of award; (2) any amount assessed on lands that are not Indian Reservation; (3) fines incurred for non-compliance or violation of TERO.
- (c) The contractor shall immediately contact the CO if there is a dispute about the applicability or amount of the TERO fee.

#### 22.5.6 Contract Clauses

- (a) The CO shall include the clause 22-14, Taxes – Indefinite Delivery Contracts, in solicitations and contracts for equipment (including leased equipment) and services, when a fixed price indefinite 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 the clause 22-15, Federal, State and Local Taxes, in solicitations and contracts over \$150,000 if a fixed price or time-and-materials contract is contemplated, except when clause 22-14 Taxes - Indefinite Delivery Contracts is utilized. For commercial acquisitions, Clause 22-15 shall not be included in the solicitation or contract; the requirement is addressed in clause 28-17.
- (c) The CO shall include the clause 22-17, Washington State Sales and Use Taxes, in all solicitations and resulting contracts for construction and services requiring materials to be performed wholly or partly in the State of Washington.
- (d) The CO shall include the clause 22-18, State of Idaho Use Tax, in all solicitations and contracts requiring construction in the State of Idaho.
- (e) The CO shall include the clause 22-19, Oregon Corporate Activity Tax, in all solicitations and contracts, for commercial activity exceeding \$1,000,000.00.
- (f) The CO shall include the clause 22-22, Contracts for Services with Individuals, in all solicitations and contracts for services with individuals who have been determined to be independent contractors.
- (g) The CO shall include the clause 22-23, Contracts for Supplemental Labor, in all solicitations and contracts for Supplemental Labor services.

- (h) The CO shall include the clause 22-24, Tribal Employment Rights Ordinance Fee in all solicitations and contracts requiring work to be performed wholly or partly on Indian Reservations and tribal lands held in trust by the federal government.

## 22.6 ELECTRONIC FUNDS TRANSFER

- (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 Accounts Payable 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). Bonneville will protect against improper disclosure of a contractor's EFT banking information.
- (d) The contractor shall submit banking information to the Bonneville Vendor File Maintenance Team, as per Clause 22-20, Electronic Funds Transfer Payment. Bonneville 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 Bonneville. 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

Accounts Payable 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 Contract Clause

- (a) The CO shall include the clause 22-20 Electronic Funds Transfer Payment, in all solicitations and contracts, except commercial acquisitions and not otherwise exempt by 22.6(b).
- (b) Oral solicitations (see subsection 11.12.2) or oral solicitations and resultant oral contracts for commercial acquisitions must be paid by EFT, unless otherwise exempt by 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 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 ACCELERATED PAYMENTS TO SMALL BUSINESS SUBCONTRACTORS**

### 22.7.1 Policy

Bonneville prime contractors shall make payments to small business subcontractors on an accelerated timetable to the maximum extent practicable, and upon receipt of accelerated payments from the Government. This acceleration does not provide any new rights under the Prompt Payment Act and does not affect the application of the Prompt Payment Act late payment interest provisions.

### 22.7.2 Contract Clause

The CO shall include the clause 22-21 Accelerated Payments to Small Business Subcontractors in all solicitations and contracts.

## 23 SERVICE CONTRACTING

This part prescribes policy and procedures that are specific to the acquisition and management of services by contract. This part applies to all contracts and orders for services regardless of the contract type or kind of service being acquired. This part includes, but is not limited to, contracts for services to which 41 U.S.C. chapter 67, Service Contract Labor Standards applies.

### 23.1 SERVICE CONTRACTS – GENERAL

#### 23.1.1 Policy

- (a) Bonneville shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C. § 3109) to do so.
- (b) For service contracts, the period of performance, for recompetition purposes, shall be limited to five years, including options.
- (c) Performance-based acquisition methods are to be used to the maximum extent practicable for acquiring services, except for:
  - (1) Architect-engineer services;
  - (2) Construction;
  - (3) Utility services; or
  - (4) Services that are incidental to supply purchases.
- (d) Bonneville shall generally rely on the private sector for commercial services.
- (e) Bonneville shall not award a contract for the performance of an inherently governmental function.
- (f) Bonneville shall only enter into non-personal service contracts which are defined at 23.1.2.
- (g) Program officials are responsible for accurately describing the need to be filled, or problem to be resolved, through service contracting in a manner that ensures full understanding and responsive performance by contractors and, in doing so, should obtain assistance from contracting officials, as needed. To the maximum extent practicable, the program officials shall describe the need to be filled using performance-based acquisition methods.
- (h) Services are to be obtained through meaningful competition, except see subpart 11.9, and free of any potential conflicts of interest.
- (i) Bonneville shall ensure that service contracts that require the delivery, use, or furnishing of products are consistent with Part 15.

#### 23.1.2 Definitions

As used in this part –

*Craft Labor* is a subset of Supplemental Labor and means non-federal employee labor, contracted with a staffing firm (third-party), billed on an hourly or daily basis performing tasks for Bonneville. The staffing firm works with the applicable Union to present a qualified candidate. Craft labor is not subject to CFR 5 Part 300 Subpart E, Use of Private Sector Temporaries.

*Independent Contractor* means a person who does work for Bonneville by contract, and Bonneville has the right to control or direct only the result of the work and not the means and methods of accomplishing the result. Bonneville has adopted the Internal Revenue Service's general and common law rules to define an Independent Contractor.

*Nonpersonal services contract* means a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between Bonneville and its employees.

*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. It can also cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis. Some of the areas in which service contracts are found include the following:

- (1) Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment.
- (2) Routine recurring maintenance of real property.
- (3) Janitorial services.
- (4) Advisory and assistance services.
- (5) Operation of Government-owned equipment, real property, and systems.
- (6) Communications services.
- (7) Architect-Engineering (see subpart 24.6).
- (8) Transportation and related services.
- (9) Research and development.

*Supplemental Labor* means non-federal employee labor contracted with a staffing firm (third-party) and billed on an hourly or daily basis performing tasks for Bonneville. Supplemental labor is not subject to CFR 5 Part 300 Subpart E, Use of Private Sector Temporaries.

*Temporary Labor* means non-federal employee labor contracted with a staffing firm (third-party) and is billed on an hourly or daily basis performing tasks for Bonneville. The performance is limited to 120 days and max of 240 days within a 24-month period, per CFR 5 Part 300 Subpart E, Use of Private Sector Temporaries.

### 23.1.3 Contracting Officer Responsibility

- (a) The CO is responsible for ensuring that a proposed contract for services is proper. The CO shall determine whether the proposed service is for personal (see 23.1.5) or nonpersonal services. OGC shall be consulted if the CO cannot make the determination.
- (b) A CO shall not issue solicitations or awards for personal services. Any requisition for personal services shall be denied and returned to the requester.

### 23.1.4 Service Contract Labor Standards

41 U.S.C. chapter 65, Service Contract Labor Standards, provides for minimum wages and fringe benefits as well as other conditions of work under certain types of service contracts. Whether or not the Service Contract Labor Standards statute applies to a specific service contract will be determined by the definitions and exceptions given in the Service Contract Labor Standards statute, or implementing regulations.

### 23.1.5 Personal Services Contracts

- (a) A personal services contract is characterized by the employer-employee relationship it creates between Bonneville and the contractor's personnel. Bonneville 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.
- (b) 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 Bonneville 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 Bonneville employee.

- (c) Each contract arrangement must be judged in the light of its own facts and circumstances, and the key question is whether Bonneville 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.
- (d) The descriptive elements listed below indicate actions Bonneville should avoid so as not to create a prohibited personal services contract:
  - (1) Decisions related to hiring or releasing contract worker;
  - (2) Granting or denying leave requests for contract workers;
  - (3) Performing annual performance reviews for contract workers;
  - (4) Unilaterally reassigning contract workers to other projects or tasks; and
  - (5) Direct and continuous supervision and contact of the contract worker by a Bonneville employee.
- (e) The descriptive elements listed below are factors in determining whether the administration of a contract creates continuous supervision and control of the contract worker. The presence (or absence) of one or even all of these factors in a particular contract does not necessarily determine whether a contract is for, or being administered as, a personal services contract. Instead, the presence of these factors requires that the contract as written or administered must be carefully reviewed to protect against creating a prohibited personal services contract.
  - (1) Performance on site;
  - (2) Principal tools and equipment furnished by Bonneville;
  - (3) Comparable services are performed in Bonneville using Government personnel; and
  - (4) The service provided can reasonably be expected to last beyond one (1) year.

#### 23.1.6 Inherently Governmental Functions

- (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 Bonneville policy, such as determining the content and application of regulations.
  - (2) The determination of Bonneville programs priorities and budget requests.
  - (3) The direction and control of employees of the Federal Government.
  - (4) The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.

- (5) The approval of position descriptions and performance standards for employees of the Federal Government.
  - (6) The determination of what Bonneville property is to be disposed of and on what terms (although Bonneville may give contractors authority to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency).
  - (7) The determination of what supplies or services are to be acquired by Bonneville (although Bonneville may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions).
  - (8) Participating as a voting member on any source selection board.
  - (9) Approving any contractual documents such as those documents defining requirements, incentive plans and evaluation criteria.
  - (10) Awarding, administering, and terminating contracts.
  - (11) Determining whether contract costs are reasonable, allocable and allowable.
  - (12) The determination of budget policy, guidance and strategy.
  - (13) The approval of Bonneville responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or Bonneville policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.
  - (14) The conduct of Administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in Government programs.
  - (15) The approval of Federal licensing actions and inspections.
  - (16) The control of the treasury accounts.
  - (17) The administration of public trusts.
  - (18) The drafting of Congressional testimony, responses to Congressional correspondence, or other Federal audit entity.
- (d) Bonneville shall not contract for the performance of inherently governmental functions. Bonneville follows the principles outlined in OMB Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, to determine whether an activity is an inherently governmental function.
- (e) Bonneville shall determine whether the service being provided under the contract is an inherently governmental function based on the following:
- (1) The definition of inherently governmental functions and the list of examples provided in section (c).
  - (2) The nature of the work to determine if the work involves the exercise of sovereign powers of the United States, such as officially representing the United States in an inter-governmental forum or body.
  - (3) The level of discretion associated with performing the work. Work requiring the exercise of a level of discretion that commits the government to a course of action where two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures or other guidance and chosen course of action cannot be overridden by a Bonneville official, shall be deemed governmental function.
  - (4) The level of involvement of the contractor in the work, to avoid the contractor's work product being so close to a final product as to effectively preempt the Bonneville official's decision making process, discretion or authority.
- (f) Prior to issuing a solicitation for advisory and assistance services or temporary workers, the CO shall receive a written determination prepared by the requisitioner and approved by the Supplemental Labor Management Office, that none of the functions to be performed pursuant to the contract are inherently governmental. Disagreements regarding the

determination will be resolved in accordance with Bonneville policy and procedures before issuance of a solicitation or contract.

#### 23.1.6.1 Functions Closely Associated with Performance of Inherently Governmental Functions

- (a) Certain services and actions that generally are not considered to be inherently governmental functions may approach being in that category because of the nature of the function and the risk that performance may impinge on Bonneville employees' performance of an inherently governmental function.
- (b) Closely associated functions are not reserved exclusively for performance by Bonneville employees, however special consideration should be given to using employees to perform these functions.
- (c) The following is a list of examples generally not considered to be inherently governmental functions but are closely associated with the performance of inherently governmental functions:
  - (1) Performing budget preparation activities, including workload modeling, fact finding, efficiency studies, and should-cost analyses.
  - (2) Activities to support Bonneville planning and reorganization.
  - (3) Support for developing policy, including drafting documents, and conducting analysis, feasibility studies, and strategy options.
  - (4) Services to support development of regulations, and legislative proposals pursuant to a specific policy direction.
  - (5) Services in support of acquisition planning, such as market research, inputs for government cost estimates and drafting statements of work and other pre-award documents.
  - (6) Services in support of source selection, such as preparing a technical evaluation and associated documentation, participating as a technical advisor or as a non-voting member of a source selection committee.
  - (7) Providing assistance in contract management, such as evaluating a contractor's performance through information gathering and analysis and providing a recommendation.
  - (8) Providing support for assessing contract claims and preparing termination settlement documents.
  - (9) Providing support in preparing responses to Freedom of Information Act requests.
  - (10) Working in a situation that permits or might permit access to confidential business information and/or any other sensitive information (other than situations covered by the National Industrial Security Program).
  - (11) Disseminating information regarding agency policies or regulations, such as conducting community relations campaigns, or conducting agency training courses.
  - (12) Participating in a situation where it might be assumed that participants are agency employees or representatives, such as attending conferences on behalf of Bonneville.
  - (13) Serving as arbitrators or providing alternative dispute resolution services.
  - (14) Constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.
  - (15) Providing inspection services.
  - (16) Providing legal advice and interpretations of regulations and statutes to Government officials.
- (d) Bonneville shall give special consideration to performance of functions closely associated with inherently governmental functions. If it is appropriate for a contractor to perform a function closely associated with an inherently governmental function, Bonneville shall

provide greater attention to the contractor's activities to ensure that the work does not expand to include performance of inherently governmental functions.

- (e) Prior to issuing a solicitation for advisory and assistance services or temporary workers, the CO shall receive a written determination prepared by the requisitioner and approved by the Supplemental Labor Management Office, that none of the functions to be performed pursuant to the contract are inherently governmental. Disagreements regarding the determination will be resolved in accordance with Bonneville policy and procedures before issuance of a solicitation or contract.

#### 23.1.7 Solicitation Provisions and Contract Clauses

- (a) The CO may include a clause similar to 23-1, Continuity of Services, in service solicitations and contracts for services, when –
  - (1) The services under the contract are considered vital and when, upon contract expiration, a successor, either the Government or another contractor, may continue them; and
  - (2) Bonneville anticipates difficulties during the transition from one contractor to another or to the Government.
- (b) The CO shall include a clause similar to 23-2, Key Personnel, in solicitations and contracts when specific personnel are essential to the conduct of a project.

#### 23.1.8 Nondisplacement of Qualified Workers

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.

##### 23.1.8.1 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 Bonneville or its contractors that is covered by the Service Contract Labor Standards statute, 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 Labor Standards statute, 41 U.S.C. § 357(b).
- (c) Exemptions.
  - (1) This requirement does not apply to:
    - (i) Contracts and subcontracts under \$150,000;

- (ii) Contracts and subcontracts awarded pursuant to 41 U.S.C. chapter 85, Committee for Purchase from People Who Are Blind or Severely Disabled;
  - (iii) 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;
  - (iv) Agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph Sheppard Act, 20 U.S.C. § 107; or
  - (v) 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)(ii) through (c)(1)(iv) 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 Bonneville to procure services on an economical and efficient basis, the HCA may exempt Bonneville 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.

#### 23.1.8.2 Contract Clause

The CO shall include Clause 23-5 Nondisplacement of Qualified Workers in solicitations and contracts for:

- (a) Service contracts, as defined at BPI 23.1.8.1(b)(1);
- (b) That are expected to exceed \$150,000; and
- (c) That are not exempted by BPI 23.1.8.1(c).

#### 23.1.9 Extension of services

Award of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of COs. In order to avoid negotiation of short extensions to existing contracts, the CO may include an option clause (see subpart 7.10) in solicitations and contracts which will enable Bonneville to require continued performance of any services within the limits and at the rates specified in the contract. However, these rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance thereunder shall not exceed 6 months.

#### 23.1.10 Temporary Labor

COs may enter into contracts for Temporary Labor, as defined in 23.1.2 Definitions, for the brief or intermittent use of specific skills facilitated by staffing firms. Temporary Labor shall comply with the authority, criteria, and conditions of 5 CFR Part 300, Subpart E, Use of Private Sector Temporaries.

- (a) Temporary Labor shall be acquired through a staffing firm (third-party), as contracting directly with individuals for Temporary Labor is prohibited.
- (b) The performance period is limited to 120 days, however if the need continues to exist beyond the initial 120 days, the performance period may extend to the maximum limit of 240 days.



- (c) The staffing firm employees shall not be considered or treated as Federal employees for any purpose, not be regarded as performing a personal service, and not be eligible for civil service employee benefits, including retirement.

#### 23.1.11 Supplemental Labor

COs may enter into contracts with staffing firms for Supplemental Labor, as defined in in 23.1.2 Definitions, to augment existing staff levels or to temporarily fill gaps in the Federal Government workforce.

- (a) Supplemental Labor is not subject to CFR 5 Part 300 Subpart E, Use of Private Sector Temporaries.
- (b) Supplemental Labor shall be acquired through a staffing firm (third-party), as contracting directly with individuals for Supplemental labor is prohibited.
- (c) Supplemental Labor firm employees shall not be considered or treated as Federal employees for any purpose, not be regarded as performing a personal service, and not be eligible for civil service employee benefits, including retirement.

#### 23.1.12 Craft Labor

COs may enter into contracts with staffing firms for Craft Labor, as defined in in 23.1.2 Definitions, to augment existing staff levels or to temporarily fill gaps in the Federal Government workforce.

- (a) Craft Labor is not subject to CFR 5 Part 300 Subpart E, Use of Private Sector Temporaries.
- (b) Craft Labor shall be acquired through a staffing firm (third-party), as contracting directly with individuals for Craft Labor is prohibited.
- (c) Craft Labor is contracted in a pool specifically for Craft services (example construction and maintenance tasks).The selected Craft Labor firm works with the applicable Union to present a qualified candidate.
- (d) Craft Labor firm employees shall not be considered or treated as Federal employees for any purpose, not be regarded as performing a personal service, and not be eligible for civil service employee benefits, including retirement.

## 23.2 UNAUTHORIZED USE OF COMPUTER SOFTWARE BY CONTRACTORS

Bonneville shall caution contractors concerning the proper use of copyrighted software licensed to Bonneville.

### 23.2.1 Contract Clause

The CO shall include a clause similar to the clause 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 ADVISORY AND ASSISTANCE SERVICES

This subpart prescribes policies and procedures for acquiring advisory and assistance services by contract. The subpart applies to contracts, whether made with individuals or organizations.

### 23.3.1 Exclusions

The following activities and programs are excluded or exempted from the definition of advisory or assistance services.

- (a) Routine information technology services unless they are an integral part of a contract for the acquisition of advisory and assistance services.
- (b) Architectural and engineering services; and
- (c) Research involving theoretical mathematics and basic research involving medical, biological, physical, social, psychological or other phenomena.

### 23.3.2 Policy

- (a) Advisory and assistance services provide information, advice, recommendations, options, alternatives, analysis and training to support or improve Bonneville's operations, projects, programs, policy development, decision-making, management and administrative activities, and may be used to augment or supplement Bonneville's knowledge and expertise to enhance Bonneville'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 Bonneville, whether or not the expert is expected to testify. Advisory and assistance service contractors 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) The acquisition of advisory and assistance services is a legitimate way to improve Bonneville services and operations. Accordingly, advisory and assistance services may be used at all organizational levels to help managers achieve maximum effectiveness or economy in their operations.
- (c) Advisory and assistance services shall not be:
  - (1) Used in performing work of a policy, decision-making, or managerial nature which is the direct responsibility of Bonneville 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) Contractors may not be paid for services to conduct evaluations or analyses of any aspect of a proposal submitted for an initial contract award unless neither Bonneville personnel, nor personnel from another Federal agency, with adequate training and capabilities to perform the required proposal evaluation, are readily available and a written determination is made by the CO and approved by the HCA in using contractor services.
- (e) Advisory and assistance service contracts with individuals.
  - (1) Bonneville, or an independent third party hired by Bonneville, shall analyze the facts and determine whether the contractor qualifies as an independent contractor prior to entering into a contract for advisory and assistance services.
  - (2) If the analysis indicates that a proposed contractor is an independent contractor, Bonneville may contract directly with that individual.
  - (3) If the analysis indicates a proposed contractor is not an independent contractor, Bonneville will contract for the services of that individual through one of its third party supplemental labor contractors. See subsection 22.5.4 for tax policy for Services with individuals.
- (f) Advisory and assistance services directly related to an investigation or legal proceeding, including any administrative, civil or criminal proceeding to which Bonneville is a party, may be acquired without regard to section (e) upon a written request from the Executive Vice President, and approved by OGC.

- (g) All individuals approved under 23.3.2(f) are required by IRS statutes and regulations to be treated, for income tax withholding purposes, as an employee. COs shall notify Accounts Payable upon receipt of HCA approval to assure proper setup of withholdings from Bonneville payments to that individual.
- (h) Bonneville shall annually review the contracts defined in (f) to ensure 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 resulting for these contracts. In addition, delegated CORs shall perform an annual review as required in subsection 14.1.3(b).
- (i) Period of performance limitations. The period of performance for an advisory and assistance service contracts shall be limited to five years, including options. COs shall refer to 7.7.4(c)(2) for further limitations when using indefinite-quantity contracts. COs shall refer to 7.7.5(c) for task order contracting.

## **23.4 DISMANTLING, DEMOLITION, OR REMOVAL OF IMPROVEMENTS**

This subpart prescribes procedures for contracting for dismantling or demolition of buildings, ground improvements and other real property structures and for the removal of such structures or portions of them (hereafter referred to as “dismantling, demolition, or removal of improvements”).

### **23.4.1 Labor standards**

Contracts for dismantling, demolition, or removal of improvements are subject to either 41 U.S.C. Chapter 67, Service Contract Labor Standards, or 40 U.S.C. Chapter 31, subchapter IV, Wage Rate Requirements (Construction). If the contract is solely for dismantling, demolition, or removal of improvements, the Service Contract Labor Standards statute applies unless further work which will result in the construction, alteration, or repair of a public building or public work at that location is contemplated. If such further construction work is intended, even though by separate contract, then the Construction Wage Rate Requirements statute applies to the contract for dismantling, demolition, or removal.

### **23.4.2 Bonds or other security**

When a contract is solely for dismantling, demolition, or removal of improvements, 40 U.S.C Chapter 31, subchapter III, Bonds (see 16.2.3) does not apply. However, the CO may require the contractor to furnish a performance bond or other security (see 16.2.4) in an amount that the CO considers adequate to –

- (a) Ensure completion of the work;
- (b) Protect property to be retained by the Government;
- (c) Protect property to be provided as compensation to the contractor; and
- (d) Protect the Government against damage to adjoining property.

### **23.4.3 Payments**

- (a) The contract may provide that the –
  - (1) Government pay the contractor for the dismantling or demolition of structures; or
  - (2) Contractor pay the Government for the right to salvage and remove the materials resulting from the dismantling or demolition operation.
- (b) The CO shall consider the usefulness to the Government of all salvageable property. Any of the property that is more useful to the Government than its value as salvage to the

contractor should be expressly designated in the contract for retention by the Government. The CO shall determine the fair market value of any property not so designated, since the contractor will get title to this property, and 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.

## 24 CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

This part prescribes policies and procedures unique to contracting for construction and architect-engineer services. It includes requirements for using certain clauses and standard forms that also applies to contracts for dismantling, demolition, or removal of improvements.

### 24.1 GENERAL

#### 24.1.1 Applicability

- (a) Construction and architect-engineering contracts are subject to the requirements in other parts of the BPI, which shall be followed when applicable. However, when a requirement in this part is inconsistent with a requirement in another part of the BPI, this Part 24 shall take precedence if the acquisition of construction or architect-engineering services is involved.
- (b) A contract for both construction and supplies or services shall include –
  - (1) Clauses applicable to the predominant part of the work (see subpart 10.3), or
  - (2) If the contract is divided into parts, the clauses applicable to each portion.

#### 24.1.2 Definitions

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 and demolition materials and debris* means materials and debris generated during construction, renovation, demolition, or dismantling of all structures and buildings and associated infrastructure.

*Construction-Management-Contract* means a contract method 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 Bonneville. 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* means defining the construction requirement (including the functional relationships and technical systems to be used, as such as architectural, environmental, structural, electrical, mechanical, and fire protection), producing the technical specifications and drawings, and preparing the construction cost estimate.

*Design-bid-build* means the traditional delivery method where design and construction are sequential and contracted for separately with two contracts and two contractors.

*Design-build* means combining design and construction in one single contract. This type of contract is sometimes referred to as the “turnkey” method, the “Engineer/Procure/Construct” EPC method, or “Design-supply” method.

*Diverting* means redirecting materials that might otherwise be placed in the waste stream to recycling or recovery, excluding diversion to waste-to-energy facilities.

*Firm* in conjunction with architect-engineer services, means any individual, partnership, corporation, association, or other legal entity permitted by law to practice the professions of architecture or engineering.

*Plans and specifications* means drawings, specifications, and other data for and preliminary to the construction.

*Progressive Design Build (PDB)* is a collaborative version of design-build used for more challenging projects to bring the designer, builder, and owner together to identify problems early and resolve them during design stage.

*Shop drawings* (also referred to as record drawings or redlines) means drawings by the construction contractor or a subcontractor at any tier to show 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.

#### 24.1.3 Policy

For non-energized facilities, Bonneville shall implement high-performance sustainable building design, construction, renovation, repair, commissioning, operation and maintenance, management, and deconstruction practice so as to –

- (a) Ensure that all new construction, major renovation, or repair and alteration of Federal buildings complies with the Guiding Principles for Federal Leadership in High-Performance and Sustainable Buildings (available at [http://www.wbdg.org/pdfs/hpsb\\_guidance.pdf](http://www.wbdg.org/pdfs/hpsb_guidance.pdf));
- (b) Pursue cost-effective, innovative strategies, such as highly reflective and vegetated roofs, to minimize consumption of energy, water, and materials;
- (c) Identify alternatives to renovate that reduce existing assets' deferred maintenance costs;
- (d) Ensure that rehabilitation of Federally-owned historic buildings utilizes best practices and technologies in retrofitting to promote long-term viability of the buildings; and
- (e) Ensure pollution prevention and eliminate waste by diverting at least 50 percent construction and demolition materials and debris.

## 24.2 SPECIAL ASPECTS OF CONTRACTING FOR CONSTRUCTION

### 24.2.1 Evaluation of Contractor Performance

Upon contract completion, performance evaluations shall be prepared for each construction contract of \$150,000 or more, and for each construction contract terminated for default regardless of contract value. Past performance evaluations may also be prepared for construction contracts below \$150,000 (see subpart 14.16).

### 24.2.2 Specifications

- (a) Whenever possible, COs shall ensure that references in specifications are to widely recognized standards or specifications promulgated by governments, industries, or technical societies.
- (b) When brand name descriptors are used, but the CO will consider other alternatives (see subsection 11.13.9) specifications must clearly identify and describe the particular physical, functional, or other characteristics of the brand-name items which are considered essential to satisfying the requirement.

### 24.2.3 Government Estimate of Construction Costs

- (a) An Independent Government Estimate (IGE) of construction costs shall be prepared and furnished to the CO at the earliest practicable time for each proposed contract and for each contract modification anticipated to exceed \$150,000. The CO may require an estimate

when the cost of required work is not anticipated to exceed the \$150,000 threshold. The estimate shall be prepared in as much detail as though Bonneville was competing for award.

- (b) Access to information concerning the Bonneville estimate shall be limited to Bonneville personnel whose official duties require knowledge of the estimate. An exception to this rule may be made during contract negotiations to allow the CO to identify a specialized task and disclose the associated cost breakdown figures in the Bonneville estimate, but only to the extent deemed necessary to arrive at a fair and reasonable price.

#### 24.2.4 Disclosure of the Magnitude of Construction Projects

Advance notices and solicitations, in excess of \$25,000 shall state the magnitude of the requirement in terms of physical characteristics and estimated price range. In no event shall the statement of size disclose Bonneville's estimate. Therefore, the estimated price should be described in terms of one of the following price ranges:

- (a) Less than \$150,000;
- (b) Between \$150,000 and \$500,000;
- (c) Between \$500,000 and \$1,000,000;
- (d) Between \$1,000,000 and \$5,000,000;
- (e) Between \$5,000,000 and \$10,000,000;
- (f) Between \$10,000,000 and \$25,000,000;
- (g) Between \$25,000,000 and \$50,000,000;
- (h) Between \$50,000,000 and \$100,000,000; or
- (i) Over \$100,000,000

#### 24.2.5 Liquidated Damages

- (a) 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 Bonneville 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 (also see subpart 6.15).
- (b) 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 procurement 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) 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;
  - (4) Vehicle costs;

- (5) Per diem; or
- (6) The cost of Bonneville crews, or hourly paid contract employees, forced on standby.

#### 24.2.6 Pricing Fixed-Price Construction Contracts

- (a) Generally, firm-fixed-price contracts shall be used to acquire construction. They may be priced –
  - (1) On a lump-sum basis (when a lump sum is paid for the total work or defined parts of the work),
  - (2) On a unit-price basis (when a unit price is paid for a specified quantity of work units), or
  - (3) Using a combination of the two methods.
- (b) Lump-sum pricing shall be used in preference to unit pricing except when –
  - (1) Large quantities of work such as grading, paving, building outside utilities, or site preparation are involved;
  - (2) Quantities of work, such as excavation, cannot be estimated with sufficient confidence to permit a lump-sum offer without a substantial contingency;
  - (3) Estimated quantities of work required may change significantly during construction; or
  - (4) Offerors would have to expend unusual effort to develop adequate estimates.
- (c) Fixed-price contracts with economic price adjustment may be used if such a provision is customary in contracts for the type of work being acquired, or when omission of an adjustment provision would preclude the ability to have competitive offers or would result in offers including unwarranted contingencies in proposed prices.
- (d) For the PDB delivery method, the default contract type is Guaranteed Maximum Price (GMP); however, a GMP may be awarded on a fixed price basis or include fixed price line items. The application of fixed price line items in a GMP shall be developed in a collaborative manner between BPA and the Contractor and consider the applicable PDB delivery Phase.

#### 24.2.7 Concurrent Performance of Firm-Fixed-Price and Other Types of Construction Contracts

In view of potential labor and administrative problems, cost-plus-fixed-fee, price-incentive, or other types of construction contracts with cost variation or cost adjustment features shall not be permitted concurrently, at the same work site, with firm-fixed-price, lump-sum, or unit price construction contracts except with the prior approval of the HCA.

#### 24.2.8 Construction contracts with Architect-Engineer Firms

Aside from a design-build contract, no contract for the construction of a project shall be awarded to the firm that designed the project or its subsidiaries or affiliates, except with the approval of the HCA.

#### 24.2.9 Inspection of Site and Examination of Data

- (a) The CO shall make appropriate arrangements for prospective offerors to inspect the work site and to have the opportunity to examine data available to Bonneville, which may provide information concerning the performance of the work such as 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.
- (b) Site information and the data should be made available to all offerors in the same manner, including information regarding known safety or hazardous conditions, as well as, any



utilities to be furnished during construction. A record shall be kept of the identity and affiliation of all offerors' representatives who inspect the site or examine the data.

- (c) During 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.

#### 24.2.10 Distribution of Advance Notices and Solicitations

Advance notices may be distributed to prospective offerors as the CO finds necessary. Solicitations should be distributed to prospective offerors in a manner to ensure prospective offerors receive complete and full technical requirements and attachments (i.e., drawings, geographic data, and maps).

#### 24.2.11 Preconstruction Orientation

- (a) The CO will inform the successful offeror of significant matters of interest, including –
  - (1) Statutory matters such as labor standards (see subpart 10.3), and subcontracting plan requirements (see Part 8); and
  - (2) Other matters of significant interest, including who has the authority to decide matters such as contractual, administrative (e.g. security, safety, and environmental protection), and construction responsibilities.
- (b) As appropriate, the CO may issue an explanatory letter or conduct a preconstruction conference.
- (c) If a preconstruction conference is to be held, the CO shall –
  - (1) Conduct the conference prior to the start of construction at the work site;
  - (2) Notify the successful offeror of the date, time, and location of the conference (see 24.5.5); and
  - (3) Inform the successful offeror of the proposed agenda and any need for attendance by subcontractors.

#### 24.2.12 Payment for Mobilization and Bonding Costs

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. 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).

#### 24.2.13 Special Procedures for Price Negotiation in Construction Contracting

- (a) COs shall follow the policies and procedures in Part 12 when negotiating prices for construction.
- (b) The CO shall evaluate proposals and associated cost or pricing data and shall compare them to the Bonneville estimate.
  - (1) Any element of proposed cost that differs significantly from the Bonneville estimate, the CO should request to offeror to submit cost information concerning that element (e.g., wage rates or fringe benefits, significant materials, equipment allowances, and subcontractor costs).
  - (2) When a proposed price is significantly lower than the Bonneville estimate, the CO shall make sure both the offeror and the Bonneville estimator completely understand the scope of the work. If negotiations reveal errors in the Bonneville estimate, the estimate shall be corrected and the changes shall be documented in the contract file.

- (c) When appropriate, additional pricing tools may be used. For example, proposed prices may be compared to current prices for similar types of work, adjusted for differences in the work site and the specifications. Also rough yardsticks may be developed and used, such as cost per cubic foot for structures, cost per linear foot for utilities or conductor installation, and cost per cubic yard for excavation or concrete.

#### 24.2.14 Special Procedure for Cost-Reimbursement Contracts for Construction

COs may use a cost-reimbursement contract to acquire construction only when its use is consistent with Part 7.

### 24.3 TWO-PHASE DESIGN-BUILD SELECTION PROCESS

This subpart prescribes policies and procedures for the use of the two-phase design-build selection procedures, with exception to the Progressive Design Build (PDB) projects.

#### 24.3.1 Use of Two-Phase Design-Build Selection Procedures

- (a) During acquisition planning, if considering the use of two-phase design-build selection procedures, the CO shall conduct the evaluation in paragraph (b) of this section.
- (b) The two-phase design-build selection procedures shall be used when the CO determines that this method is appropriate, based on the following:
  - (1) Three or more offers are anticipated; and
  - (2) Design work must be performed by offerors before developing price or cost proposals, and offerors will incur a substantial amount of expense in preparing offers.
  - (3) At a minimum, the following criteria must be considered:
    - (i) The extent to which the project requirements have been adequately defined;
    - (ii) The time constraints for delivery of the project;
    - (iii) The capability and experience of potential contractors;
    - (iv) The suitability of the project for use of the two-phase selection method; and
    - (v) The capability of Bonneville to manage the two-phase selection process.
- (c) Any solicitation which the CO determines this method is appropriate shall follow the strategy panel requirements in subpart 6.9.

#### 24.3.2 Scope of Work

Bonneville shall develop, either in-house or by contract, a scope of work that defines the project and states the requirements. The scope of work may include criteria and preliminary design, budget parameters, and schedule or delivery requirements.

#### 24.3.3 Phase One

- (a) Phase One of the solicitation(s) shall include –
  - (1) The scope of work;
  - (2) The Phase One evaluation factors, including –
    - (i) Technical approach (but not detailed design or technical information);
    - (ii) Technical qualifications, such as –
      - (A) Specialized experience and technical competence;
      - (B) Capability to perform;
      - (C) Past performance of the offeror’s team (including architect-engineer and construction members); and
    - (iii) Other appropriate factors (excluding cost or price related factors, which are not permitted in Phase One;
  - (3) Phase Two evaluation factors (see 24.5.4); and

- (4) A statement of the maximum number of offerors that will be selected to submit phase-two proposals. The maximum number specified in the solicitation shall be determined by the CO. The CO shall document this determination in the contract file.
- (b) After evaluating Phase One proposals, the CO shall select the most highly qualified offerors (not to exceed the maximum number specified in the solicitation) and request that only those offerors submit Phase Two proposals.

#### 24.3.4 Phase Two

- (a) Phase Two of the solicitation(s) shall be prepared in accordance with subpart 11.13, and include Phase Two evaluation factors. Examples of potential Phase Two technical evaluation factors include design concepts, management approach, key personnel, and proposed technical solutions.
- (b) Phase Two of the solicitation(s) shall require submission of technical and price proposals, which shall be evaluated separately, in accordance with subpart 12.5.

### 24.4 GENERAL CONSTRUCTION PURCHASE GUIDANCE

#### 24.4.1 Dismantling, Demolition or Removal of Improvements

- (a) Contracts for dismantling, demolition, or removal of improvements are subject to either the Service Contract Labor Standards statute (41 U.S.C. § 6701-6707) or the Construction Wage Rate Requirements statute (40 U.S.C. § 3141-3148). If the contract is solely for dismantling, demolition, or removal of improvements, the Service Contract Labor Standards statute 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 Bonneville forces, then the Construction Wage Rate Requirements statute applies to the contract for dismantling, demolition, or removal.
- (b) The CO shall consider the usefulness to Bonneville of all salvageable property. Any of the property whose usefulness to Bonneville exceeds its value as salvage to the contractor should be expressly designated in the contract for retention by Bonneville. The contract may provide that the (1) Bonneville pay the contractor for the dismantling or demolition of structures, (2) the contractor pay Bonneville 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) The CO shall determine the fair market value of any property not to be retained by Bonneville, 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 Bonneville property to be transferred to contractors under dismantling, demolition or removal of improvements contracts. See Part 19 and Appendix 19 for further information.

#### 24.4.2 State Regulation of Federal Construction Projects

- (a) Bonneville 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 Bonneville property. The States have enforcement authority for safety (OSHA) and environmental protection (CERCLA and RCRA).

- (b) Contractors which encounter attempts by State or local government entities to assess various types of fees should be advised of Bonneville'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 OGC.

#### 24.4.3 Tribal Employment Rights Ordinances in Construction Projects

Occasionally, efforts are made by State or local governments to have Bonneville 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 Bonneville 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). Bonneville recognizes that Tribal Employment Rights Ordinances (TERO) that effect projects on or near certain Indian reservations may have effect on contractor labor. Bonneville shall inform offerors of the existence of a TERO in the solicitation.

#### 24.4.4 Safety Requirements

While a contractor, including subcontractors, is to be held responsible for its actions with respect to safety, Bonneville 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. Bonneville safety policy and procedures for contractors are found in Part 15.

#### 24.4.5 Supply, Service, Maintenance or Other Contracts Involving Construction

- (a) The requirements of this part do not ordinarily apply to supplies, services, maintenance, research, and development, or other nonconstruction contracts. However, contracts predominantly for non-construction work may include comparatively minor amounts of construction work. Construction items under such contracts are not exempted from the requirements of this part simply because the work is to be performed under a contract which also requires, for example, the furnishing of supplies. On the other hand, where construction work is to be performed in support of other work such as manufacturing and furnishing of supplies, the circumstances may be such that the construction work may be so merged with non-construction activity or may be so fragmented in terms of the locations or time spans in which it is to be performed that it cannot be segregated as a separate contractual requirement for construction, alteration, or repair of a public building or public work. Generally the requirements apply to, and the appropriate clauses in subpart 24.5 must be included in a contract if:
- (1) The contract contains specific requirements for substantial amounts of construction work, or it is ascertainable at the contract date that a substantial amount of construction work will be necessary for the performance of the contract. The word "substantial" relates to the type and quantity of construction work to be performed and not merely to the total value of construction work as compared to the total value of the contract; and
  - (2) Such construction work is physically or functionally separate from and, as a practical matter, is capable of being performed on a segregated basis from the other work required by the contract.
- (b) The standard clauses provide that they will be applicable to the contract work only to the extent that such work is subject to the labor standards statute's involved. Under contracts requiring substantial amounts of segregable construction work, only such segregable construction will be covered.

- (1) For example, the requirements do not apply to installation, maintenance, and alteration work incidental to furnishing supplies under a supply contract; however, if a substantial and segregable amount of construction, alteration, or repair work at the site is required, such as for installation of autotransformers and large refrigerator systems or for physical site modification or rearrangement, the labor standards for construction contracts apply to the construction work at the site.
- (2) Contracts for maintenance or service are not ordinarily subject to the requirements of this subpart. Maintenance includes the routine, recurring type of work necessary to keep a facility in such condition that it may be continuously used at an established capacity and efficiency for its intended purpose. However, if such maintenance or service contracts call for substantial and segregable items of construction, alteration, or repair, the labor standards provisions for construction contracts will be applicable to those items. All contracts in excess of \$2,000 for painting of any public building or public work whether performed in connection with the original construction or as regular maintenance, are subject to the labor standards provisions for construction contracts.

## **24.5 SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

### **24.5.1 Dismantling and Demolition of Property**

The CO shall insert a clause similar to the 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 Bonneville property under the contract.

### **24.5.2 Liquidated Damages - Construction**

- (a) If the CO determines that liquidated damages are appropriate, the clause 24-2, Liquidated Damages – Construction, shall be used in solicitations and contracts for construction. If the contract specifies more than one completion date for separate parts or stages of the work, revise paragraph (a) of the clause to state the amount of liquidated damages for delay of each separate part or stage of the work.
- (b) The CO shall insert the clause 24-35, Time Extensions, in solicitations and contracts for construction that use the clause 24-2, Liquidated Damages – Construction, when that clause has been revised as provided in paragraph (a) of this section.

### **24.5.3 Site Investigation and Conditions Affecting the Work**

The CO shall include the clause 24-3, Site Investigation and Conditions Affecting the Work, in solicitations and contracts when a fixed-price construction, or a fixed-price dismantling, demolition and removal of improvements is contemplated, and the contract amount is expected to be greater than \$150,000. The CO may insert the clause in solicitations and contracts when a firm-fixed-price construction contract or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be at or below \$150,000.

### **24.5.4 Physical Data**

The CO shall include the clause 24-4, Physical Data, in solicitations and contracts when a fixed-price construction contract is contemplated and physical data (e.g., test borings, hydrographic data, and 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.

#### 24.5.5 Preconstruction Conference

If the CO determines it may be desirable to hold a preconstruction conference, the CO shall insert the clause 24-5, Preconstruction Conference, in solicitations and fixed-price contracts for construction, or dismantling, demolition, or removal of improvements contract.

#### 24.5.6 Schedule for Construction Contracts

The CO shall insert the clause 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 \$150,000, and the period of actual work performance exceeds 60 days. The clause may also be inserted in such solicitations and contracts when work performance is expected to last less than 60 days and an unusual situation exists that warrants imposition of the requirements. This clause should not be used in the same contract with clauses covering other management approaches for ensuring that a contractor makes adequate progress.

#### 24.5.7 Differing Site Conditions

- (a) 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 Bonneville and the contractor with compliance with the Archaeological Resources Protection Act of 1979 (36 CFR 1214).
- (b) The CO shall include the clause 24-7, Differing Site Conditions, in solicitations and contracts when a fixed-price construction, or a fixed-price dismantling, demolition, or removal of improvements contract is completed, and the contract amount is expected to be greater than \$150,000. The CO may insert the clause in solicitations and contracts when a fixed-price construction, or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be at or below \$150,000.

#### 24.5.8 Layout of Work

The CO shall insert the clause 24-8, Layout of Work, in solicitations and contracts when a fixed-price construction contract is contemplated and the use of this clause is appropriate due to the need for accurate work layout and siting verification during work performance.

#### 24.5.9 Specifications, Drawings and Material Submittals for Construction

The CO shall include a clause similar to the clause 24-9, Specifications, Drawings and Material Submittals for Construction, in all solicitations and contracts for construction expected to be greater than \$150,000. When shop drawings are required, the CO may add text similar to Alternate I or II to paragraph (h) of the clause. The CO may insert the clause in solicitations and contracts when a fixed-price construction and the contract amount is expected to be at or below \$150,000.

#### 24.5.10 Price Data Sheet

The CO shall include the provision 24-10, Price Data Sheet, in solicitations and contracts involving construction when a fixed-price contract with lump sum pricing is in use, and the contract amount is expected to be greater than \$150,000. This provision will aid in the calculation of progress payments.

#### 24.5.11 Working Hours

The CO shall include a clause similar to the clause 24-11, Working Hours - Construction, in solicitations and contracts for construction.

#### 24.5.12 Radio Information

The CO may include a clause similar to the clause 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.

#### 24.5.13 Material and Workmanship

The CO shall include the clause 24-13, Material and Workmanship, in solicitations and contracts for construction. When material substitutions are not desirable, the CO shall use Alternate I of the clause.

#### 24.5.14 Superintendence by the Contractor

The CO shall include the clause 24-14, Superintendence by the Contractor, in solicitations and contracts when a fixed-price construction or a fixed-price dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is expected to be greater than \$150,000. The CO may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be at or below \$150,000.

#### 24.5.15 Permits and Responsibilities

The CO shall include the clause 24-15, Permits and Responsibilities, in solicitations and contracts when a construction or dismantling, demolition, or removal of improvements contract is contemplated.

#### 24.5.16 Other Contracts

The CO shall include the clause 24-16, Other Contracts, in solicitations and contracts when fixed-price construction and a dismantling, demolition, or removal of improvements contract is contemplated, the contract amount is expected to be greater than \$150,000, and there is a reasonable expectation of other work activities at the work site during the term of the contract. The CO may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be at or below \$150,000.

#### 24.5.17 Operations and Storage Areas

The CO may include a clause similar to the clause 24-17, Operations and Storage Areas, in solicitations and contracts when a firm-fixed-price construction and demolition contract is contemplated and the contract amount is expected to be greater than \$150,000.

#### 24.5.18 Use and Possession Prior to Completion

The CO shall include the clause 24-18, Use and Possession Prior to Completion, in solicitations and contracts when a fixed-price construction contract is contemplated, and the contract amount is expected to be greater than \$150,000. This clause may be inserted in solicitations and contracts when the contract amount is expected to be at or below \$150,000.

#### 24.5.19 Cleaning Up

The CO shall include the clause 24-19, Cleaning Up, in solicitations and contracts when a fixed-price construction or a dismantling, demolition, or removal of improvements contract is contemplated and the contract amount is to be greater than \$150,000. The CO may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be at or below \$150,000.

#### 24.5.20 Availability and Use of Utility Services

The CO shall insert the clause 24-20, Availability and Use of Utilities Services, in solicitations and contracts when a fixed-price construction or a dismantling, demolition, or removal of improvements contract is contemplated, the contract is to be performed on Bonneville sites, and the CO determines (a) that the existing utility system is adequate for the needs of both Bonneville and the contractor, and (b) furnishing it is in Bonneville's interest. When this clause is used, the CO shall list the available utilities in the contract.

#### 24.5.21 Road Maintenance

The CO shall include a clause similar to the clause 24-21, Road Maintenance, in solicitations and contracts when a fixed-price construction or a dismantling, demolition, or removal of improvements contract is contemplated, the contract work may damage site or adjacent roads, and the contract amount is expected to be greater than \$150,000. The CO may insert the clause in solicitations and contracts when a fixed-price construction or a fixed-price contract for dismantling, demolition, or removal of improvements is contemplated and the contract amount is expected to be at or below \$150,000.

#### 24.5.22 Use of Land for Storage and Offices

The CO may include a clause similar to the clause 24-22, Use of Land for Storage and Offices, in solicitations and contracts for transmission line construction, or a dismantling, demolition, or removal of improvements of transmission lines.

#### 24.5.23 Use of Explosives

The CO shall include a clause similar to the clause 24-23, Use of Explosives, in all solicitations and contracts for construction and a dismantling, demolition, or removal of improvements contract when the work may include the use of explosives.

#### 24.5.24 Contractor's Daily Report

The CO shall include a clause similar to the clause 24-24, Contractor's Daily Report, in solicitations and contracts for construction. If the specification and technical requirements package addresses the daily report requirement, the CO may eliminate this clause from the solicitation and contract. 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 Bonneville contracts.

#### 24.5.25 Field Contract Modifications

The CO may include the Clause 24-25, Field Contract Modification, in solicitations and contracts for construction when individuals to be delegated the authority of the clause are adequately trained. The CO shall provide Field Modification forms, appropriately tailored to the contract, to those given the authority to issue them. 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 individual changes that do not exceed \$10,000. Additionally, when multiple changes are issued under this authority they are limited to no more than 5% of the original award or no more than \$50,000. Any priced changes above \$10,000 and/or aggregate changes exceeding 5% of original contract award of \$50,000, shall be submitted to the contracting officer for further action. No additional field modifications may be issued under this authority until all previous field modifications have been officially incorporated into the contract by the contracting officer. Additionally, all executed field modifications must be sent to the CO within 10 business days of award. Failure to send executed field modifications to the CO in a timely manner, may result in unilateral revocation of field modification authority by the CO.

#### 24.5.26 Oral Modifications

The CO may include the clause 24-26, Oral Modification, in solicitations and contracts for construction. The CO shall not modify the contents of this clause.

#### 24.5.27 Equipment Cost Allowances

The CO may include a clause similar to the clause 24-27, Equipment Cost Allowances, in solicitations and contracts for construction when a fixed-price contract expected to be greater than \$150,000 is contemplated. This clause is useful in negotiation of equipment costs when equitable adjustments for contract changes are necessary.

#### 24.5.28 Quantity Surveys

The CO may insert the clause 24-28, Quantity Surveys, in solicitations and contracts when a fixed-price construction contract providing for unit pricing of items and for payment based on quantity surveys is contemplated. If it is determined at a level above that of the CO that is impracticable for Government personnel to perform the original and final surveys, and the Government wishes the contractor to perform these surveys, the clause shall be used with its Alternate I.

#### 24.5.29 Work Oversight in Cost-Reimbursement Construction Contracts

The CO shall insert the clause 24-29, Work Oversight in Cost-Reimbursement Construction Contracts, in solicitations and contracts when a cost-reimbursement construction contract is contemplated.

#### 24.5.30 Organization and Direction of the Work

The CO shall insert the clause 24-30, Organization and Direction of the Work, in solicitations and contracts when a cost-reimbursement construction contract is contemplated.

#### 24.5.31 Contracting By Negotiation

The CO shall insert, in solicitations for construction, the provision 24-31, Preparation of Proposals – Construction, when contracting by negotiation.

#### 24.5.32 Magnitude of Requirement

The CO shall include the provision 24-32, Magnitude of Requirement, in solicitations for construction and insert one of the price ranges listed in 24.2.4.

#### 24.5.33 Use of Equipment by the Government

The CO shall insert the clause 24-33, Use of Equipment by the Government, in contracts requiring heating and air conditioning of existing buildings if it may be necessary for Bonneville to operate all or part of the equipment before final acceptance of the contract.

#### 24.5.34 Subcontracts for Construction

The CO shall include the clause 24-34, Subcontracts - Construction, in solicitations and contracts for construction and the contract amount is expected to exceed \$150,000. The CO may insert the clause in solicitations and contracts for construction when the contract amount is expected to be at or below \$150,000. Use the clause with its Alternate I when the effort to be subcontracted involves the management of handling hazardous or toxic wastes.

#### 24.5.35 Site Visit

The CO shall insert a provision substantially the same as 24-36, Site Visit – Construction, in solicitations which include the clauses 24-3, Site Investigation and Conditions Affecting the Work, and 24-7, Differing Site Conditions. Alternate I may be used when an organized site visit will be conducted.

## 24.6 ARCHITECT-ENGINEER SERVICES

This subpart prescribes policies and procedures applicable to the acquisition of architect-engineer services.

### 24.6.1 Policy

- (a) Bonneville shall fulfill requirements for architect-engineer services through negotiated contracts for these services based on the demonstrated competence and qualifications of prospective contractors to perform the services at fair and reasonable prices.
- (b) Services that do not require performance by a registered licensed architect or engineer are not subject to the requirements of this subpart.
- (c) Architect-Engineer services usually consist of work performed by contract workers subject to the labor policies for service contracts. COs shall incorporate into solicitation and contracts the appropriate Service Contract Labor Standards and applicable labor laws in Part 10.

#### 24.6.1.1 Applicable Contracting Procedures

- (a) For facility design contracts, the statement of work shall require that the architect-engineer specify, in the construction design specifications, use of the maximum practicable amount of recovered materials consistent with the performance requirements, availability, price reasonableness and cost-effectiveness. Where appropriate, the statement of work also shall require the architect-engineer to consider energy conservation, pollution prevention, and waste reduction to the maximum extent practicable in developing the construction design specifications.
- (b) Solicitations and contracts that include the specification of energy-consuming products must comply with the requirements at subpart 15.5.
- (c) When the contract statement of work includes both architect-engineer services and other services, the CO shall follow the procedures in this subpart if the statement of work, substantially or to a dominant extent, specifies performance or approval by a registered or licensed architect or engineer.
- (d) Other than “incidental services” as specified in the definition of architect-engineer services in 2.2 and 24.6.1.2(a)(3), services that do not require performance by a registered or licensed architect or engineer, notwithstanding the fact that architect-engineers also may perform

those services, should be acquired pursuant to Parts 23 and/or 28. The CO may also opt to utilize Part 29, if desired.

#### 24.6.1.2 Implementation

- (a) COs should consider the following services to be “architect-engineer services” subject to the procedures of this subpart:
- (1) Professional services of an architectural or engineering nature, as defined by applicable State law, which the State law requires to be performed or approved by a registered architect or engineer.
  - (2) Professional services of an architectural or engineering nature associated with design or construction of real property.
  - (3) Other professional services of an architectural or engineering nature or services incidental thereto (including studies, investigations, surveying and mapping, tests, evaluations, consultations, comprehensive planning, program management, conceptual designs, plans and specifications, value engineering, construction phase services, soils engineering, drawing reviews, preparation of operating and maintenance manuals and other related services) that logically or justifiably require performance by registered architects or engineers or their employees.
  - (4) *Professional surveying and mapping services.* Surveying is considered to be architectural and engineering services and shall be procured from registered surveyors or architects and engineer firms. Mapping associated with the research, planning, development, design, construction, or alteration of real property is considered to be an architectural and engineering services. However, mapping services that are not connected to traditionally understood or accepted architectural and engineering activities, are not incidental to such architectural and engineering activities, or have not in themselves traditionally been considered architectural and engineering services, shall be procured pursuant to the provisions in Parts 23, 28, and/or 29.
- (b) COs may award contracts for architect-engineer services to any firm permitted by law to practice the professions of architecture or engineering.

#### 24.6.2 Selection of Firms for Architect-Engineer Contracts

- (a) Contracts for architect-engineer services shall generally be made using the tradeoff approach, unless the award is being made under an Indefinite-Delivery, Indefinite-Quantity contract, or a task order under a blanket purchase agreement (see 11.13.4).
- (b) Bonneville shall evaluate each potential contractor in terms of its –
- (1) Professional qualifications necessary for satisfactory performance of required services;
  - (2) Specialized experience and technical competence in the type of work required, including, where appropriate, experience in energy conservation, pollution prevention, waste reduction, and the use of recovered materials;
  - (3) Capacity to accomplish the work in the required time;
  - (4) Past performance on contracts with Government agencies and private industry in terms of cost control, quality of work, and compliance with performance schedules; and
  - (5) Location in the general geographical area of the project and knowledge of the locality of the project; provided, that application of this criterion leaves an appropriate number of qualified firms, given the nature and size of the project.

#### 24.6.3 Performance Evaluation

Upon contract completion, performance evaluations shall be prepared for each architect-engineering contract of \$150,000 or more, and for each contract terminated for default

regardless of contract value. Past performance evaluations may also be prepared for contracts below \$150,000 (see subpart 14.16).

#### 24.6.4 Government Cost Estimate for Architect-Engineer Work

- (a) An independent Government estimate of the cost of architect-engineer services shall be prepared and furnished to the CO before commencing negotiations for each proposed contract or contract modification expected to be more than \$150,000. The estimate shall be prepared on the basis of a detailed analysis of the required work as though Bonneville were submitting a proposal.
- (b) Access to information concerning the Government estimate shall be limited to Government personnel whose official duties require knowledge of the estimate. An exception to this rule may be made during contract negotiations to allow the CO to identify a specialized task and disclose the associated cost breakdown figures in the Government estimate, but only to the extent deemed necessary to arrive at a fair and reasonable price. The overall amount of the Government's estimate shall not be disclosed.

#### 24.6.5 Negotiations

- (a) Negotiations shall be conducted in accordance with subpart 12.7.
- (b) The CO shall inform the firm that no construction contract may be awarded to the firm that designed the project, except as provided in 24.2.8.
- (c) During negotiations, the CO shall inform the firm of the acceptable and allowable costs (see Part 13 and Appendix 13; or for Progressive Design Build projects see clause 24-43.)
- (d) Because selection of firms is based upon qualifications, the extent of any subcontracting is an important negotiation topic. The clause prescribed at 24.6.8.5, Subcontracts – Architect-Engineer Services, limits a firm's subcontracting to firms agreed upon during negotiations.

#### 24.6.6 [Reserved]

#### 24.6.7 Liability for Government Costs Resulting from Design Errors or Deficiencies

Architect-engineer contractors shall be responsible for the professional quality, technical accuracy, and coordination of all services required under their contracts. A firm may be liable for Government costs resulting from errors or deficiencies in designs furnished under its contract. Therefore, when a modification to a construction contract is required because of an error or deficiency in the services provided under an architect-engineer contract, the CO (with the advice of technical personnel and legal counsel) shall consider the extent to which the architect-engineer contractor may be reasonably liable. The CO shall enforce the liability and issue a demand for payment of the amount due, if the recoverable cost will exceed the administrative cost involved or is otherwise in the Government's interest. The CO shall include in the contract file a written statement of the reasons for the decision to recover or not to recover the costs from the firm.

#### 24.6.8 Contract Clauses

##### 24.6.8.1 Redesign Responsibility for Design Errors or Deficiencies

The CO shall insert the clause 24-37, Responsibility of the Architect-Engineer Contractor, in all architect-engineer contracts.

##### 24.6.8.2 Work Oversight in Architect-Engineer Contracts

The CO shall insert the clause 24-38, Work Oversight in Architect-Engineer Contracts, in all architect-engineer contracts.

#### 24.6.8.3 Requirements for Registration of Designers

The CO shall insert the clause 24-39, Requirements for Registration of Designers, in architect-engineer contracts, except that it may be omitted when the design will be performed (1) outside the United States and its outlying areas; or (2) in a State or outlying area of the United States that does not have registration requirements for the particular field involved.

#### 24.6.8.4 Supervision and Inspection Services

The CO shall insert the clause, 24-40, Option for Supervision and Inspection Services, in solicitations and contracts for architect-engineer services when supervision and inspection services by the architect-engineer may be required during construction.

#### 24.6.8.5 Subcontractors – Architect-Engineer Services

The CO shall insert the clause 24-41, Subcontractors – Architect-Engineer Services, in architect-engineer contracts when the prime contractor is utilizing subcontractors in the performance of the work.

#### 24.6.8.6 Authorized Purchasers – Construction

The CO shall insert the clause 24-42, Authorized Purchaser – Construction, in contracts when allowing the contractor, as authorized in writing by the CO, to make purchases on behalf of Bonneville under the terms and conditions of a Bonneville contract/agreement.

### **24.7 PROGRESSIVE DESIGN BUILD**

#### 24.7.1 Applicability

This subsection applies to all solicitations and contracts that use the Progressive Design-Build (PDB) delivery method. PDB contracts are subject to the requirements in other parts of the BPI, which shall be followed when applicable. However, when a requirement in this part is inconsistent with a requirement in another part of the BPI, this subsection shall take precedence if the acquisition of PDB services is involved.

#### 24.7.2 Definitions

*Allowance* means a budget amount for those items for which there are unidentifiable risks, incomplete designs, or unknown conditions that have been estimated by the Design-Builder and are included in a GMP. If the final cost of an allowance item is more or less than the estimated amount, the allowance may be increased or decreased by a commensurate amount with Bonneville's approval.

*Basis of Design Documents* means those documents that are set forth in a contract modification that establish the Scope of Work for phase 3 of the project for a Task Order and/or Task Order Project.

*Bidding or Bids* as used in this contract to mean either RFQ (Quote) or RFP (Proposal); not an Invitation For Bid (IFB) or Sealed Bid.

*Buyout* is defined as the point in the project where the Design-Builder has executed all trade partner subcontracts.

*Component Task Order Guaranteed Maximum Price (GMP) proposal* is a Guaranteed Maximum Price (GMP) proposal that covers a partial, or component element of the construction for a specific Task Order. Component GMPs are typically negotiated prior to the final GMP. See “Early Work Construction Packages.”

*Component Guaranteed Maximum Price Proposal (CGMP)* represents the scope and total costs for a discrete component of work required to implement a project. The CGMP proposal may authorize performance of a complete phase of a project, or a discrete activity within a phase. A CGMP proposal may also be used to authorize the implementation of early construction work during phase 2 of the project. Examples of work performed under a CGMP proposal include the ordering or long-lead items or starting a particular phase of construction for which the risks are adequately identified and the scope of work is defined sufficiently for Bonneville and the Design-Builder to reasonably determine price. The CGMP proposal shall include all the information required in the contract documents and represents the Design-Builder’s total compensation for the Scope of Work included in the CGMP proposal. All CGMP proposals will be conformed into the final Project GMP proposal.

*Construction Completion* is the date when all of the construction work for a Task Order/Project is completed and accepted by Bonneville and the deliverables required in the Scope of Work for the applicable Task Order/Project have been delivered and accepted by Bonneville. Construction completion includes, but is not limited to final cleanup of the premises, completion of punch lists, delivery of warranty and all record documents, completion of inspections and acceptance of all tasks set forth in the applicable contract modification for construction completion.

*Construction Documents* are the documents, consisting of drawings and specifications, to be prepared or assembled by the Design-Builder consistent with the basis of design documents unless a deviation from the basis of design documents (as applicable) is specifically set forth in a change order executed by both the Owner and Design-Builder, as part of the design review process contemplated by this contract.

*Construction Packages* is a portion of the construction work, which will be performed after a Task Order GMP or Component GMP has been established. These Construction Packages generally occur in phase 3 though can take place before that; see “Early Work Construction Packages”.

*Design-Builder’s Contingency* is an amount agreed upon by the Design-Builder and Bonneville and included within a Task Order GMP. In developing the GMP, the Design-Builder and Bonneville shall develop the Design-Builder’s contingency collaboratively and in a transparent manner. Use of the Design-Builder’s contingency requires approval by the Owner.

*Contract Price* means the cumulative value of all GMPs that are developed and agreed by the parties. The contract price is the total maximum cost of the work to design and construct the entire project. Design-Builder shall be responsible for all costs in excess of the contract price.

*Cost of the Work* are set forth in the GMP Cost Principles for PDB in Clause 24.44.

*Design Contingency* is an amount carried in the Design-Builder's GMP or CGMP during design development to cover costs which are not reasonably inferable except for material changes in scope. The costs attributable to clarifications, assumptions, and further development and completion of the drawings and specifications.

*Design Materials* means any and all documents, shop drawings, electronic information, including computer programs and computer generated materials, data, plans, drawings, sketches, illustrations, specifications, descriptions, models and other information developed, prepared, furnished, delivered or required to be delivered by, or for, the Design-Builder: (1) to the Owner under the contract documents; or (2) developed or prepared by or for the Design-Builder specifically to discharge its duties under the contract documents.

*Design-Builder* is a contractor Bonneville has selected to provide design and construction services. All references in this contract to the contractor shall mean the Design-Builder.

*Design-Builder's Fee* is established in the Design-Builder's Component GMP or GMP. The Design-Builder's Fee is calculated as the Cost of Work included in the CGMP or GMP multiplied by the Design-Builder's Fee Percentage. The Design-Builder's Fee in the CGMP or GMP shall not be based on contingency costs included within the CGMP or GMP. The Design-Builder's Fee will be applied to contingency values when the contingency use is approved by the Owner.

*Design-Builder's Fee Percentage* is the amount set forth in the Design-Builder's Business/Pricing proposal and in the IDIQ Schedule of Prices. During phases 1-4, the Design-Builder's compensation shall charge the Fee Percentage on the cost of the work as set forth below. The Design-Builder's Fee Percentage includes the following items, which shall not be charged as a cost of the work: 1) all profit and overhead of the Design-Builder for this Project; 2) all regional and home office overhead expenses, including labor and materials, phone, facsimile, postage, internet service, and other incidental office expenses attributed to Work on this project, and 3) all other direct and indirect costs incurred by the Design-Builder that are not otherwise specifically identified in the Cost of the Work.

*Final Completion* is the date when all tasks set forth for phase 4 of a Task Order/Project have been completed and accepted by Bonneville, including but not limited to the completion of the work.

*Guaranteed Maximum Price (GMP)* is the maximum compensation Owner agrees to pay Design-Builder for the scope of work included in a Guaranteed Maximum Price or Component Guaranteed Maximum Price Proposal. The Design-Builder agrees that it will be responsible for paying all costs of completing the work described in the GMP or CGMP Proposal and shall not seek reimbursement from the Owner for any costs that exceed the GMP, as adjusted in accordance with the Contract Documents including those authorized by written Change Order. The GMP shall be prepared by the Design-Builder in consultation with Bonneville.

*Guaranteed Maximum Price Proposal* represents the scope and total costs for completion of all Phases of Work for a Project. The Guaranteed Maximum Price Proposal shall include the costs for all Component Guaranteed Maximum Price Proposals, if any, previously approved by the Owner. The Guaranteed Maximum Price Proposal shall include all information required in the Contract Documents and represents the Design-Builder's total compensation for the Scope of Work included in the GMP Proposal and all incorporated CGMP Proposals.

*Guaranteed Maximum Price Savings* means the difference as of the date of final completion of the Work, between the Guaranteed Maximum Price (as it may be adjusted in accordance with the Contract terms, including any unspent contingency and allowance amounts), and the total aggregate sum of the Cost of Work plus the fee.

*Insurance, Taxes and Bonding Costs* means the costs to provide the insurance and bonds required under this contract. Insurance, Taxes and Bonding Costs shall not be considered a Cost of the Work. Design-Builder shall be reimbursed insurance, taxes, and bonding costs without applying the Design-Builder's Fee Percentage.

*Owner's Contingency* is a fund to cover cost growth during the project used at the discretion of the Owner usually for costs that result from Owner directed changes or unforeseen Site conditions. The amount and use of the Owner's contingency shall be at the Owner's sole discretion. The Owner's contingency is not part of the GMP. Owner's contingency is separate from the PDBs contingency, is controlled by the owner, and is transmitted to the PDB in the form of a task order modification, which typically increases the GMP.

*Owner's Project Criteria* are developed by or for Owner to describe Owner's program requirements and objectives for the project, including use, space, price, time, site, and expandability requirements, as well as submittal requirements and other requirements governing Design-Builder's performance of the work. Owner's Project Criteria may include conceptual documents, design criteria, design performance specifications, design specifications, and LEED® or other sustainable design criteria and other project-specific technical materials and requirements.

*Phases* are defined as discrete elements of work for which the Design-Builder will receive a Notice to Proceed. The end of each phase represents a decision point or stage gate at which the Owner will determine whether to advance the project into the next phase.

*Reliable Design Decision* is a decision, development, or election that refines the Basis of Design Documents, that is approved by the Owner and that is set forth in the design evolution log. A Reliable Design Decision cannot change the Owner's Program or the Basis of Design Documents but shall instead constitute a further development or refinement of the design for the Task Order Project with which all subsequent design materials, design submissions and construction documents shall be consistent.

*Schedule of Items (SOI)* is set forth at Part B to this contract and sets forth contract terms. The IDIQ SOI is applicable to all work under this contract. A Task Order Schedule of Items is applicable only to an identified Task Order.

*Schedule of Values (SOV)* is a section in the CGMP or GMP proposal that contains a comprehensive breakdown of the value and cost of the project. The SOV is a list of every work item on a project using the CSI format organized according to anticipated bid packages and including quantities, unit prices, and cost extension. All costs will be organized by Work Order as applicable.

*Substantial Completion* is the stage in the progress of the work when the work or designated portion thereof is sufficiently complete in accordance with the contract documents so that the Owner can occupy or utilize the work for its intended use. The parties may include more specific requirements for Substantial Completion in Change Orders, Task Orders, and/or Contract Modifications.



*Task Order* (when applicable) is when the work is authorized by a Task Order. Each Task Order will be developed collaboratively as set forth in this contract. Each Task Order will describe the Task Order Projects within the Task Order. Provided the parties enter into a contract modification, the parties will enter into the subsequent phases of the outlined in the contract documents for each Task Order/Project.

*Task Order Project* (when applicable) is when the parties develop within each Task Order “Task Order Projects”, which shall be a separate scope of work within the Task Order. Each Task Order Project shall have a separate GMP.

*The Task Order/Project Phase Sequencing Plan* is the plan developed by the Design-Builder in collaboration with the Owner in Phase 1 that sets forth the phases for each Task Order and Task Order Project and whether each Task Order Project proceeds through Phases 2-4 1) separately; 2) in bundles; or 3) together with other Task Order Projects in a single Task Order.

*Trend* is an issue that has been identified by the Design-Builder or the Owner that may cause a change to the Owner’s Project Criteria or the Basis of Design Documents, as applicable, and/or any Contract Term. All trends will be captured in a Trend Log for each project.

*Design Evolution Log* is a document intended to record design decisions during the design development phase of the project that are consistent with the OPR and contract terms and identify those decisions that cause a change to the OPR or contract terms. The DEL includes documentation related to design decisions and consequences made during design development.

*Work* is the services, design, and construction to be completed by the Design-Builder under the terms of this Contract. Work specifically includes the furnishing of all services, labor, materials, equipment, and all incidentals necessary to the successful completion of the services, design, and construction, whether expressly required by or reasonably inferable from the contract documents, whether they are temporary or permanent, and whether they are incorporated into the finished work or not. Work also includes all other obligations imposed on the Design-Builder by the contract.

*Work Order* will be issued by the owner for each Task Order Project prior to Phase 1 for each Task Order. Design-Builder must have a Work Order in order to be compensated under this contract. Design-Builder must identify the applicable Work Order(s) for each invoice.

#### 24.7.3 Policy

Bonneville shall fulfill requirements for PDB through negotiated contracts for these services based on the demonstrated competence and qualifications of prospective contractors to perform the services with an emphasis on developing a trusting, collaborative, and transparent partnership.

PDB services are typically led by a General Contractor with expertise in PDB delivery, but can also be led by an Architectural/Engineering firm of similar size and expertise. The CO shall make a determination in the acquisition strategy.

To comply with a “best buy” the Design Builder’s Fee is proposed during solicitation and provides Bonneville with a meaningful level of price competition. The CO shall consider all factors in making evaluation criteria centered on qualifications. It is strongly preferred that

contracts for PDB delivery method use the tradeoff approach and weight all non-price evaluation factors more heavily than price.

PDB contracts require specific cost principles to properly negotiate and administer GMP. The CO shall insert clause 24.44, Guaranteed Maximum Price (GMP) Cost Principles for Progressive Design Build in all solicitations and contracts using the PDB delivery method. PDB contracts are not subject to BPI Part 13 and Appendix 13.

The CO shall disclose Bonneville's estimated budget amount for the project or total program if more than one project is contemplated.

There are no required professional PDB credentials, however, it is strongly preferred that members of the PDB Team are Design-Build Institute of America (DBIA) certified or similar.

The CO shall consider the need for an Owner's Consultant (OC) to assist Bonneville with PDB. If applicable, the OC contract shall be awarded prior to initiating the RFP for the PDB contract. The OC shall be included in the preparation of the solicitation, evaluation, award, and administration of the contract. The OC's scope generally includes the following services:

- (1) Consultation for PDB delivery
- (2) Estimating
- (3) Auditing
- (4) Commissioning
- (5) Code Compliance
- (6) Owner's Quality Representation
- (7) Special Inspections and Materials Testing

Bonneville shall assemble a Project Team that is experienced and/or formally trained in PDB delivery. The requisitioner shall verify that program sponsors and resources are available to staff and manage the contract for the duration of the project. This includes the need for an OC and how the OC will be engaged in the project.

#### 24.7.4 Solicitation

This subpart prescribes policies and procedures for the use of the Two-Phase Progressive Design-Build selection process for all PDB contracts.

- (a) Phase One of the solicitation shall include –
  - (1) The Statement of Work. Bonneville shall develop, either in-house or by contract, a Statement of Work (SOW) that defines the project and states the requirements. The SOW may include criteria and preliminary design, budget parameters, and schedule; or
  - (2) Delivery requirements. The SOW shall include program goals that align with PDB delivery. Development of the program goals shall be done in collaboration with the CO and the OC, if an OC contract is awarded to assist with PDB. Program goals may include the following, subcomponents to each goal and shall be included as needed:
    - (i) Effective and efficient design.
    - (ii) Effectively use sustainable building materials and methods to exceed BPA's goals.
    - (iii) Maximize Efficiency of Phasing and Schedule.
    - (iv) High Functioning Team.
    - (v) Efficient and Transparent Pricing.
    - (vi) Design for Health and Safety.

- (3) Statement of Qualifications; and
- (4) The Phase One evaluation factors includes.
  - (i) Team Organization
  - (ii) Demonstrated Experience with Projects of Similar Scope and Complexity
  - (iii) Contractor Safety Rating
- (5) Letters from Insurance and Surety; and
- (6) Shortlist Considerations including;
  - (i) The most highly qualified offerors
  - (ii) A statement of the maximum number of offerors that will be selected or shortlisted to submit phase two proposals. The maximum number specified in the solicitation shall be determined by the CO, but generally not to exceed three to four offerors. The CO shall document this determination in the contract file.
  - (iii) After evaluating Phase One proposals, the CO shall select the most highly qualified offerors (not to exceed the maximum number specified in the solicitation) and request that only those offerors submit Phase Two proposals.
- (b) Phase Two of the solicitation shall include –
  - (1) Interactive Meeting. The purpose of the Interactive Meeting is to evaluate how well the shortlisted Offerors and their proposed Design-build team collaborates with BPA. Offerors should consider the Interactive Meeting to be the first project meeting with BPA and conduct the meeting as if the proposed design-build team was selected on the project. The Interactive Meeting will occur before the submission of the Technical Proposal, and is evaluated and scored as part of the Technical Proposal. See Supply Chain’s PDB Guide for additional information.
  - (2) Submission of a technical and price proposal, which shall be evaluated separately, in accordance with subpart 12.5. The offeror’s price/cost proposal shall be the Design-Build Fee Percentage that will be inserted into Section B Part 1 Schedule of Pricing.
- (c) Evaluation
  - (1) The CO shall consider the following evaluation factors or similar, in addition to price, for the Technical Proposal;
  - (2) Overall Management Approach
  - (3) Project Design
  - (4) Project Controls
  - (5) Scheduling and Sequencing
  - (6) Key personnel
  - (7) Minutes from the Interactive Meeting

#### 24.7.5 Contract Clauses

The CO shall include the following clauses in all Progressive Design Build contracts:

24-43 Progressive Design Build (PDB)

24-44 GMP Cost Principles for PDB



## 25 INTERAGENCY ACQUISITIONS

### 25.1 SCOPE OF PART

- (a) This part prescribes policies and procedures for Interagency Acquisitions. This part does not include Interagency Grants, Financial Assistance and Cooperative Agreements. Bonneville's financial assistance framework is outlined and governed solely in accordance with the Bonneville Financial Assistance Instructions (BFAI). The BFAI is available at <http://www.bpa.gov/Doing%20Business/finassist/Pages/default.aspx>.
- (b) This part prescribes policies and procedures, when financial assistance instruments are not utilized with Federal, State, Local and Federally Recognized Tribal Governments, Institutions for Higher Education (IHE) and Non-profit organizations.
- (c) Additionally, this part prescribes policies and procedures for utilizing Memorandums of Agreement and Memorandums of Understanding.

### 25.2 INTERAGENCY AGREEMENTS (IAA)

#### 25.2.1 Scope of Subpart

This subpart prescribes policies and procedures to conduct business with other government entities including Federal, State, Local, and Federally Recognized Tribal Governments and in rare instances with non-profit organizations through Interagency Agreements (IAA).

#### 25.2.2 General

These government entities are accountable to the public and are subject to similar statutes which sometimes contain more restrictive regulations than Bonneville. When conducting business with other government entities, an IAA is the preferred method to acquire goods and services. An IAA provides a statement of work and payment mechanism without negotiating terms and conditions as usually performed in a commercial type contract.

#### 25.2.3 Policy

- (a) Bonneville may enter into IAAs based on the authority of the Bonneville Project Act (16 U.S.C. § 832.). Other Federal entities enter into IAAs based on the authority of the Economy Act (31 U.S.C. § 1535). Under the Bonneville Project Act, Bonneville may conduct business with other government entities through the use of an IAA. An IAA would be appropriate in the following situations:
  - (1) A statute, executive order, court order or law expressly authorizes or requires that an acquisition be made through another government agency.
  - (2) A government entity needs supplies or services and obtains them using another department and/or agency's contract.
- (b) A non-profit organization seeks reimbursement for supplies or services when neither Financial Assistance nor a contract is appropriate, and the IAA is expressly used as a payment mechanism. An example is a non-profit organization collecting on behalf of a local, state or federal government for payment of supplies or services. The CO shall document that using an IAA represents the best procurement approach to meet the business need. At a minimum, the CO should cite:
  - (1) The statute, executive order, court order or law that expressly authorizes or requires that an acquisition be made through another government agency; or
  - (2) Explain why the use of an interagency acquisition is in the best interest of Bonneville.

#### 25.2.4 Procedures

- (a) IAA Procedures.
- (1) The IAA may be placed on any form or document that is acceptable to both agencies. The form or document used must provide the acquisition authorization (i.e., Bonneville Power Act, The Economy Act, or other statute, executive order, court order, or law), a description of the work (i.e., Statement of Work), and payment mechanism for the supplies and/or services.
  - (2) The CO is authorized to sign another agency's IAA forms.
  - (3) If the CO determines there are inherent risks with another agency's form, the CO should request an OGC review.
  - (4) The order, shall at a minimum, must include the following:
    - (i) A description of the supplies and/or services required;
    - (ii) Delivery requirements;
    - (iii) A funds citation or work order, whichever is appropriate;
    - (iv) A payment provision; and
    - (v) The acquisition authority as appropriate (i.e., Bonneville Power Act, The Economy Act, or other statute, executive order, court order or law).
- (b) Payment Method.
- (1) Bonneville may ask the requesting agency, in writing, for advance payment for all or part of the estimated cost of furnishing the supplies or services. Adjustment on the basis of actual costs shall be made as agreed to by the departments and/or agencies.
    - (i) Advance payment is authorized from a Federal agency to another Federal agency, or from a Federal agency to a Federally Recognized Indian Tribal Government.
    - (ii) For guidance on all other types of advance payments refer to 22.1.4.1.
  - (2) If approved by Bonneville, payment for actual costs may be made by the requesting agency after the supplies or services have been furnished.
  - (3) In no event shall Bonneville be liable for any fee or charge in excess of the actual costs (or estimated cost if the actual cost is not known) of entering into and administering the IAA under which the order is filled.
- (c) Other Terms and Conditions.
- (1) Bonneville and the other agency should agree to procedures for the resolution of disagreements that may arise under interagency acquisitions.
  - (2) No other terms and conditions are required to execute IAA's.
- (d) Close out Process.
- The Treasury Interagency Agreement process identifies and standardizes Treasury-wide IAA procedures and shall apply to interagency agreements that are created manually (paper forms) or created using G[1]Invoicing. BPA follows the IAA process as identified at Treasury-IAA-Process-Jan2021.pdf TFM, which addressees the preparation, processing, execution, administration and closeout of interagency agreements. An order shall be considered "closed" upon delivery of the product or completion of services from the servicing trading partner and the full amount of the order has been Intra-Governmental Payment and Collection (IPAC'd). No further action is required. If a balance exists between the actual IPAC'd amounts and the amount identified on the order, then confirmation that all IPACs have been submitted and payment received must be provided by the servicing trading partner. The order shall be modified to reflect the actual amount IPAC'd and then any balance must be de-obligated in the bureau's financial system.

## **25.3 CONTRACTS WITH STATE, LOCAL, AND FEDERALLY RECOGNIZED INDIAN TRIBAL GOVERNMENTS (IGC)**

### **25.3.1 Scope of Subpart**

This subpart provides the principles for acquisitions with State, Local and Federally recognized Indian Tribal Governments. The following subpart is to address a contract relationship with State, Local and Federally recognized Indian Tribes.

### **25.3.2 Policy**

- (a) If no other contracting method is available, the CO may use an Intergovernmental Contract (IGC).
- (b) The CO shall select the appropriate contract type and appropriate procurement approach based on the nature of the project and inherent risks following the requirements in Part 7.
- (c) The CO shall document that the use of an IGC (versus an IAA or grant/agreement executed under the BFAI) represents the best procurement approach.
- (d) For determining the costs applicable to work performed by State, Local and Indian Tribal Governments refer to the BFAI.
- (e) The CO shall closeout a cost reimbursement IGC when it is determined that all applicable administrative actions and work of the IGC have been completed by the non-Federal entity. If the non-Federal entity fails to provide the closeout documents, BPA will proceed to close out the IGC with the information available.
- (f) The non-Federal entity shall submit, no later than 180 calendar days after the end date of the period of performance, all invoices (including final invoice), financial reports, performance reports, and other reports, as required by the terms and conditions of the IGC. If the non-Federal entity cannot meet this requirement, the non-Federal entity shall notify the BPA CO prior to the due date of the mitigating circumstances as to why they could not submit the closeout documents and state when the closeout documents will be provided.
- (g) Post-closeout adjustments and continuing responsibilities allow BPA to make financial adjustments to a previously closed award such as resolving indirect cost payments and making adjustments to final payments. In such instances, the CO may open a closed IGC to make a financial adjustment, with the Supervisory CO's approval.
- (h) The Federal awarding agency must make every effort to complete closeout actions no later than one year after the end of the period of performance unless otherwise directed by authorizing statutes.
- (i) If the non-Federal entity does not submit all reports and invoices in accordance with this section within one year of the period of performance end date, the Federal awarding agency must report the non-Federal entity's material failure to comply with the terms and conditions of the award with the OMB-designated integrity and performance system (sam.gov). Federal awarding agencies may also pursue other enforcement actions per § 200.339.

### **25.3.3 Contract Clause**

The CO shall insert the clause 25-1, IGC Closeout, in all solicitations and contracts for IGC awards.

## **25.4 CONTRACTS WITH EDUCATIONAL INSTITUTIONS**

### **25.4.1 Scope of Subpart**

This subpart prescribes policies and procedures for contracting with IHEs.

#### 25.4.2 Policy

- (a) If no other agreement method is available, the CO may use a contract.
- (b) The CO shall select the appropriate contract type and appropriate procurement approach based on the nature of the project and inherent risks following the requirements in Part 7.
- (c) The CO shall document that the use of a contract (versus an IAA or grant/agreement) represents the best procurement approach.
- (d) For determining the costs applicable to work performed by IHE refer to the BFAI.

### **25.5 CONTRACTS WITH NONPROFIT ORGANIZATIONS**

#### 25.5.1 Scope of Subpart

This subpart prescribes policies and procedures for contracting with nonprofit organizations.

#### 25.5.2 Policy

- (a) If no other agreement method is available, the CO may use a contract.
- (b) The CO shall select the appropriate contract type and appropriate procurement approach based on the nature of the project and inherent risks.
- (c) The CO shall document that the use of a contract (versus an IAA or financial assistance) represents the best approach.
- (d) For determining the costs applicable to work performed by nonprofit organizations refer to the BFAI.

### **25.6 MEMORANDUM OF AGREEMENT / MEMORANDUM OF UNDERSTANDING**

#### 25.6.1 Scope of Subpart

This subpart provides for Memorandum of Agreements (MOAs) / Memorandum of Understandings (MOUs). MOUs and MOAs are distinguished from contracts and financial assistance because, while it may commit funds, it is not a mechanism for direct payment or transfer of funding. The terms MOA and MOU are used interchangeably in this subpart.

#### 25.6.2 Policy

- (a) MOUs require a review by OGC and are managed and coordinated with the affected program office.
- (b) The authorization to sign a MOU is coordinated through the OGC. Typically MOUs are signed by delegated program personnel.
- (c) A CO is not authorized to sign MOAs or MOUs.



## 26 MICRO-PURCHASE PROGRAM (MPP)

This part prescribes the policies and procedures for the use of the Government Purchase Card (GPC or P-Card), Convenience Check, the Authorization to Pay (ATP) process, and the usage of these procurement tools under the Micro-Purchase Program (MPP).

### 26.1 GENERAL

- (a) The Micro-Purchase Program (MPP) is intended to streamline small purchase methods by minimizing paperwork, streamlining the payment process, and simplifying the administrative effort normally associated with traditional contract methods for acquiring supplies and services. The Micro-Purchase Program employs a set of purchasing tools that can be used in a decentralized manner to facilitate Bonneville operations, both locally and in the field.
- (b) The Micro-Purchase Program encompasses three tools: P-Card, ATP, and Convenience Checks. Within this policy, the term P-Card means all three tools, unless specifically called out. All tools contained in this program are governed by the exact same set of rules and limits, with differences only existing in specific usage (e.g., ATP requires the Asset Suite system for payment, whereas the P-Card makes payments immediately).
- (c) Bonneville is an authorized user of the U.S. General Services Worldwide Federal Supply Service for Purchase, Travel, and Fleet. GSA maintains a contractual relationship with a financial institution, to which Bonneville issued an order against for use of the Government-Wide Purchase Card Program.
- (d) The primary use of the P-Card is to purchase supplies and services for official government business valued at or below the micro-purchase threshold. The P-Card may also be used as a method of payment in conjunction with other contracting methods above the micro-purchase threshold depending on the type of contracting vehicle utilized, with the appropriate delegation of authority.

### 26.2 DEFINITIONS

As used in this part –

*Agency/Organizational Program Coordinator (A/OPC)*, also known as the P-Card Program Coordinator, is the person responsible for managing the Micro-Purchase Program for Bonneville and establishes program guidelines. The A/OPC helps set up accounts; serves as liaison between the program participants and the purchase card servicing bank; provides on-going advice; audits P-Card accounts as required; and keeps necessary account information current. This individual serves as the focal point for answering management inquiries, establishing, and maintaining accounts, issuing and destroying P-Card and Convenience Checks.

*Approving Official (AO)* is the person who has primary responsibility for ensuring the Cardholder has used the P-Card or the ATP process in accordance with this policy and procedures in the MPP Manual. The AO certifies the Cardholders monthly statement and approves the accounting via Bonneville's financial system. The AO serves as the initial internal control to prevent or identify fraud, abuse, or misuse of the P-Card.

*Authorization to Pay (ATP)* is a process that can be used in lieu of a P-Card. Only authorized users of the Micro-Purchase Program can use the ATP. The authority to use the ATP may be granted explicitly at the time of card issuance and will generally be given to all Cardholders at the discretion of the A/OPC. Additionally, the ATP process is governed by the exact same set of policies and limits as assigned to a Cardholder.

*Cardholder (CH)* is a person with authority delegated by the HCA (via the A/OPC) to make commercial off-the-shelf (COTS) purchases of supplies and services with a P-Card.

*Competition Threshold* means purchases at or below the competition threshold of \$25,000 for Construction and Services, and \$50,000 for Supplies.

*Convenience Check* is a check (also known as a third-party draft) written against a P-Card. Convenience Checks are a payment or procurement tool intended only for use with merchants that do not accept P-Cards. Convenience Checks should be used as a payment method of last resort, only when no reasonable alternative merchant is available who accepts the card and utilizing the ATP process is not viable. Convenience Checks are used infrequently at Bonneville.

*Emergency Purchase* is an event of significant impact requiring the activation of the Agency Incident Management Team and an Incident Commander (IC) is assigned. It does not have the same meaning of one-time immediacy for urgent purchases as defined below. Part 27 outlines the purchasing policies, procedures, and authorities for emergency purchases.

*Final Pay Clearance* is the form and process used to ensure that the employee has returned Bonneville property prior to their leaving. For the Micro-Purchase Program, this means cancellation of the P-Card and ATP authority and receipt of all certified statements.

*Micro-Purchase* means an acquisition of supplies, services, construction, and A&E, the aggregate amount of which does not exceed the micro-purchase threshold. Micro-purchases do not require provisions or clauses, but does not prohibit the inclusion of clauses, and is at the discretion of the CO.

*Micro-Purchase Threshold* means:

- (a) \$2,000 for Construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (formally known as Davis Bacon); and
- (b) \$2,500 for Services subject to 41 U.S.C. chapter 67, Service Contract Labor Standards (formally known as Service Contract Act); and
- (c) \$50,000 for Supplies

Micro-Purchase Program Manual (MPP Manual) is the operations program manual that contains procedures and guidance for all Bonneville personnel who have a role in P-Card transactions and the ATP process.

*Purchase Card*, also known as P-Card, is the charge card issued by a financial institution to named Bonneville employees, used to execute certain Bonneville purchases as described in this Part.

*Split purchase* is separating a requirement that exceeds the micro-purchase threshold, or the Cardholder's single purchase threshold, into two or more buys as a means of circumventing the purchase limit.

*Urgent (Non-Emergency) Purchase* is a purchase needed to complete assigned projects that would otherwise be unduly delayed. Urgent is defined as an unusual and compelling urgency where Bonneville would be seriously injured or harmed, financially or otherwise, if the purchase was not executed immediately.

## **26.3 POLICY**

- (a) Unless otherwise prohibited elsewhere in the BPI, the P-Card and/or the ATP process shall be used for the ordering and paying for standard, commercially available off-the shelf (COTS) items under the micro-purchase threshold.
- (b) The P-Card is the preferred method to acquire services up to \$2,500. The P-Card may be utilized for professional services up to the micro-purchase threshold only after a contracting

officer (CO) makes a written determination that the Service Contract Labor Statute is not applicable to the purchase. The Cardholder shall include this determination with the vendor invoice.

- (c) The P-Card may be used as the procurement method for construction up to \$2,000.
- (d) To establish a new P-Card, ATP authority, or convenience check account with the servicing bank, an application request form (Bonneville Form F4230.09e, Micro-Purchase Authority Application Request) must be completed. The application form shall clearly identify the single and monthly purchase thresholds to be established for the new account.
- (e) *Purchase Account Limits*. P-Card authorized users and convenience check account holders are subject to a single purchase threshold and a monthly purchase threshold as set by the A/OPC.
  - (1) *Single Purchase Limits (SPL)*. A cardholder's SPL is based on operational needs. A "single purchase" is the total of those items purchased at one time from a particular vendor. Multiple items may be purchased at one time using the P-card; however, no single purchase may exceed the authorized SPL. Splitting up a purchase through the use of a P-Card to remain under the SPL is a violation of procurement policy.
    - (i) Non-warranted cardholders. The SPL shall not exceed the micro-purchase threshold, unless an appropriate delegation of procurement authority, or single purchase exception waiver, is granted by the HCA.
    - (ii) Warranted cardholders. The limit shall be established the individual's warrant authority.
  - (2) *Monthly Purchase Limit (MPL)*. The MPL is the maximum total dollar amount a Cardholder is authorized to procure each month. The MPL shall be established for each Cardholder based on organizational budget and prudent acquisition needs. This amount is established at the servicing bank when a Cardholder's account is first established. The MPL applies to the monthly total of all P-Card, ATP, and Convenience Check transactions. This amount is similar to a "credit limit".
- (f) For purchases above the micro-purchase threshold, P-Cards may be used by Cardholders, with the appropriate delegation of procurement authority, to make payments against contracts, purchase orders, or orders under blanket purchase agreements (BPAs).
- (g) For payments against contracts, purchase orders, or order under BPAs, the P-Card may be used within the limits established by an approved delegation.
- (h) Use of the P-Card on orders above the micro-purchase threshold, shall comply with all applicable policies and procedures of the BPI. Use of the P-Card, the ATP process, or the Convenience Check does not relieve the purchase from any procurement requirements of this policy.
- (i) For purchases requiring special approvals or circumstances refer to the Micro-Purchase Program Manual, Section 9: Special Types of Purchases. These special types of purchases may include testing, inspection, insurance and/or certification/license requirements, or property that must be tracked and tagged.
- (j) P-Cards shall be used only by the employee whose name appears on the card and shall not be re-delegated.
- (k) Deliberate use of MPP authority for other than authorized purchases, or Cardholders who fail to properly execute their assigned responsibilities, may be held personally liable to Bonneville for the amount of any unauthorized purchases. These actions may be viewed as committing fraud against the Government and subject to disciplinary action and/or criminal penalty under 18 U.S.C. § 287. This may also result in the revocation of the MPP authority and removal of the Cardholder from participation in the Micro-Purchase Program.
- (l) Personal use items shall not be purchased with Bonneville funds except as defined in this instruction (see subpart 6.14), Bonneville policies, Safety and Health Program Handbook, and specific HR Directives. The Cardholder, and Approving Official if the purchase action

has been certified, may be held personally and financially responsible for personal-use items purchased outside of this policy.

- (m) Each Cardholder 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 Cardholder.
- (n) An Approving Official shall not certify a purchase if it cannot be identified as a legitimate purchase for Bonneville purposes. When an Approving Official has certified a Cardholder's transaction, the Approving Official becomes responsible for those purchases.
- (o) Approving Officials who fail to properly execute their assigned responsibilities may be held personally liable to Bonneville 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.
- (p) Training.
  - (1) Initial Micro-Purchase Program training is mandatory for all new program participants including Data Entry Personnel (DEP).
  - (2) Program participants shall attend refresher training at least every two years as directed and scheduled by the A/OPC. Refresher training may be in-person, web-based training (WBT), or classroom format.
- (q) Bonneville will do business with responsible and reputable firms and individuals. Cardholders 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. List of such entities, entitled the System for Award Management (SAMS), is available at <http://www.sam.gov>. If a Cardholder suspects a vendor's status, the Cardholder shall check the list or contact the A/OPC before placing the order.
- (r) *Comply with Section 508 of the Rehabilitation Act.* Section 508 of the Rehabilitation Act (29 U.S.C. § 749d) was enacted to ensure that Federal employees and members of the public with disabilities have access to the Federal Government's Electronic and Information Technology. Purchases for electronic and information technology items must comply with the requirements of Section 508 and must be coordinated through the Chief Information Officer (CIO).
- (s) *Convenience Checks.*
  - (1) The use of a convenience check, as a last resort payment method, must be evaluated and determined to be the only viable MPP tool under the circumstance.
  - (2) Convenience Checks should be used only when no reasonable alternative merchant is available who accepts the card and utilizing the ATP process is not viable.
  - (3) *Purchases for training and education courses.*
  - (4) The P-Card shall be used by Learning and Workforce Development Office (HT) personnel to pay for government, non-government and/or off-the-shelf training and education up to \$50,000 for an individual or planned series of the same training event, activity, or course material.
  - (5) In accordance with Bonneville HR Directive 410-04, all training and education requests must be submitted through the Human Resources Management Information System (HRMIS) and approval obtained before an individual may attend training.
  - (6) The employee development manager will ensure requested training is in compliance with all statutory, legal, and administrative requirements. The Learning and Workforce Development cardholder must have an approved training request prior to contacting a vendor.
  - (7) Off-the-shelf training is defined as training products and services regularly available to the general public and/or Government personnel. The term includes training offered in catalogs or other printed material by a college, university, professional association, consultant firm or organization. It does not include training specifically developed designed, and produced to meet requirements unique to an organization and/or

program. A contract requisition submitted to the contracting office is required to purchase training designed specifically to meet a requirement particular to an organization.

## 26.4 RESPONSIBILITIES

### 26.4.1 Head of the Contracting Activity

- (a) The HCA establishes policy for the use of P-Cards, ATP, Convenience Checks, and the internal controls for the Micro-Purchase Program.
- (b) The HCA delegates authority to the A/OPC to establish Cardholder and Approving Official accounts and make appropriate decisions to effectively manage the Micro-Purchase Program.
- (c) The HCA shall review and approve or deny any requests for single purchase limits, or one-time purchase increase above the respective competition threshold, see Part 26 definitions, as requested by an Approving Official through the A/OPC.

### 26.4.2 Supply Chain Services

The Director of Contracts and Strategic Sourcing is responsible for the overall management of the Micro-Purchase Program. The Director of Contracts and Strategic Sourcing shall designate the A/OPC, whose duties and responsibilities shall include management of the Micro-Purchase Program.

### 26.4.3 Agency/Organizational Program Coordinator (A/OPC)

The A/OPC shall:

- (a) Implement procedures and guidelines for the Micro-Purchase Program in accordance with the following policies and procedures:
  - (1) Micro-Purchase Program Manual;
  - (2) Bonneville Purchasing Instructions (BPI);
  - (3) Asset Management Instructions (AMI);
  - (4) The award instrument with the financial institution (see 26.1(b));
  - (5) OMB Circular A-123, Appendix B; and
  - (6) Other relevant Bonneville policies.
- (b) Conduct oversight and management of the Micro-Purchase Program;
- (c) Develop and maintain an internal control program to provide adequate oversight to the Micro-Purchase Program;
- (d) Provide training, advice and guidance to Cardholder, Approving Officials, and other Bonneville personnel;
- (e) Take appropriate action when policies have not been followed, including immediate cancellation of the card, ATP authority, and reporting possible fraud to the HCA, Financial Management and Internal Audit;
- (f) Maintain a file for each active Cardholder. Files must be kept and retained in accordance with Bonneville Policy 236-1, Information Governance and Lifecycle Management and the Agency File plan. Files contain (but are not limited to) the following:
  - (1) A signed Cardholder application form;
  - (2) Any mandatory training certificates;
  - (3) Approving Official training certificates;
  - (4) Any official correspondence between the A/OPC, Cardholder and other procurement officials or Cardholder supervisor;
  - (5) Copies of reviews; and

- (6) Notices (emails or official letters) of noncompliance findings.
- (g) Generate all required or requested DOE, Bonneville Finance, HCA, Supply Chain, Supervisor and Approving Official reports;
- (h) Review and approve all Cardholder requests for single purchase limit increases up to the respective competition threshold, 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;
- (i) Ratify unauthorized commitments up to \$50,000 following the procedures and documentation in BPI 1.9.3(a) – (d) without further approvals where the purchase was for commercial supplies and/or services under \$50,000. For ratifications above \$50,000 and less than \$150,000, the Director of Contracts and Strategic Sourcing is authorized to approve the ratification. All applicable labor laws (Construction Wage Rate Requirements and Service Contract Labor Standards) must be followed. If labor laws apply, ratification must be executed by a contracting officer;
- (j) Report to the HCA violations of Cardholder or Approving Official authorities and responsibilities, when the A/OPC has directed the Cardholder or Approving Official to make a refund payment to Bonneville or take other action to resolve an erroneous or improper purchase; and
- (k) Attend all training required to achieve and maintain no less than a Level 1 Certification, as defined in BPI Appendix 2A, Bonneville Acquisition Workforce Contracting Officer Certification Program.

#### 26.4.4 Approving Officials (AO)

All AOs shall:

- (a) Follow all policies and procedures in the “Acknowledgement of Responsibilities,” Micro-Purchase Manual, Bonneville Purchasing Instructions, Bonneville Policies, and Asset Management Instructions and ensure their Cardholders do the same;
- (b) Sign and date the Approving Official “Acknowledgement of Responsibilities” received during training, and submit to the A/OPC;
- (c) Authorize purchases and approve payment transactions through the monthly reconciliation process for P-Card transactions and in Asset Suite for ATP transactions. Approving Officials shall review Cardholder documentation to ensure purchases were for official government purposes before certifying transactions;
- (d) Approve within 3 business days all outstanding ATP transactions placed by a Cardholder (under their purview) in the Asset Suite system (Voucher Panel)
- (e) Have no more than 15 Cardholders, or 500 transactions per month, assigned to them. HCA approval is required for additional numbers;
- (f) Recommend the appropriate purchase limits for Cardholders; and
- (g) In coordination with the A/OPC, take the following action for improper purchases as necessary:
  - (1) Request immediate cancellation of the Cardholder account (if not already cancelled);
  - (2) Require Cardholder to return merchandise for credit as appropriate;
  - (3) Require Cardholder to pay for improper purchases personally; and
  - (4) Other appropriate disciplinary action of the Cardholder as appropriate.

#### 26.4.5 Cardholders (CH)

All Cardholders shall:

- (a) Ensure that purchases are official and necessary to the proper execution of Bonneville's programs and mission, and that all policies in the CH Cardholder "Acknowledgement of Responsibilities", Micro-Purchase Program Manual, and relevant portions of the Bonneville Purchasing Instructions, Bonneville Policies, Asset Management Instructions, and other relevant policies such as Personnel Letters, Safety and Health Handbook, etc., are followed;
- (b) Sign and date the Cardholder "Acknowledgement of Responsibilities" received during training, and submit to the A/OPC;
- (c) Dispute original charges if an agreed-upon credit does not appear on the next statement;
- (d) Immediately notify the financial institution and A/OPC 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 AO;
- (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 Bonneville, asking for Government or best customer discounts. When determining which vendor to choose, a Cardholder must consider the total cost of merchandise such as quality, timeliness versus urgency of delivery, quantity, ease of service, warranties, support and maintenance, standardization, shipping costs, Cardholder's time, etc.; and
- (i) Never split purchases or allow vendors to split orders to fit within the single purchase limit. Splitting amounts across more than one MPP tool (P-Card user, ATP transaction or Convenience Check to stay below the authorized limit is also prohibited.

#### 26.4.6 Supervisors

Supervisors of Approving Officials shall:

- (a) Request Approving Officials via the Micro-Purchase Authority Request application form;
- (b) Consult with AO to ensure purchase limits requested are appropriate for the Cardholder'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 a CH, and is in a position to question purchases as necessary;
- (d) Review MPP policies and procedures, especially as they relate to prohibited personal-use items and communicate the expectations that both Cardholder and Approving Officials will follow them;
- (e) Support the Approving Official in carrying out the certification function; and
- (f) In coordination with the A/OPC, take the following action for improper purchases as necessary:
  - (1) Request immediate cancellation of Cardholder account (if not already cancelled);
  - (2) Require Cardholder to return merchandise for credit as appropriate;
  - (3) Require Cardholder to pay for improper purchases personally;
  - (4) Request removal and replacement of an Approving Official as appropriate; and
  - (5) Other appropriate disciplinary action of the Cardholder and/or Approving Official as appropriate.

## 27 EMERGENCY PURCHASES

### 27.1 GENERAL

- (a) Bonneville has developed and continues to upgrade its business continuity capabilities to prepare for and respond to disruptive events which could impact Bonneville's operations.
- (b) This part prescribes policies and responsibilities of parties for Bonneville'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 Part 27 are effective ONLY when activated during a major disruptive event by those authorized to do so as designated in subpart 27.3.

#### 27.1.1 Definitions

As used in this part –

*Administrator*, as used in this part, means the Administrator of Bonneville Power Administration, or successor according to the line of succession defined in Bonneville Policy 140-1, or the on-duty Incident Commander for the agency defined in Bonneville's Incident Management Plan.

*Contingency Contracting Officer (CCO) Warrant*, as used in this part is a specific individual who has been issued a CCO warrant for the sole purpose of supporting an emergency event as defined in this part. The CCO warrant is only authorized for use during this BPA Administrator declared emergency.

*Emergency*, as used in this part, means: an event of significant impact requiring the activation of the agency incident management team and an Incident Commander (IC) is assigned. It does not have the same meaning of one-time immediacy for field emergency purchases specified in BPI 1.8.4.6.

*Incident Commander* or *IC* 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 Bonneville's response to a disruptive event.

*Head of the Contracting Activity* or *HCA*, as used in this part, 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.

*Urgency* means an unforeseen problem which creates an urgent and compelling need to deviate from standard purchasing guidelines. (For example, a tool breaks which will delay work to re-energize a transmission line as scheduled.) See 1.8.4.6. for purchasing authorities for urgent situations.

### 27.2 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 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 Bonneville Policy 140-1 section 1.5(l).



- (c) Once an emergency has been declared in accordance with this part, the CCO Warrants are immediately activated without any further action. The warrants are active until the BPA Administrator declares the emergency is over.

## 27.3 RESPONSIBILITIES

### 27.3.1 Administrator

The Administrator, or individual in line of succession during a state of emergency, or the Incident Commander, may:

- (a) Retain all purchasing policy and authority as appropriate;
- (b) Act as, or appoint, the Incident Commander or other individual who retains purchasing policy and authority as the situation warrants; and
- (c) Grant CO authority and issue warrants in the absence or incapacitation of the HCA or HCA designees.

### 27.3.2 Head of the Contracting Activity (HCA)

The HCA, or the individual in line of succession, shall:

- (a) Delegate emergency purchasing authority to named individuals other than CCO Warrant holders (as required) 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 CCO Warrant 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.

### 27.3.3 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.

### 27.3.4 Supervisors

Supervisors of COs delegated contingent warrant authority during the state of emergency shall:

- (a) Cooperate with the Administrator, Incident Commander, or HCA, to ensure staff is able to carry out the temporary duties of a CO 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 purchasing policy and practice.

### 27.3.5 Finance Office

The Finance Office may activate the emergency cash procedures.

## 27.4 RETAINED PURCHASE POLICIES

The following policies are retained during an emergency:

- (a) Part 3 Standards of Conduct and Business Practices unless suspended as part of the emergency declaration;
- (b) Part 10.2 Labor Policies for Service Contracts, purchases of services (including equipment rentals with operators) may not exceed \$2,500 when purchased using MPP tools;
- (c) Part 10.3 Labor Policies for Construction Contracts, purchases of construction may not exceed \$2,000 when purchased using MPP tools.

## 27.5 PURCHASING REQUIREMENTS

- (a) Purchases made under these emergency purchasing provisions must be conducted under the policy at subsection 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 Bonneville-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.

## 27.6 USE OF MICRO- PURCHASE PROGRAM (MPP) IN A DECLARED EMERGENCY

Upon the activation of this BPI emergency purchases section, designated personnel shall activate the Bonneville emergency purchasing account and increase existing named cardholders' spend limits.

## 27.7 SUMMARY OF PURCHASING FLEXIBILITIES

### 27.7.1 Authorities

- (a) The HCA will issue CCO Warrants to individuals identified by the Director of Contracts and Strategic Sourcing. These warrants will be activated at the time of a BPA Administrator declared emergency.
- (b) The Administrator or Incident Commander may grant CCO authority and issue CCO Warrants in the absence or incapacitation of the HCA.
- (c) The Administrator or Incident Commander may act as, or appoint an individual who retains purchase policy responsibility and authority as the situation warrants.
- (d) 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.

### 27.7.2 Purchase Methods

Persons with purchasing authority shall use simplified purchase methods as available, including:

- (a) Place oral orders and document with a contract after the fact;
- (b) Use the MPP tools to complete transactions;
- (c) Letter contracts (subsection 7.8.4), however documentation of competition and written material request, purchase requisition, or contract requisitions may be provided after the fact;

- (d) Use abbreviated purchase terms and conditions, as appropriate to the emergency and the nature of the contract;
- (e) Advance 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 (subsection 22.1.4); and
- (f) Interagency Acquisitions (IAAs) may be used (Part 25).

#### 27.7.3 Documentation Requirements under Emergency Purchases

- (a) All documentation must be completed per subsection 4.4 and must be filed in the official file no later than 45 calendar days.
- (b) Delegations of emergency purchasing authority (see 27.7.1(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 Bonneville. The length of explanation is less important than the cogency of the rationale for actions taken. This documentation may be reviewed by the managers or auditors evaluating Bonneville'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
  - (8) 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.

#### 27.7.4 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 Bonneville needed?
- (d) Did Bonneville 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 Bonneville given the circumstances?
- (f) Were prices fair and reasonable, given the circumstances?
- (g) Was competition adequate given the emergency?
- (h) Did the contractor deliver or furnish what Bonneville ordered?
- (i) Was documentation of the purchase appropriate given the emergency?

## 28 ACQUISITION OF COMMERCIAL ITEMS AND SERVICES

This part prescribes policies and procedures unique to the acquisition of commercial items and services as defined in subpart 2.2. 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 ACQUISITION OF COMMERCIAL ITEMS AND SERVICES - GENERAL

#### 28.1.1 Applicability

- (a) This part shall be used for the acquisition of supplies or services that meet the definition of commercial items at subpart 2.2.
- (b) COs shall use the policies in this part in conjunction with the policies and procedures for solicitation, evaluation and award prescribed in the Part 6 – Acquisition Planning, Strategy and Requisitioning, Part 11 – Solicitation Policies, and Part 12 – Source Selection and Award, 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 subpart 2.2 uses the phrase “purposes other than governmental purposes.” These purposes are those that are not unique to a government.
- (e) COTS items are defined in subpart 2.2. Unless indicated otherwise, all of the policies that apply to commercial items also apply to COTS items. See 28.1.3 for the list 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) Using the Bonneville P-Card as a method of purchase rather than only as a method of payment;
  - (2) The imprest fund; or
  - (3) Directly from another Federal agency.

#### 28.1.2 Policy

COs shall:

- (a) Conduct market research to determine whether commercial items or nondevelopmental items are available that could meet Bonneville'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.
- (d) Determine whether an item or service meets the definition of commercial per subpart 2.2.
  - (1) Whenever possible, logical groupings of items should be identified as “commercial” without conducting an individual technical review of every item. The CO 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:
    - (i) Items for which industry standards are used as the sole procurement document (e.g., American Society for Testing and Materials (ASTM));
    - (ii) Items described by commercial item description (CIDs);
    - (iii) Items with an Acquisition Method suffix Code (AMSC);

- (iv) Federal Stock Classes (FSC's) that can reasonably be presumed to be commercial (e.g., lumber, specified metals, subsistence, and medical).
- (2) CO's assessment: Where a CO 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 CO 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.
- (3) Contractor determination: If a contractor procured an item commercially, and Bonneville subsequently procures the same item, the CO shall consider the item to be commercial.
- (4) 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) COTS items are commercial items that have been sold, leased, or licensed in substantial quantities in the commercial marketplace and that are offered to Bonneville 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.
- (b) The following laws are not applicable to contracts for the acquisition of COTS items:
  - (1) 41 U.S.C. § 8302, portion of first sentence that reads "substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States," Buy American Act—Supplies, component test.
  - (2) 41 U.S.C. § 8303, portion of first sentence that reads "substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States," Buy American Act—Construction Materials, component test.
- (c) The following laws are not applicable to subcontracts for the acquisition of COTS items:
  - (1) Subcontracting with Debarred or Suspended Entities (Clause 11-7); and
  - (2) Requirement for US Flag Vessels (Clause 14-16).
- (d) All of the policies that apply to commercial items apply to COTS items. Additionally, the laws listed in 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.
- (e) In accordance with Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. § 7964d), requiring activities must prepare requirements documents for electronic and information technology that comply with the applicable accessibility standards issued by the Architectural and Transportation Barriers Compliance Board at 36 CFR Part 1194 (also see 6.11.2.2.1).

### 28.1.4 Subcontract Requirements

- (a) "Subcontract" includes a transfer of commercial items between divisions, subsidiaries, or affiliates of the contractor or subcontractor at any tier.
- (b) 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 Bonneville. 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.

- (c) “Flowdown requirements” are requirements from a prime contractor’s contract with Bonneville that are to be incorporated into the prime’s subcontracts. Contractors are required to flow down requirements as identified in the clause 28-20.1 or 28-20.2 in the Bonneville 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 Bonneville contracts.
- (d) To extend the benefits of commercial item acquisitions to the subcontractor level, Bonneville 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.

#### **28.1.4.1 Procedures**

The contractor shall include the requirements identified in the following clauses to its subcontractors when these clauses are included in the Bonneville contract for commercial items or services. The subcontract requirements are addressed paragraph (c) in the clauses 28-20.1, Requirements Unique to Government Contracts – Supplies and 28-20.2, Requirements Unique to Government Contracts - Services.

## **28.2 SPECIAL REQUIREMENTS FOR ACQUIRING COMMERCIAL ITEMS AND/OR SERVICES**

### 28.2.1 General

This subpart 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

- (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 Part 11, and also 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 Bonneville’s needs. Generally, Bonneville’s statement of need for a commercial item will describe the type of product or service to be acquired and explain how Bonneville intends to use the product or service in terms of function to be performed, performance requirement or essential physical characteristics. Describing Bonneville’s needs in these terms allows offerors to propose methods that will best meet the needs of Bonneville.
- (c) When acquiring commercial information technology using Internet Protocol, COs shall include the appropriate Internet Protocol compliance requirements in accordance with the IPv6 requirement in OMB Memo M-05-22, dated August 2, 2005.
- (d) Requirements documents for electronic and information technology must comply with the applicable accessibility standards issued by the Architectural and Transportation Barriers Compliance Board at 36 CFR Part 1194 (see 6.11.2.2.1).

### 28.2.3 Procedures for solicitations, evaluation and award

COs shall use the policies unique to the acquisition of commercial items prescribed in this part in conjunction with the policies and procedures for solicitation, evaluation, and award prescribed in Part 6, Acquisition Planning, Strategy and Requisitioning; Part 11, Solicitation Policies; and Part 12, Source Selection and Award, as appropriate for the particular acquisition.

#### 28.2.4 Contract Method

- (a) It is in Bonneville's best interest that COs 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 Bonneville's standard terms and conditions.
- (b) Reference to "contract(s)" includes both a contract and a purchase order, as appropriate to the subject procurement. Where Bonneville's terms and conditions are unmodified, representing lower procurement risk, the CO should consider the use of a simplified contract method such as a purchase order or delivery- or task-order rather than a contract. See subsection 4.3.1(c) for guidance on acceptance of purchase orders by signature and by performance. Where Bonneville's terms and conditions have been modified, representing higher procurement risk to Bonneville, COs should award using a fixed-price type or indefinite-delivery contract, requiring contractor signature to evidence agreement to the modified terms and conditions.
- (c) The CO shall select the contract method based on an assessment of the nature of the project and inherent risks.
- (d) COs shall use the following contract methods for acquiring commercial items and services: fixed-price type contracts or purchase orders, delivery- or task-orders, indefinite-delivery contracts, and orders/calls against BPAs; see Part 7 for more instructions regarding contract methods.

#### 28.2.5 Contract type

- (a) Except as provided in paragraph (b) of this section, COs shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items.
- (b) COs 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-Hour; see Part 7 for descriptions and guidance for these contract types.
  - (1) A time-and-materials contract or labor-hour contract (see subpart 7.8) may be used for the acquisition of commercial services when:
    - (i) The service is acquired under a contract awarded using –
      - (A) Competitive procedures (see subpart 11.8); or
      - (B) The procedures for noncompetitive acquisitions in subpart 11.9.
    - (ii) The CO –
      - (A) Executes a document of award decision (DAD) (see subpart 12.8) for the contract, in accordance with paragraph (b)(2) of this section (see paragraph (c) of this section for indefinite-delivery contracts), that no other contract type authorized by this subpart is suitable;
      - (B) Includes a ceiling price in the contract or order that the contractor exceeds at its own risk; and
      - (C) Prior to increasing the ceiling price of a time-and-materials or labor-hour contract or order, shall –
        - (1) Document the decision in the contract or order file; and

- (2) When making a change that modifies the general scope of a contract or order, follow the procedures at subpart 11.9.
- (2) Each DAD required by paragraph (b)(1)(ii)(A) of this section shall contain sufficient facts and rationale to justify that no other contract type authorized by this subpart is suitable. At a minimum, the DAD shall –
- (i) Include a description of the market research conducted;
  - (ii) Establish that it is not possible at the time of placing the contract or order to accurately estimate the extent or duration of the work or to anticipate costs with any reasonable degree of confidence;
  - (iii) Establish the requirement has been structured to maximize the use of firm-fixed-price or fixed-price with economic price adjustment contracts (e.g., by limiting the value or length of the time-and-material/labor-hour contract or order; establishing fixed prices for portions of the requirement) on future acquisitions for the same or similar requirements; and
  - (iv) Describe the actions planned to maximize the use of firm-fixed-price or fixed-price with economic price adjustment contracts on future acquisitions for the same requirements.
- (c) (1) Indefinite-delivery contracts (see subpart 7.7) 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, COs 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 subpart 7.3). For such contracts, the CO shall execute a DAD required by paragraph (b)(2) of this section, for each order placed on a time-and-materials or labor-hour basis.
- (3) If an indefinite-delivery contract only allows for the issuance of orders on a time-and-materials or labor-hour basis, the DAD required by (b)(2) of this section shall be executed to support the basic contract and shall also explain why providing for an alternative firm-fixed-price or fixed-price with economic price adjustment pricing structure is not practicable. The DAD for this contract shall be approved by the Director of Contracts and Strategic Sourcing, or his/her acting Tier 4 Manager.
- (d) 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 subsection 7.6.4).
- (e) Use of any contract types to acquire commercial items and/or services other than those authorized by this subpart is prohibited.

#### 28.2.6 Period of Performance

- (a) In order to take advantage of changing conditions in the commercial market place, contracts with performance periods in excess of five years should be avoided when acquiring commercial items and services. This protects Bonneville from committing to pricing which may not be representative of changing market conditions and pricing.
- (b) HCA waiver is required for awards for commercial items and/or services where the performance period is expected to extend beyond five years, including option years.
- (c) COs shall limit the performance period for awards for the acquisition of commercial items and/or services to five years, including option periods.

#### 28.2.7 Offers



- (a) Where technical information is necessary for evaluation of offers, COs 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, COs shall request existing product literature from offerors of commercial items in lieu of unique technical proposals.
- (b) COs should allow offerors to propose more than one product that will meet a Bonneville need in response to solicitations for commercial items. The CO shall evaluate each product as a separate offer.

#### 28.2.8 Use of Past Performance

- (a) Per 11.13. 2.1(c) and 11.13.4.1(d), past performance should be an important element of every evaluation and contract award for commercial items.
- (b) COs 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 subsection 12.5.7 Analysis of Past Performance, as applicable.

#### 28.2.9 Contract Quality Assurance

Contracts for commercial items shall rely on contractors' existing quality assurance systems as a substitute for Bonneville 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 Bonneville shall be conducted in a manner consistent with commercial practice.

#### 28.2.10 Determination of Price Reasonableness

Price reasonableness is an assessment by the CO that the pricing is appropriate for the level of effort or deliverable and the complexity of the activity. The CS may prepare the price reasonableness documentation; however, the CO is ultimately responsible for the price reasonableness determination. Market conditions and product availability as well as functionality may change from year to year. Bonneville has the responsibility to its ratepayers to verify price reasonableness for new awards as well as for extensions or renewals. While the CO must establish price reasonableness in accordance with subsection 12.5.2, as applicable, the CO 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 CO must ensure that contract terms, conditions, and prices are commensurate with Bonneville's need.

#### 28.2.11 Contract Financing

Customary market practice for some commercial items may include buyer contract financing. The CO may offer Bonneville financing in accordance with the policies and procedures in subsection 22.1.4, Advance Payments.

#### 28.2.12 Technical Data

Bonneville shall acquire only the technical data and the rights in that data customarily provided to the public with a commercial item or process. The CO 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 CO shall include

appropriate clauses delineating the rights in the technical data in the solicitation and contract per Part 17.

#### 28.2.13 Computer Software

- (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 Bonneville'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, Bonneville 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, Bonneville 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 Part 17.

#### 28.2.14 Customary Commercial Practices

- (a) 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 CO 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.
- (b) "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).

### **28.3 SOLICITATION PROVISIONS AND CONTRACT CLAUSES FOR THE ACQUISITION OF COMMERCIAL ITEMS AND SERVICES**

#### 28.3.1 Commercial Items Provisions and Clauses - General

- (a) 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 Bonneville's interests. However, in procurements for more complex procurements or projects, for critical business operations, or for specialized procurements, such as IT or 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 subpart describes the usage of BPI commercial clauses, modification of the clauses, and the incorporation of non-Part 28 clauses into a solicitation or contract.
- (b) The clauses in this subpart are intended to address, to the maximum extent practicable, commercial market practices for a wide range of potential Bonneville acquisitions of commercial items and services. However, because of the broad range of commercial items

and services acquired by Bonneville, variations in commercial practices, and the relative volume of Bonneville's acquisitions in the specific market, COs may, within the limitations of subsection 28.3.14, after conducting appropriate market research, tailor provisions and clauses to adapt to the market conditions for each acquisition.

- (c) Modifications (or tailoring) to the clauses listed in 28.3.5(b) will not reflect current customary commercial practices and will not be approved.

### 28.3.2 Policy

- (a) 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.
- (b) Notwithstanding prescriptions contained elsewhere in the BPI, when acquiring commercial items, COs 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 Bonneville 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 subsection 28.3.6.

### 28.3.3 Provisions and Clause Requirements

#### 28.3.3.1 Invoice

- (a) Bonneville pays invoices in accordance with the Prompt Payment Act. Proper invoices contain all of the required information as listed in the clause 28-3, Invoice. Failure to provide the required invoice information will result in a delay in invoice processing and payment.
- (b) The invoice clause for commercial procurements shall not be waived or modified.

#### 28.3.3.2 Payment

- (a) Contracts for commercial items/services shall be on a firm-fixed-price or time-and-materials/labor-rate basis only. The payment clauses, 28-4.1 and 28-4.2 address federal prompt payment, electronic funds transfer, discounts, overpayments, and interest requirements in one clause. Bonneville 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. Bonneville's payments are made by Electronic Funds Transfer (EFT). Contractors must submit their taxpayer identification number (TIN) and other necessary banking information to Bonneville to receive EFT payment.
- (b) The Payment clauses for commercial procurements shall not be waived or modified with the exception that COs may modify the frequency of Bonneville's payment per 22.2.2(b). Bonneville'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 fixed-price type or a time-and-materials/labor rate basis as described in subsection 28.2.5.
- (c) *Payment –Fixed-Price.* 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.

- (d) *Payment – Time-and-Materials.* 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.

#### 28.3.3.3 Inspection and Acceptance

- (a) The Part 28 Inspection and Acceptance clauses, 28-5.1 and 28-5.2, are based upon the assumption that Bonneville will rely on the contractor's assurances that the commercial item tendered for acceptance conforms to the contract requirements. Bonneville 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, Bonneville always retains the right to refuse acceptance of nonconforming items. This clause is generally appropriate when Bonneville is acquiring noncomplex commercial items.
- (b) 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 CO shall include alternative inspection procedure(s) and ensure these procedures and the postaward remedies adequately protect the interests of Bonneville.
- (c) The acquisition of commercial items under other circumstances such as an "as is" basis may also require acceptance procedures different from those contained in the clause 28-5.1 Inspection/Acceptance Firm-Fixed-Price.
- (d) The CO should consider the effect the specific circumstances will have on the acceptance paragraph as well as other paragraphs of the clause. The CO also must carefully examine the terms and conditions of any express warranty with regard to the effect it may have on Bonneville's available postaward remedies.
- (e) COs may tailor the Inspection/Acceptance clauses to reflect customary commercial practices. Modifications to the Inspection/Acceptance 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.)

#### 28.3.3.4 Changes

- (a) Changes to commercial contracts shall be bilateral by written agreement of the parties with no unilateral government right to direct changes.
- (b) For contracts, bilateral agreement is achieved by signature of the parties on a contract modification.
- (c) For purchase orders, bilateral agreement to the purchase order revision is achieved through Bonneville'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.

#### 28.3.3.5 Stop Work Order

Performance on all, or any part, of the work under a commercial contract may be stopped upon the CO's written notice to the contractor for a period of up to 90 days. Any further period of stoppage must be agreed to by Bonneville 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 Convenience clauses. Bonneville 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.

### 28.3.3.6 Force Majeure/Excusable Delay

- (a) 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 CO 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 CO 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) Bonneville 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 Bonneville written notice as soon as reasonably possible after the commencement of the excusable delay.
- (c) The CO shall send a cure notice prior to terminating a contract for any reason other than late delivery. The CO may terminate for cause without a cure notice for late deliveries.

### 28.3.3.7 Termination

- (a) General. Part 28's commercial termination clauses, 28-9 through 28-10, permit Bonneville to terminate a contract for commercial items either for the convenience of Bonneville or for cause. However, the Termination for Bonneville'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 COs shall follow the procedures in this Part 28. COs may continue to use Part 20 as guidance to the extent that Part 20 does not conflict with this section and the language of the clauses 28-9.1, 28-9.2, 28-10.1 and 28-10.2.
- (b) Policy. COs shall follow Part 28 termination policies for the termination of contracts for commercial items and services. Bonneville's rights after a termination for cause shall include all the remedies available to any buyer in the marketplace. The CO should exercise Bonneville's right to terminate a contract for commercial items and services either for Bonneville's convenience or for cause only when such a termination would be in the best interests of Bonneville. The CO shall consult with OGC prior to terminating for cause.
- (c) Termination for cause.
  - (1) Termination for Default is used in noncommercial procurements while Termination for Cause is used in commercial procurements. Bonneville's rights and responsibilities differ under each. Under termination for default Bonneville is entitled to recover its costs for reprourement of the items/services. In contrast, under termination for cause Bonneville is entitled to all the rights and remedies available to any buyer in the commercial marketplace, including recovery of its costs for reprocurring 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.
  - (2) Bonneville 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 Bonneville, on written request, with adequate assurances of future performance.

- (3) Bonneville may not terminate the contract for cause if the contractor experiences a force majeure/excusable delay event and provides the required notice to the CO. See 28.3.3.6 for additional information and policy regarding force majeure and excusable delay.
  - (4) The CO 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 CO 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 the clause 28-8, Force Majeure/Excusable Delay.
  - (5) Bonneville'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 procurement costs together with any incidental or consequential damages incurred because of the termination.
  - (6) When a termination for cause is appropriate, the CO 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 Bonneville intends to seek or provide a date by which Bonneville will inform the contractor of the remedy; and
    - (iv) State that the notice constitutes a final decision of the CO and that the contractor has the right to appeal under the Disputes clause 28-13.
  - (7) The CO shall ensure that information related to Termination for Cause notices are included in the official file per subsection 4.4.2. In the event the termination for cause is subsequently converted to a termination for convenience, or is otherwise withdrawn, the CO shall also ensure that a notice of the conversion or withdrawal is documented in the official file.
- (d) *Termination for the convenience of Bonneville.*
- (1) When the CO terminates a contract for commercial items or services for Bonneville's convenience, the contractor shall be paid:
    - (i) 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
    - (ii) 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
    - (iii) 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. Bonneville does not have any right to audit the contractor's records solely due to the termination for convenience.
  - (2) Generally, the parties should mutually agree upon the requirements of the termination proposal. The parties must balance Bonneville's need to obtain sufficient documentation to support payment to the contractor against the goal of having a simple and expeditious settlement.

#### 28.3.3.8 Warranty

- (a) COs are required to take advantage of commercial warranties. To the maximum extent practicable, solicitations for commercial items shall require offerors to offer Bonneville 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 Bonneville's intended use of the item.

- (b) *Implied warranties.* Bonneville's postaward rights contained in the 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 Bonneville will use the items. Bonneville can rely upon an implied warranty of fitness for particular purpose when—
    - (i) The seller knows the particular purpose for which Bonneville intends to use the item; and
    - (ii) Bonneville relied upon the contractor's skill and judgement that the item would be appropriate for that particular purpose.
- (c) *Express warranties.* Express warranties are provided by the offeror in writing to purchasers of their commercially offered items and services. Any express warranty Bonneville intends to rely upon must meet the needs of Bonneville.

#### 28.3.3.8.1 Policy

- (a) *Implied warranties.*
- (1) Bonneville 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 the clause 28-11 in the provisions of an express warranty. COs must ensure that the express warranty provides for the repair or replacement of defective items discovered within a reasonable period of time after acceptance.
  - (3) COs, to the maximum extent possible, shall include a description of the particular purpose for which Bonneville will use the item in the solicitation.
  - (4) COs shall review an offeror's implied warranties or any disclaimers of implied warranties to verify that Bonneville's interests are adequately protected. If one of the above implied warranties has been expressly excluded by the offeror, the CO should contact OGC for review.
- (b) *Express warranties.*
- (1) COs shall verify that offeror's express warranties offered to Bonneville are at least the same warranty terms, including offers of extended warranties, offered to the general public in customary commercial practice.
  - (2) The CO should analyze any commercial warranty to determine if:
    - (i) The warranty is adequate to protect the needs of Bonneville: e.g., items covered by the warranty and length of warranty;
    - (ii) The terms allow Bonneville 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.
  - (3) Where the offeror has excluded implied warranties contained in Clause 28-11 in the provisions of an express warranty, the CO 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 4.9.1(d), COs shall obtain OGC review of procurements where the warranties of merchantability and fitness for a particular purpose have been excluded.

- (4) COs shall include the offeror's express warranties in the contract by attachment.
- (c) COs may modify the Warranty clauses to reflect customary commercial practices per subsection 28.4.2 without HCA waiver; however per 4.9.1(d) OGC review is required prior to award. Modifications to the 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, warranty periods, contract financing arrangements, etc.)
- (d) COs shall consult with OGC prior to asserting any claim for a breach of an implied or express warranty.

#### 28.3.3.9 Limitation of Liability

- (a) 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) Except as otherwise provided by an express warranty, contractors shall not be liable to Bonneville for consequential damages resulting from any defect or deficiencies in accepted commercial items or services.

#### 28.3.3.10 Disputes

- (a) Bonneville'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 Bonneville's procurement contracts for commercial items/services will be resolved in accordance with the clause 21-3, Disputes, which is incorporated into commercial contracts by reference in the text of the clause 28-13.
- (b) The Disputes clause for commercial procurements shall not be waived or modified.

#### 28.3.3.11 Indemnification

- (a) 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 Bonneville. Bonneville is relying on the offeror's representations of rightful use and ownership and expects the offeror to protect Bonneville against any allegations of infringement.
- (b) Contractors are required to indemnify Bonneville, 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) COs shall promptly notify OGC and the HCA of any claim or proceeding alleging infringement.

#### 28.3.3.12 Risk of Loss



- (a) 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) For commercial items provided under its contracts, Bonneville accepts the risk of loss when the items are either delivered to a carrier, if transportation is f.o.b. origin, or delivered to Bonneville at the delivery destination specified in the contract if transportation is f.o.b. destination.

#### 28.3.3.13 Title

Unless specified elsewhere in the contract, title to commercial items passes to Bonneville upon acceptance, regardless of when or where Bonneville takes physical possession.

#### 28.3.3.14 Taxes

Bonneville pays applicable taxes on the procurement of commercial items and services in the same manner as it procures noncommercial items and services. See subpart 22.5, Taxes, for more information on applicable taxes.

#### 28.3.3.15 Assignment

- (a) When procuring commercial items and/or services, Bonneville permits contractors to assign their payment rights to a financial institution without prior approval of Bonneville. Customary commercial practice requires that contractors have the ability to assign their payment rights under their contracts for financing purposes.
- (b) Policy.
  - (1) Bonneville's commercial contracts shall not prohibit assignment of payment rights.
  - (2) Bonneville 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 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) Upon receipt of assignment documents from the contractor, the CO shall notify Bonneville's Accounts Payable department that an assignment has been made, and forward the bank generated forms.

#### 28.3.3.16 Other Compliances

- (a) Bonneville requires its contractors to adhere to all applicable Federal, State, and local laws, Executive Orders, rules, and regulations while performing under its contract with Bonneville. Contractors may not use their performance on a Bonneville contract as justification or rationale for noncompliance with other applicable laws, Executive Orders, rules, or regulations.
- (b) The Other Compliance clause for commercial procurements shall not be waived or modified.

#### 28.3.3.17 Requirement Unique to Government Contracts

- (a) Bonneville 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 Bonneville's acquisition of commercial items and services. The clause also

identifies which requirements must be included in subcontracts for commercial items and services. See subsection 28.1.4 Subcontract Requirements.

- (b) The Requirements Unique to Government Contracts clause for commercial procurements shall not be waived or modified.

#### 28.3.3.18 Order of Precedence

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.

#### 28.3.3.19 Applicable Law

Federal law will apply to any claim of breach of Bonneville's contracts for the acquisition of commercial items and/or services.

#### 28.3.4 Contract Clauses

- (a) COs shall include the 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.
- (b) COs shall include the clause 28-1.2, Indefinite Delivery – Definite Quantity Contract – Basic Terms, in solicitations and contracts for commercial items and services where the contracting method will be a Master Contract.
- (c) COs shall include the clause 28-1.3, Indefinite Delivery – Indefinite Quantity Contract– Basic Terms, in solicitations and contracts for commercial items and services where the contracting method will be a Master Contract.
- (d) COs shall include the clause 28-1.4, Blanket Purchase Agreement – Basic Terms, in solicitations and contracts for commercial items and services where the contracting method will be a Master Agreement. COs shall delete any sections which are inapplicable to the subject procurement.
- (e) COs shall include the clause 28-1.5, Purchase Order – Basic Terms, in solicitations and contracts for commercial items and services where the contracting method will be a Purchase Order.
- (f) COs shall include the clause 28-1.6, Blanket Ordering Agreement – Basic Terms, in solicitations and contracts for commercial items and services where the contracting method will be a Master Purchase Order.
- (g) COs shall include a clause similar to 28-2, Schedule of Items, in solicitations and contracts for commercial items and services except for contracts that utilize the Standard Contract Format.
- (h) COs shall include the clause 28-3, Invoice, in solicitations and contracts for commercial acquisitions.
- (i) COs shall include the 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 22.2.2(b). The face page of the award form shall indicate the address to which invoices are to be sent for processing.
- (j) COs shall include the clause 28-4.2, Payment – Time-and-Materials/Labor Hour, 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 22.2.2(b). The face page of the award form shall indicate the address to which invoices are to be sent for processing.

- (k) COs shall include a clause similar to the 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 the 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 the clause 28-5.1 for acquisitions of commercial items sold on an “as is” basis.
- (l) COs shall include a clause similar to the clause 28-5.2, Inspection/Acceptance Time-and-Materials/Labor Hour, in solicitations and contracts for commercial acquisitions issued on a time and materials basis or on a labor hour basis. COs shall modify the clause 28-5.2 to include alternative inspection procedures for the acquisition of complex commercial items or commercial items used in critical applications.
- (m) COs shall include the clause 28-6, Changes, in solicitations and contracts for commercial acquisitions.
- (n) COs shall include the clause 28-7, Stop Work Order, in solicitations and contracts for commercial acquisitions to retain the right to suspend the work during contract performance.
- (o) COs shall include the clause 28-8, Force Majeure/Excusable Delay, in solicitations and contracts for commercial acquisitions.
- (p) COs shall include the clause 28-9.1, Termination for Cause – Firm-Fixed-Price, in solicitations and contracts for commercial acquisitions issued on a firm-fixed-price basis.
- (q) COs shall include the clause 28-9.2, Termination for Cause – Time-and-Materials/Labor Hour, in solicitations and contracts for commercial acquisitions issued on a time-and-material or labor rate basis.
- (r) COs shall include the clause 28-10.1, Termination for Convenience – Firm-Fixed-Price, in solicitations and contracts for commercial acquisitions issued on a firm-fixed-price basis.
- (s) COs shall include the clause 28-10.2, Termination for Convenience – Time-and-Materials/Labor Hour, in solicitations and contracts for commercial acquisitions issued on a time-and-materials or labor-hour rate basis.
- (t) COs shall include a clause similar to the clause 28-11, Warranty, in solicitations and contracts for commercial acquisitions. COs may modify the clause 28-11 only to reflect commercial market practices. Modifications must be reviewed by OGC per subpart 4.9.
- (u) COs shall include the clause 28-12, Limitation of Liability, in solicitations and contracts for commercial acquisitions.
- (v) COs shall include the clause 28-13, Disputes, in solicitations and contracts for commercial acquisitions.
- (w) COs shall include the clause 28-14, Indemnification, in solicitations and contracts for commercial acquisitions.
- (x) COs shall include the clause 28-15, Risk of Loss – FOB, in solicitations and contracts for commercial acquisitions when the procurement includes delivery of commercial items to Bonneville.
- (y) COs shall include the clause 28-15.1, Risk of Loss-INCOTERMS®, in solicitations and contracts for commercial acquisitions when the procurement includes delivery of commercial items to Bonneville using INCOTERMS®.
- (z) COs shall include the clause 28-16, Title, in solicitations and contracts for commercial acquisitions.
- (aa) COs shall include the clause 28-17, Taxes, in solicitations and contracts for commercial acquisitions.
- (bb) COs shall include the clause 28-18, Assignment, in solicitations and contracts for commercial acquisitions.
- (cc) COs shall include the clause 28-19, Other Compliances, in solicitations and contracts for commercial acquisitions.

- (dd) COs shall include the clause 28-20.1, Requirements Unique to Government Contracts – Supplies and/or 28-20.2, Requirements – Services in solicitations and contracts for commercial acquisitions as applicable to the subject acquisition.
- (ee) COs shall include a clause similar to the 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.
- (ff) COs shall include the clause 28-22, Applicable Law, in solicitations and contracts for commercial acquisitions.
- (gg) COs shall include the clause 28-23, Internet Protocol Version 6, in solicitations and contracts for commercial acquisitions of IT technology that use Internet Protocol (IP) technology.
- (hh) The CO shall include the clause 28-24, Authorized Purchaser, in solicitations and contracts for material and equipment if a construction contractor may order materials using a Bonneville contract.

#### 28.3.5 Tailoring of Provisions and Clauses for the Acquisition of Commercial Items

- (a) 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 Bonneville'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 tailor 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 tailoring of the clauses.
- (b) The following clauses implement statutory requirements and shall not be tailored:
  - (1) 28-3 Invoice
  - (2) 28-4.1 Payment – Firm-Fixed-Price
  - (3) 28-4.2 Payment – Time-and-Materials/Labor-Hour
  - (4) 28-13 Disputes
  - (5) 28-18 Assignment
  - (6) 28-19 Other Compliances
  - (7) 28-20.1 Requirements Unique to Government Contracts – Supplies
  - (8) 28-20.2 Requirements Unique to Government Contracts – Services
- (c) The CO shall not tailor 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 is approved in accordance with subpart 1.7.
  - (1) 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 Bonneville.
  - (2) 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) Some procurements may need additional terms and conditions in the solicitation and contract to more adequately address Bonneville'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 CO may include appropriate clauses when an indefinite-delivery type of contract will be used. The clauses prescribed at subsection 7.7.6 may be used for this purpose.
  - (2) The CO may include appropriate clauses when the use of options is in Bonneville's interest. The clauses prescribed in subsection 7.10.8 may be used for this purpose.
  - (3) The CO may include the clauses contained in subparts 17.2 through 17.6, Commercial Software, Hardware and Equipment, and Services for IT procurements.
- (b) The CO 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.
  - (c) The CO may include in solicitations and contracts other (non-Part 28) BPI clauses when their use is consistent with the limitations contained in Part 28 and with customary commercial practices for the item/service being procured. It is the CO's responsibility to analyze the proposed clauses for consistency with Part 28 policies and with commercial practices.
  - (d) The CO shall ensure that the appropriate safety and health requirements are included in the technical specifications, the statement of work, and the exhibits in all solicitations and contracts for commercial services when the contractor employees may encounter potentially hazardous working conditions. The CO shall consult with the Bonneville Safety Office regarding the appropriate safety and health requirements to include in solicitations and contracts. The CO shall include the clause 15-12, Contractor Safety and Health and Clause, and 15-13, Contractor Safety and Health Requirements, in commercial procurements as applicable based on the clause prescriptions at 15.6.4.1. Refer to subpart 15.6 for additional information and requirements related to safety.

## **28.4 SOLICITATION FOR COMMERCIAL ITEMS**

### **28.4.1 General**

This subpart provides optional procedures for a streamlined evaluation of offers for commercial items. These procedures are intended to simplify the process of preparing and issuing solicitations, and evaluating offers for commercial items consistent with customary commercial practices.

### **28.4.2 Evaluation Procedures for Commercial Items**

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 Bonneville's requirement instead of using evaluation sub-factors. Solicitations for commercial items do not have to contain sub-factors 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.

#### **28.4.2.1 Policy**

- (a) Offers shall be evaluated using only the evaluation factors contained in the solicitation.

- (b) COs shall issue the awards for commercial items on the basis of lowest price technically acceptable or tradeoff. COs shall select the offer that is most advantageous to Bonneville based on the evaluation factors identified in the solicitation. COs shall fully document the rationale for selection of the successful offeror including discussion of any tradeoffs considered per Parts 11 and 12.
- (c) Technical evaluation factors are not required in commercial item solicitations. COs shall select the offer that is most advantageous to Bonneville 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 Part 12.

## **28.5 CANCELLATION OF COMMERCIAL PURCHASE ORDERS**

- (a) If a purchase order that has been formally accepted in writing by the contractor is to be canceled, the CO shall process the cancellation in accordance with the Termination for Convenience procedures in Part 20.
- (b) If a purchase order has not been accepted by a contractor through either written confirmation or performance needs to be canceled, the CO shall notify the contractor in writing that the purchase order is canceled, and shall request the contractor's written acceptance of the cancellation, and proceed as follows:
  - (1) If the contractor accepts the cancellation and does not claim that costs were incurred as a result of beginning performance under the purchase order, no further action is required (i.e., the purchase order shall be considered canceled).
  - (2) If the contractor does not accept the cancellation or claims that costs were incurred as a result of beginning performance under the purchase order, the CO shall process the action as termination prescribed in paragraph (a) of this subsection.

## 29 FEDERAL SUPPLY SCHEDULES

### 29.1 SCOPE OF PART

This part prescribes policies and procedures for Bonneville Power Administration on the use of Federal Supply Schedules (FSS) for acquiring supplies and services as well as information technology (IT). Bonneville's unique statutory authority does not mandate the use of the Federal Acquisition Regulation (FAR) and subsequently any use of FSS is optional. However, the FSS provides a powerful and streamlined option to acquire supplies and services. Following the fundamental principles of the BPI to provide best value contracting solutions, the FSS contracts leverage spend Government-wide reducing overall costs for these supplies and services, as well as reducing administrative costs to agencies as well.

### 29.2 DEFINITIONS

As used in this part—

*CO* means an individual with ordering authority to place orders and/or establish blanket purchase agreements (BPAs) against existing Federal Supply Schedules (see Appendix 2-B, subpart 2.8). *Federal Supply Schedule* also referred to as Multiple Award Schedules (MAS) are long-term governmentwide contracts, typically in the form of an Indefinite-Delivery-Indefinite-Quantity contract, with commercial firms providing federal, state, and local government buyers access to commercial supplies (products) and services at volume discount pricing.

*Government-wide acquisition contract (GWAC)* means a task-order or delivery-order contract for information technology established by a federal agency for Government-wide use. The Solutions for Enterprise-Wide Procurement (SEWP) is an example of a GWAC.

*Ordering activity* means agency or Bonneville Power Administration.

*Ordering Officer* means an individual with delegated authority, from the CO, to place orders (may also be referred to as calls) against a funded delivery order or task order on a blanket purchase agreement (BPA) (see 7.9.4.3(a)(4)).

*Multiple Award Schedule (MAS)* means contracts awarded by GSA or the Department of Veterans Affairs (VA) for similar or comparable supplies, or services, established with more than one supplier, at varying prices.

*Requiring agency* means the agency needing the supplies or services.

*Schedules e-Library* means the on-line source for GSA and VA Federal Supply Schedule contract award information. Schedules e-Library may be accessed at <http://www.gsa.gov/elibrary>.

*Special Item Number (SIN)* means a group of generically similar (but not identical) supplies or services that are intended to serve the same general purpose or function.

*Solutions for Enterprise-Wide Procurement (SEWP)* means a multi-award GWAC vehicle focused on commercial IT products and product based services.

*Supply chain risk* means the risk that an adversary may sabotage, maliciously introduce unwanted function, or otherwise subvert the design, integrity, manufacturing, production, distribution, installation, operations, or maintenance of a Bonneville Cyber System (BCS) so as to surveil, deny, disrupt, or otherwise degrade the function, use or operation of such system.

## 29.3 GENERAL

- (a) The Federal Supply Schedule (FSS) program is also known as the GSA Schedules Program or the Multiple Award Schedule (MAS) Program. The FSS program is directed and managed by General Services Administration (GSA) and provides Federal agencies with a simplified process for obtaining supplies and services at prices associated with volume buying. Indefinite delivery contracts (IDIQs) are awarded to provide supplies and services at stated prices for given periods of time. GSA may delegate certain responsibilities to other agencies.
- (b) GSA authorizes other agencies, referred to as “ordering activities”, to place orders, or establish blanket purchase agreements (BPA), against the GSA’s Multiple Award Schedule (MAS) contracts. Bonneville Power Administration has been granted this authority.
- (c) GSA schedule contracts require all schedule contractors to publish an “Authorized Federal Supply Schedule Pricelist (pricelist)”. The pricelist contains all supplies and services offered by a schedule contractor. In addition, each pricelist contains the pricing and the terms and conditions pertaining to each Special Item Number that is on the schedule. The schedule contractor is required to provide one copy of its pricelist to any ordering activity when requested. Also, a copy of the pricelist may be obtained from the Federal Supply Services by submitting an e-mail request to [schedules.infocenter@gsa.gov](mailto:schedules.infocenter@gsa.gov) or by telephone at 1-800-488-3111.
  - (1) This part, together with the pricelists, contains necessary information for placing delivery or task orders with schedule contractors. In addition, COs should review, and be familiar with, the GSA schedule contracting office issued Federal Supply Schedules publications that contain a general overview of the Federal Supply Schedule (FSS) program and address pertinent topics.
  - (2) Copies of schedules publications may be requested by contacting the Centralized Mailing List Service through the Internet at <http://www.gsa.gov/cmlls>, submitting written e-mail requests to [CMLS@gsa.gov](mailto:CMLS@gsa.gov), or by completing GSA Form 457, FSS Publications Mailing List Application, and mailing it to the GSA Centralized Mailing List Service (7SM), P.O. Box 6477, Fort Worth, TX 76115. Copies of GSA Form 457 may also be obtained from the above referenced points contact.
- (d) GSA Advantage
  - (1) GSA offers an on-line shopping service called “GSA Advantage!” through which ordering activities may place orders against Schedules. (Ordering activities may also use GSA Advantage! to place orders through GSA’s Global Supply System, a GSA wholesale supply source, formerly known as “GSA Stock” or the “Customer Supply Center.” Ordering activities may access GSA Advantage! Home Page at <http://www.gsaadvantage.gov>).
  - (2) GSA Advantage! enables ordering activities to search specific information (*i.e.*, national stock number, part number, common name), review delivery options, place orders directly with Schedule contractors (except see 29.6.6) and pay for orders using the P-Card.
- (e) For more information or assistance regarding the Federal Supply Schedule Program, review the following Web site: <http://www.gsa.gov/schedules>. Additionally, for on-line training courses regarding the Schedules Program, review the following web site: <http://www.gsa.gov/training>.
- (f) Contractual terms and conditions are contained in Federal Supply Schedule contracts and are not to be re-negotiated. Only the BPI clauses listed in subsection 29.5.1 may be supplemented to orders or GSA Schedule BPAs.
- (g) Contracts for the acquisition of Federal Supply Schedules 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 29 shall take precedence for the acquisition of Federal Supply Schedules items.

- (h) COs may establish Blanket Purchase Agreements (BPAs) under any Federal Supply Schedule contract. The CO shall utilize the procedures below for determining the need for a BPA.
  - (1) Accurate and detailed record keeping is also required. Ordering activities that do not have the staff or skill to maintain organized records for all orders placed to the BPA account might not be best suited for a BPA.
- (i) For administrative convenience, a CO may add items not included on the Federal Supply Schedule (also referred to as open market items) to a Federal Supply Schedule blanket purchase agreement (BPA) or an individual task or delivery order only if -
  - (1) The items not on the Federal Supply Schedule constitute less than 50% of the total order value for individual task or delivery orders. For auto awards, the CO shall consider how this requirement will be met and set up controls/processes accordingly.
  - (2) All applicable acquisition regulations pertaining to the purchase of the items not on the Federal Supply Schedule have been followed, including: competition requirements (see subpart 11.8), contracting methods (see Part 7), and planning, strategy, and requisitioning requirements (see Part 6);
  - (3) The CO has determined the price for the items not on the Federal Supply Schedule is fair and reasonable;
  - (4) The items are clearly labeled on the order as items not on the Federal Supply Schedule; and
  - (5) All open market items are similar in nature to the items found on the Federal Supply Schedule.
- (j) When using the Government-wide commercial purchase card as a method of payment, orders at or below the micro-purchase threshold are exempt from verification of any active exclusions System for Award Management (SAM) database and whether the contractor has a delinquent debt subject to collection under the Treasury Offset Program (TOP).

#### **29.4 APPLICABILITY**

- (a) Procedures in this subpart apply to –
  - (1) Individual orders for supplies or services placed against Federal Supply Schedules contracts; and
  - (2) BPAs established against Federal Supply Schedule contracts.
- (b) Federal Supply Schedule COs may establish special ordering procedures for a particular schedule. In this case, that schedule will specify those special ordering procedures. Unless otherwise noted, special ordering procedures established for a Federal Supply Schedule take precedence over the procedures in subpart 29.6.
- (c) The use of Federal Supply Schedules for construction is prohibited.
- (d) The use of Federal Supply Schedules for architect and engineering (A-E) services is authorized.

#### **29.5 USE OF FEDERAL SUPPLY SCHEDULES**

- (a) *General.* BPAs and orders placed against a MAS using the procedures in this subpart, are considered to be issued using competition (see 11.8). Therefore, when establishing a BPA (as authorized in subsection 7.9.4), or placing orders under Federal Supply Schedule contracts using the procedures of subpart 29.6, COs shall not seek competition outside of the Federal Supply Schedules; but see paragraph (g) of this section.
- (b) *Foreign item evaluation requirements.* When a schedule lists both foreign and domestic items that will meet the needs of the requiring activity, the CO must apply the procedures of

Part 9, Contracting with Foreign Businesses. When purchase of an item of foreign origin is specifically required, the requiring activity must furnish the CO sufficient information to permit the determinations required by Part 9 to be made.

- (c) *Interagency acquisitions.*
  - (1) The CO, when placing an order or establishing a BPA, is responsible for applying the regulatory and statutory requirements applicable to the agency for which the order is placed or the BPA is established. The requiring agency shall provide the information on the applicable regulatory and statutory requirements to the CO responsible for placing the order.
  - (2) For orders over \$550,000, the CO shall make a determination that use of the Federal Supply Schedule is the best procurement approach.
- (d) *Acquisition planning.* Orders placed under a Federal Supply Schedule contract –
  - (1) Are not exempt from the planning and requisition requirements (see Part 6); and
  - (2) Must, whether placed by the requiring agency, or on behalf of the requiring agency, be consistent with the requiring agency's statutory and regulatory requirements applicable to the acquisition of the supply or service.
- (e) *Best Buy Determination.* Supplies offered on the schedule are listed at fixed prices. Services offered on the schedule are priced either at hourly rates, or at a fixed price for performance of a specific task (e.g., installation, maintenance, and repair). The Federal Supply Schedule CO has already determined the prices of supplies and fixed-price services, and rates for services offered at hourly rates, under schedule contracts to be fair and reasonable. Therefore, COs are not required to make a separate determination of fair and reasonable pricing, except for a price evaluation as required by 29.6.2(d). By placing an order against a schedule contract using the procedures in subpart 29.6, the CO has concluded that the order represents the best buy (as defined in subpart 1.1) and results in the lowest overall cost alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs. Although GSA has already negotiated fair and reasonable pricing, COs shall consider additional discounts before placing an order as prescribed in 29.6.4.
- (f) If the CO issues a RFQ, the CO shall provide the RFQ to any schedule contractor that requests a copy of it.
- (g) *Type-of-order preference for services.*
  - (1) The CO shall specify the order type (i.e., firm-fixed-price, time-and-materials, or labor-hour) for the services offered on the schedule priced at hourly rates.
  - (2) COs shall use fixed-price orders for the acquisition of commercial services to the maximum extent practicable.
  - (3)
    - (i) A time-and-materials or labor-hour order may be used for the acquisition of commercial services only when it is not possible at the time of placing the order to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.
    - (ii) Prior to the issuance of a time-and-materials or labor-hour order, the CO shall—
      - (A) Execute a Memorandum For Record (MFR) for the order, in accordance with paragraph (g)(3)(iii) of this section that a fixed-price order is not suitable;
      - (B) Include a ceiling price in the order that the contractor exceeds at its own risk; and
      - (C) When the total performance period, including options, is more than five years, the MFR prepared in accordance with this paragraph shall be signed by the CO and approved by the HCA prior to the execution of the base period (see deviation procedures at 1.7).

- (iii) The MFR required by paragraph (g)(3)(ii)(A) of this section shall contain sufficient facts and rationale to justify that a fixed-price order is not suitable. At a minimum, the MFR shall—
  - (A) Include a description of the market research conducted (see 29.5(d) and 11.10(e));
  - (B) Establish that it is not possible at the time of placing the order to accurately estimate the extent or duration of the work or anticipate costs with any reasonable degree of confidence;
  - (C) Establish that the current requirement has been structured to maximize the use of fixed-price orders (e.g., by limiting the value or length of the time-and-materials/labor-hour order; or, establishing fixed prices for portions of the requirement) on future acquisitions for the same or similar requirements; and
  - (D) Describe actions to maximize the use of fixed-price orders on future acquisitions for the same requirements.
- (iv) Prior to an increase in the ceiling price of a time-and-materials or labor-hour order, the CO shall—
  - (A) Conduct an analysis of pricing and other relevant factors to determine if the action is in the best interest of Bonneville and document the order file;
  - (B) Document the noncompetitive transaction for a change that modifies the general scope of the order; and
  - (C) Comply with the requirements at 29.3(f) when modifying an order to add open market items.

#### 29.5.1 Contract Clauses

COs are to use the following clauses in orders or BPAs against Federal Supply Schedules, when applicable.

- (a) If establishing a BPA, CO's shall include the clause 28-1.4, Blanket Purchase Agreement – Basic Terms.
- (b) COs shall include the clause 5-2, Privacy Protection, in solicitations, orders, and BPAs, if the work requires the contractor to receive or access sensitive PII or significant amounts of non-sensitive PII from Bonneville.
- (c) COs shall include the clauses 5-2, Privacy Protection, and 5-3, Privacy Act, in solicitations, orders, and BPAs, if the work of the contract requires designing, developing, or operating a system that will maintain Bonneville Privacy Act records.
- (d) COs shall include the clause 15-17, Information Assurance, in solicitations, orders, and BPAs where the conditions of subsection 15.9.4 exist.
- (e) COs shall include the clause 15-18, Homeland Security, in solicitations, orders and BPAs as prescribed in 15.10.3.
- (f) COs shall include the clause 15-12, Contractor Safety and Health, in solicitations, orders and BPAs as prescribed in 15.6.4.1.
- (g) COs shall include the clause 15-13, Contractor Safety and Health Requirements, in solicitations, orders and BPAs as prescribed in 15.6.4.1.
- (h) COs shall include the clause 15-15, Screening Requirements for Personnel Having Access to Bonneville Facilities, in all solicitations, orders and BPAs as prescribed in 15.7.2.1.
- (i) COs shall include the clause 15-16, Access to Bonneville Facilities and Computer Systems, in all solicitations, orders and BPAs, as prescribed in 15.8.3.
- (j) COs shall include the clauses 16-7, Work on a Government Installation, and 16-8, Minimum Insurance Coverage, when work is performed on Government property, as prescribed in 16.4.8.1 and 16.4.8.2. The CO may increase the dollar amounts of coverage, if necessary to protect Bonneville's interests.

## 29.6 ORDERING PROCEDURES FOR FEDERAL SUPPLY SCHEDULES

- (a) COs shall use the ordering procedures of this section when placing an order or establishing a BPA for supplies or services. The procedures in this section apply to all schedules. For establishing BPAs and for orders under BPAs see 29.6.3.
- (b) COs shall include an evaluation factor regarding supply chain risk when acquiring information technology, whether as a service or as a supply.
- (c) Solicitations are informal and do not use any provisions found in other parts of the BPI. Instead they are simply an e-mail, or a documented phone call, requesting a quote.

### 29.6.1 Ordering Procedures for Supplies and Services Not Requiring a Statement of Work

- (a) *Orders at or below the micro-purchase threshold.* COs and Bonneville Purchase Cardholders may place orders at, or below, the micro-purchase threshold with any Federal Supply Schedule contractor that can meet the agency's needs. Although not required to solicit from a specific number of schedule contractors, orders should be distributed among schedule contractors to the maximum extent practicable.
- (b) *Orders exceeding the micro-purchase threshold but not exceeding \$550,000.* COs shall place orders with the schedule contractor that can provide the supply or service that represents the best value. Before placing an order, the CO shall:
  - (1) Consider reasonably available information about the supply or service offered under MAS contracts by surveying at least two schedule contractors through the "GSA Advantage!" on-line shopping service, by reviewing the catalogs or pricelists of at least two schedule contractors, or by requesting quotations from at least two schedule contractors (see 29.6.5); or
  - (2) Document the circumstances for restricting competition to fewer than two schedule contractors based on one of the reasons at subpart 11.9.
- (c) *For proposed orders exceeding \$550,000.*
  - (1) Each order shall be placed on a competitive basis in accordance with (c)(2) and (3) of this section, unless this requirement is waived on the basis of a noncompetitive justification that is prepared in accordance with 29.6.6.
  - (2) The CO shall provide a RFQ that includes a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made (see 29.6.1(e)).
  - (3) The CO shall provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least two contractors that can fulfill the requirements. When fewer than two quotes are received from schedule contractors that can fulfill the requirement, the CO shall prepare a written determination explaining that no additional contractors capable of fulfilling the requirement could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least two schedule contractors.
  - (4) The CO shall ensure that all quotes received are fairly considered and award is made in accordance with the basis for selection in the RFQ.
- (d) In addition to price (see 29.5(e)) and 29.6.4), when determining best buy, the CO may consider, among other factors, the following:
  - (1) Past performance.
  - (2) Special features of the supply or service required for effective program performance.
  - (3) Trade-in considerations.
  - (4) Probable life of the item selected as compared with that of a comparable item.
  - (5) Warranty considerations.
  - (6) Maintenance availability.

- (7) Environmental and energy efficiency considerations.
- (8) Delivery terms.
- (e) *Minimum documentation.* The CO shall document in Memorandum for Record (MFR) format—
  - (1) The schedule contracts considered, noting the contractor from which the supply or service was purchased;
  - (2) A description of the supply or service purchased;
  - (3) The amount paid;
  - (4) When an order exceeds \$550,000, evidence of compliance with the ordering procedures at 29.6.1(c); and
  - (5) The basis for the award decision.

#### 29.6.2 Ordering Procedures for Services Requiring a Statement of Work

- (a) *General.* COs shall use the procedures in this subsection when ordering services priced at hourly rates as established by the schedule contracts. The applicable services will be identified in the Federal Supply Schedule publications and the contractor's pricelists. For establishing BPAs and for orders under BPAs see 29.6.3.
- (b) *Statements of Work (SOWs).* All Statements of Work shall include a description of work to be performed; location of work; period of performance; deliverable schedule; applicable performance standards; and any special requirements (e.g., security clearances, travel, and special knowledge). To the maximum extent practicable, agency requirements shall be performance-based statements.
- (c) *Request for Quotation procedures.* The CO must provide the Request for Quotation (RFQ), which includes the statement of work and evaluation criteria (e.g., experience and past performance), to schedule contractors that offer services that will meet the agency's needs.
  - (1) *Orders at, or below, the micro-purchase threshold.* COs may place orders at, or below, the micro-purchase threshold with any Federal Supply Schedule contractor that can meet the agency's needs. Orders should be distributed (or rotated) among schedule holders.
  - (2) *For orders exceeding the micro-purchase threshold, but not exceeding \$550,000.*
    - (i) The requisitioner shall develop a statement of work, in accordance with 29.6.2(b).
    - (ii) The CO shall provide the RFQ (including the statement of work and evaluation criteria) to at least two schedule contractors that offer services that will meet the agency's needs or document the circumstances for restricting consideration to fewer than two schedule contractors based on one of the reasons at 29.6.6(a).
    - (iii) The CO shall specify the type of order (i.e., firm-fixed-price, labor-hour) for the services identified in the statement of work. The CO should establish firm-fixed-prices, as appropriate.
  - (3) *For proposed orders exceeding \$550,000.* In addition to meeting the requirements of 29.6.2(c)(2)(i) and (iii), the following procedures apply:
    - (i) Each order shall be placed on a competitive basis in accordance with (c)(3)(ii) and (iii) of this section, unless this requirement is waived on the basis of a justification that is prepared and approved in accordance with 29.6.6.
    - (ii) The CO shall provide a RFQ that includes a statement of work and the evaluation criteria.
    - (iii) The CO shall—
      - (A) Provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least two contractors that can fulfill the requirements. When fewer than three quotes are received from schedule

contractors that can fulfill the requirements, the CO shall prepare a written determination to explain that no additional contractors capable of fulfilling the requirements could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least three schedule contractors; and

- (B) Ensure all quotes received are fairly considered and award is made in accordance with the evaluation criteria in the RFQ.
- (4) The CO shall provide the RFQ (including the statement of work and the evaluation criteria) to any schedule contractor who requests a copy of it.
- (d) *Evaluation.* The CO shall ensure all responses received are evaluated using the evaluation criteria provided to the schedule contractors. The CO is responsible for considering the level of effort and the mix of labor proposed to perform a specific task being ordered, and for determining that the total price is reasonable. Place the order with the schedule contractor that represents the best buy (see 29.5(f) and 29.6.4).
- (e) *Notification of Award.* After award, the CO should provide timely notification to unsuccessful offerors. If an unsuccessful offeror requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the award decision shall be provided.
- (f) *Use of time-and-materials and labor-hour orders for services.* When placing a time-and-materials or labor-hour order for services, see 29.5(i).
- (g) *Minimum documentation.* The CO shall document in the MFR—
- (1) The schedule contracts considered, noting the contractor from which the service was purchased;
  - (2) A description of the service purchased;
  - (3) The amount paid;
  - (4) The evaluation methodology used in selecting the contractor to receive the order;
  - (5) The rationale for any tradeoffs in making the selection;
  - (6) The price reasonableness determination required by paragraph (d) of this subsection;
  - (7) The rationale for using other than—
    - (i) A firm-fixed-price order; or
    - (ii) A performance-based order; and
  - (8) When an order exceeds \$550,000, evidence of compliance with the ordering procedures at 29.6.2(c)(3).

### 29.6.3 Blanket Purchase Agreements

- (a) *Establishment.*
- (1) COs may establish BPAs under any schedule contract to fill repetitive needs for supplies or services. COs shall establish the BPA with the schedule contractor(s) that can provide the supply or service that represents the best buy.
  - (2) In addition to price (see 29.5(f) and 29.6.4), when determining the best value, the CO shall consider past performance, but may, among other factors, consider the following:
    - (i) Special features of the supply or service required for effective program performance.
    - (ii) Trade-in considerations.
    - (iii) Probable life of the item selected as compared with that of a comparable item.
    - (iv) Warranty considerations.
    - (v) Maintenance availability.
    - (vi) Environmental and energy efficiency considerations.
    - (vii) Delivery terms.
  - (3) The CO shall:

- (i) To the maximum extent practicable, give preference to establishing multiple-award BPAs, rather than establishing a single-award BPA.
- (ii) Not make a single-award BPA with an estimated value exceeding \$100 million (including any options), may be awarded unless the HCA determines in writing that—
  - (A) The orders expected under the BPA are so integrally related that only a single source can reasonably perform the work;
  - (B) The BPA provides only for firm-fixed-price orders for –
    - (1) Products with unit prices established in the BPA; or
    - (2) Services with prices established in the BPA for specific tasks to be performed; and
  - (C) Only one source is qualified and capable of performing the work at a reasonable price to the Government; or
  - (D) It is necessary in the public interest to award the BPA to a single source for exceptional circumstances.
- (iii) Ensure the requirement for a determination for a single-award BPA greater than \$100 million is in addition to any applicable requirement for a noncompetitive procurement.
- (iv) In determining how many multiple-award BPAs to establish or that a single-award BPA is appropriate, the CO should consider the following factors and document the decision in the acquisition plan or BPA file:
  - (A) The scope and complexity of the requirement(s);
  - (B) The benefits of on-going competition and the need to periodically compare multiple technical approaches or prices;
  - (C) The administrative costs of BPAs; and
  - (D) The technical qualifications of the schedule contractor(s).
- (4) BPAs shall address the frequency of ordering, invoicing, discounts, requirements, (e.g., estimated quantities, work to be performed), delivery locations, and time.
- (5) When establishing multiple-award BPAs, the CO shall specify the procedures for placing orders under the BPAs in accordance with 29.6.3(c)(2).
- (6) Establishment of a multi-agency BPA against a Federal Supply Schedule contract is permitted if the multi-agency BPA identifies the participating agencies and their estimated requirements at the time the BPA is established.
- (7) Minimum documentation. The CO shall include in the official file documentation as a single document, or by multiple documents, if necessary, the –
  - (i) Schedule contracts considered, noting the contractor to which the BPA was awarded;
  - (ii) Description of the supply or service purchased;
  - (iii) Price;
  - (iv) Required justification for a noncompetitive BPA (see 29.6.6), if applicable;
  - (v) Determination for a single-award BPA exceeding \$100 million, if applicable (see (a)(3)(ii) of this section);
  - (vi) Documentation supporting the decision to establish multiple-award BPAs or a single-award BPA (see (a)(3)(iv));
  - (vii) Evidence of compliance with paragraph (b) of this section, for competitively awarded BPAs, if applicable; and
  - (viii) Document in the MFR. This should include the evaluation methodology used in selecting the contractor, the rationale for any tradeoffs in making the selection, and a price reasonableness determination for services requiring a statement of work.

- (b) *Competitive procedures for establishing a BPA.* This paragraph applies to the establishment of a BPA, in addition to applicable instruction in paragraph (a).
- (1) The procedures of this paragraph apply when establishing a BPA for supplies and services that are listed in the schedule contract at a fixed price for the performance of a specific task, where a statement of work is not required (e.g., installation, maintenance, and repair).
- (i) If the estimated value of the BPA does not exceed \$550,000.
- (A) The CO shall:
- (1) Consider reasonably available information about the supply or service offered under MAS contracts by surveying at least two schedule contractors through the GSA Advantage! on-line shopping service, by reviewing the catalogs or pricelists of at least two schedule contractors, or by requesting quotations from at least two schedule contractors (see 29.6.5); or
- (2) Document the circumstances for restricting consideration to fewer than two schedule contractors based on one of the reasons at 29.6.6.
- (B) The CO shall establish the BPA with the schedule contractor(s) that can provide the best buy.
- (ii) If the estimated value of the BPA exceeds \$550,000.
- (A) The CO shall provide a RFQ that includes a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made.
- (B) The CO shall provide the RFQ to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least two contractors that can fulfill the requirements. When fewer than two quotes are received from schedule contractors that can fulfill the requirements, the CO shall prepare a written determination explaining that no additional contractors capable of fulfilling the requirements could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least three schedule contractors.
- (C) The CO shall ensure all quotes received are fairly considered and award is made in accordance with the basis for selection in the RFQ. After seeking price reductions (see 29.6.4), establish the BPA with the schedule contractor(s) that provides the best value.
- (D) The BPA must be established in accordance with paragraphs (b)(1)(ii)(B) and (C) of this section, unless the requirement is waived on the basis of a justification that is prepared and approved in accordance with 29.6.6.
- (2) *For services requiring a statement of work.* This applies when establishing a BPA that requires services priced at hourly rates, as provided by the schedule contract. The applicable services will be identified in the Federal Supply Schedule publications and the contractor's pricelists.
- (i) Statements of Work (SOWs). The requisitioner shall develop a statement of work. All Statements of Work shall include a description of work to be performed; location of work; period of performance; deliverable schedule; applicable performance standards; and any special requirements (e.g., security clearances, travel, and special knowledge). To the maximum extent practicable, agency requirements shall be performance-based statement.
- (ii) Type-of-order preference. The CO shall specify the order type (i.e., firm-fixed-price, time-and-materials, or labor-hour) for the services identified in the statement of work. The CO should establish firm-fixed-priced orders to the



maximum extent practicable. For time-and-materials and labor-hour orders, the CO shall follow the procedures at 29.5(g)(3).

- (iii) Request for Quotation procedures. The CO must provide a RFQ, which includes the statement of work and evaluation criteria (e.g., experience and past performance), to schedule contractors that offer services that will meet the agency's needs.
  - (iv) If the estimated value of the BPA does not exceed \$550,000. The CO shall provide the RFQ (including the statement of work and evaluation criteria) to at least two schedule contractors that offer services that will meet the agency's needs.
  - (v) If estimated value of the BPA exceeds \$550,000. The CO shall provide the RFQ, which includes the statement of work and evaluation criteria, to as many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that quotes will be received from at least two contractors that can fulfill the requirements. When fewer than two quotes are received from schedule contractors that can fulfill the requirements, the CO shall document the file. The CO shall prepare a written determination explaining that no additional contractors capable of fulfilling the requirements could be identified despite reasonable efforts to do so. The determination must clearly explain efforts made to obtain quotes from at least three schedule contractors.
  - (vi) The CO shall ensure all quotes received are fairly considered and award is made in accordance with the basis for selection in the RFQ. The CO is responsible for considering the level of effort and the mix of labor proposed to perform, and for determining that the proposed price is reasonable.
  - (vii) The BPA must be established in accordance with paragraph (b)(2)(iv) or (v), and with paragraph (b)(2)(vi) of this section, unless the requirement is waived on the basis of a justification that is prepared and approved in accordance with 29.6.6.
  - (viii) The CO shall establish the BPA with the schedule contractor(s) that represents the best value (see 29.4(d) and 29.6.4).
- (c) *Ordering from BPAs.*
- (1) *Single-award BPA.* If the CO establishes a single-award BPA, authorized users may place the order directly under the established BPA when the need for the supply or service arises.
  - (2) *Multiple-award BPAs.*
    - (i) Orders at or below the micro-purchase threshold. COs may place orders at or below the micro-purchase threshold with any BPA holder that can meet the agency needs. The CO should attempt to distribute any such orders among the BPA holders.
    - (ii) Orders exceeding the micro-purchase threshold but not exceeding \$550,000.
      - (A) The CO must provide each multiple-award BPA holder a fair opportunity to be considered for each order exceeding \$550,000 unless one of the exceptions at 29.6.6(a)(1)(i) applies.
      - (B) The CO need not contact each of the multiple-award BPA holders before placing an order if information is available to ensure that each BPA holder is provided a fair opportunity to be considered for each order.
      - (C) The CO shall document the circumstances when restricting consideration to less than all multiple-award BPA holders offering the required supplies and services.
    - (iii) Orders exceeding \$550,000.

- (A) The CO shall place an order in accordance with paragraphs (c)(2)(iii)(A)(1), (2) and (3) of this paragraph, unless the requirement is waived on the basis of a justification that is prepared in accordance with 29.6.6. The CO shall –
  - (1) Provide a RFQ to all BPA holders offering the required supplies or services under the multiple-award BPAs, to include a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made;
  - (2) Afford all BPA holders responding to the RFQ an opportunity to submit a quote; and
  - (3) Fairly consider all responses received and make award in accordance with the selection procedures.
- (B) The CO shall document evidence of compliance with these procedures and the basis for the award decision.
- (3) *BPAs for hourly rate services.* If the BPA is for hourly rate services, the requisitioner shall develop a statement of work for each order covered by the BPA. COs should place these orders on a firm-fixed-price basis to the maximum extent practicable. For time-and-materials and labor-hour orders, the CO shall follow the procedures at 29.5(g)(3). All orders under the BPA shall specify a price for the performance of the tasks identified in the statement of work. The CO is responsible for considering the level of effort and the mix of labor proposed to perform a specific task being ordered, and for determining that the total price is reasonable through appropriate analysis techniques, and documenting the file accordingly.
- (d) *Duration of BPAs.*
  - (1) Multiple-award BPAs generally should not exceed five years in length, but may do so to meet program requirements.
  - (2) A single-award BPA shall not exceed one year. It may have up to four one-year options. See paragraph (e) of this section for requirements associated with option exercise.
  - (3) Contractors may be awarded BPAs that extend beyond the current term of their GSA Schedule contract, so long as there are option periods in their GSA Schedule contract that, if exercised, will cover the BPA's period of performance.
- (e) *Review of BPAs.*
  - (1) The CO shall review the BPA and determine in writing, at least once a year (e.g., at option exercise), whether –
    - (i) The schedule contract, upon which the BPA was established, is still in effect;
    - (ii) The BPA still represents the best value (see 29.5(e)); and
    - (iii) Estimated quantities/amounts have been exceeded and additional price reductions can be obtained.
  - (2) The determination shall be included in the official contract file.

#### 29.6.4 Price Reductions

COs shall seek a price reduction when the order or BPA exceeds \$550,000 acquisitions. Schedule contractors are not required to pass on to all schedule users a price reduction extended only to an individual ordering activity for a specific order or BPA. COs shall document the contract file for evidence that price reductions were sought (e.g., negotiation memo for record, correspondence, etc.).

#### 29.6.5 [Reserved]

#### 29.6.6 Noncompetitive Transactions

A CO must justify its action when restricting competition in accordance with subpart 11.9.

### 29.6.7 Payment

Payment for oral and written orders by any authorized means, including the purchase card.

## 29.7 ORDERING ACTIVITY RESPONSIBILITIES

### 29.7.1 Order Placement

- (a) COs may place orders orally for supplies and services up to \$550,000 if they do not require a Statement of Work (SOW).
- (b) If permitted under the schedule contract, use of the P-Card is encouraged for –
  - (1) Orders valued at or below the micro-purchase threshold
- (c) COs may use an agency prescribed form, or an established electronic communications format to order supplies or services from schedule contracts.
- (d) The CO shall place orders directly with the contractor in accordance with the terms and conditions of the pricelists (see 29.3(b)). Prior to placement of the order, the CO shall ensure that the regulatory and statutory requirements have been applied.
- (e) Orders shall include the following information in addition to any information required by the schedule contract:
  - (1) Complete shipping and billing addresses.
  - (2) Contract number and date.
  - (3) Agency order number.
  - (4) FOB delivery point (i.e., origin or destination).
  - (5) Discount terms.
  - (6) Delivery time or period of performance.
  - (7) Special item number or national stock number.
  - (8) A statement of work (SOW) for services, when required, or a brief, complete description of each item (when ordering by model number, features, and options such as color, finish, and electrical characteristics, if available, must be specified).
  - (9) Quantity and any variation in quantity.
  - (10) Number of units.
  - (11) Unit price.
  - (12) Total price of order.
  - (13) Points of inspection and acceptance.
  - (14) Other pertinent data; e.g. delivery instructions or receiving hours and size-of-truck limitation.
  - (15) Marking requirements.
  - (16) Level of preservation, packaging, and packing.

### 29.7.2 Inspection and Acceptance

- (a) *Supplies.*
  - (1) Consignees shall inspect at destination except when the schedule contract indicates that mandatory source inspection is required by the schedule contracting agency; or
  - (2) When the schedule contracting agency performs the inspection, the CO will provide two (2) copies of the order specifying source inspection to the schedule contracting agency. The schedule contracting agency will notify the CO of acceptance or rejection of the supplies.
  - (3) Material inspected at the source by the schedule contracting agency, and determined to conform with the product description of the schedule, shall not be re-inspected for the same purpose. The consignee shall limit inspection to kind, count, and condition on receipt.

- (4) Unless otherwise provided in the schedule contract, acceptance is conclusive, except as regards latent defects, fraud, or such gross mistakes as amount to fraud.
- (b) *Services*. The agency has the right to inspect all services in accordance with the contract requirement and as called for by the order. The CO shall ensure inspections and tests are performed as specified in the order's quality assurance surveillance plan in a manner that will not unduly delay the work.

#### 29.7.3 Remedies for Nonconformance

- (a) If a contractor delivers a supply or service, but it does not conform to the order requirements, the CO shall take appropriate action in accordance with the inspection and acceptance clause of the contract, as supplemented by the order.
- (b) If the contractor fails to perform an order, or take appropriate corrective action, the CO may terminate the order for cause or modify the order to establish a new delivery date (after obtaining consideration as appropriate). COs shall follow the procedures at 29.7.4 when terminating an order for cause.

#### 29.7.4 Termination for Cause

- (a) A CO may terminate an individual order for cause. Termination for cause shall comply with the following procedures, and may include charging the contractor with excess costs resulting from repurchase.
- (b) *Policy*. The CO shall exercise the Government's right to terminate a contract for commercial items either for convenience or for cause when such a termination would be in the best interests of the Government. The CO should consult with general counsel prior to terminating for cause (see subpart 4.3).
- (1) The Federal Acquisition Regulation (FAR) clause 52.212-4 "Excusable Delay" contained in Federal Supply Schedules requires contractors notify the CO as soon as possible after commencement of any excusable delay. In most situations, this requirement should eliminate the need for a show cause notice prior to terminating a contract. The CO shall send a cure notice prior to terminating an order for a reason other than late delivery.
- (2) The Government's rights after termination for cause shall include all the remedies available to any buyer in the marketplace. The Government's preferred remedy will be to acquire similar items from another contractor and to charge the defaulted contractor with any excess re-procurement costs together with any incidental or consequential damages incurred because of termination.
- (3) When a termination for cause is appropriate, the CO shall send the contractor a written notification regarding termination. At a minimum, this notification shall –
- (i) Indicate the contract is terminated for cause;
  - (ii) Specify the reasons for termination;
  - (iii) Indicate which remedies the Government intends to seek or provide a date by which the Government will inform the contractor of the remedy; and
  - (iv) State that the notice constitutes a final decision of the CO and that the contractor has the right to appeal under the Disputes clause (see 29.7.6).
- (c) The schedule contracting office shall be notified of all instances where an individual order to a schedule contractor has been terminated for cause, or if fraud is suspected.
- (d) If the contractor asserts that the failure was excusable, the CO shall follow the procedures at 29.7.6, as appropriate.
- (e) If the contractor is charged with excess costs, the following apply:
- (1) Any repurchase shall be made at as low a price as reasonable, considering the quality required by the agency, delivery requirement, and administrative expenses. Copies of all

repurchase orders, except the copy furnished to the contract or any other commercial concern, shall include the notation:

- (2) "Repurchase against the account of \_\_\_\_\_ *[insert contractor's name]* under Order \_\_\_\_\_ *[insert order number]* under Contract \_\_\_\_\_ *[insert contract number]*."
- (3) When excess costs are anticipated, the CO may withhold funds due the contractor as offset security. COs shall minimize excess costs to be charged against the contractor and collect or set-off any excess costs owed.
  - (i) If a CO is unable to collect excess repurchase costs, it shall notify the schedule contracting office after final payment to the contractor.
    - (A) The notice shall include the following information about the terminated order:
      - (B) Name and address of the contractor.
      - (C) Schedule, contract, and order number.
      - (D) National stock or special item number and a brief description of the item.
      - (E) Cost of the schedule items involved.
      - (F) Excess costs to be collected.
      - (G) Other pertinent data.
    - (ii) The notice shall also include the following information about the purchase contract:
      - (A) Name and address of the contractor.
      - (B) Item repurchase cost.
      - (C) Repurchase order number and date of payment.
      - (D) Contract number, if any.
      - (E) Other pertinent data.
  - (f) Only the schedule CO may modify the contract to terminate for cause any, or all, supplies or services covered by the schedule contract. If the schedule CO has terminated any supplies or services covered by the schedule contract, no further orders may be placed for those items. Orders placed prior to termination for cause shall be fulfilled by the contractor, unless terminated for the convenience of the Government by the CO.

#### 29.7.5 Termination for Convenience

- (a) A CO may terminate individual orders for the Government's convenience. Terminations for the Government's convenience shall comply with the following procedures:
  - (1) When the CO terminates a contract for commercial items for the Government's convenience, the contractor shall be paid –
    - (i) (A) 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
      - (B) 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 Schedule; and
    - (ii) Any charges the contractor can demonstrate directly resulted from the termination. The contractor may demonstrate such charges using its standard record keeping system and is not required to comply with the cost accounting standards or the contract cost principles in Part 13. The Government does not have any right to audit the contractor's records solely because of the termination for convenience.
  - (2) Generally, the parties should mutually agree upon the requirements of the termination proposal. The parties must balance the Government's need to obtain sufficient documentation to support payment to the contractor against the goal of having a simple and expeditious settlement.

- (c) Before terminating orders for the Government's convenience, the CO shall endeavor to enter into a "no cost" settlement agreement with the contractor.
- (d) Only the schedule CO may modify the schedule contract to terminate, any, or all, supplies or services covered by the schedule contract for the Government's convenience.

#### 29.7.6 Disputes

- (a) *Disputes pertaining to the performance of orders under a schedule contract.*
  - (1) Under the Disputes clause of the schedule contract, the CO may –
    - (i) Issue final decisions on disputes arising from performance of the order (but see paragraph (b) of this section); or
    - (ii) Refer the dispute to the schedule CO.
  - (2) The CO shall notify the schedule CO promptly of any final decision.
- (b) *Disputes pertaining to the terms and conditions of schedule contracts.* The CO shall refer all disputes that relate to the contract terms and conditions to the schedule CO for resolution under the Disputes clause of the contract and notify the schedule contractor of the referral.
- (c) *Appeals.* Contractors may appeal final decisions to either the HCA, the Civilian Board of Contract Appeals (CBCA) or the U.S. Court of Federal Claims (see subpart 21.3).
- (d) *Alternative dispute resolution.* The CO should use the alternative dispute resolution (ADR) procedures, to the maximum extent practicable (see 21.3.14).

## 30 NON-PROCUREMENT OBLIGATIONS AND USE OF FORM

### 30.1 POLICY

This part prescribes policies and procedures for Bonneville Power Administration on the use of Non-Procurement Obligations. Bonneville will use the Non-Procurement Obligation Form as an obligation control document for approved uses identified in table. Non-Procurement Obligation Form is a financial action and shall not be used as any type of contract or agreement. It does not establish a contractual relationship or an invoice payment for an established contract.

### 30.2 DEFINITIONS

As used in this part—

*Fees for Services* means types of actions are services that should not or cannot be competed and commonly provided by a local or state government or regulated utility. Bonneville does not receive services on a continued basis.

An example of a fee for service would be flagging services mandated by Washington State Department of Transportation during a traffic interruption as a result of work being performed by or for BPA. In this case, only one source can be used and the service is not recurring in nature. Additionally, the flagging was not solicited or proposed but is mandated and provided by the State of Washington and subsequently billed for.

*Utilities* means a service such as furnishing electricity, natural or manufactured gas, water, sewerage, thermal energy, chilled water, steam, hot water, or high temperature hot water. This includes both regulated and unregulated type utilities that are acquired without obligation to Bonneville except for services received, and where a written, bilateral agreement or contract with unique terms and conditions is neither required 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. The following are not considered a utility service –

- (1) Internet;
- (2) Cable television;
- (3) Telephone services (land line only, this does not include cellular phone services)
- (4) Refuse removal when multiple providers are available, refuse removal will be considered a commercial service and shall follow the competition requirements in BPI 11.8. Only if one of the following conditions are present, shall refuse removal be treated as a utility:
  - (i) If market research determines that only one commercial source is available, refuse removal may be acquired in the same manner as utility services by program personnel responsible for arranging other utility services for the facility; or
  - (ii) A local government (i.e., city or county) provided services to a directed source

### 30.3 PROCEDURES

- (a) For approved uses identified in table, the requester will submit a Non-Procurement Obligation Form to their identified approving official for review and approval. The approving official is responsible for ensuring that purchase has adequate justification and meets the requirements of this policy.
- (b) Completed and approved forms shall be submitted to Accounts Payable with supporting documents for processing and payment.

### 30.4 AUTHORIZATIONS

- (a) The Head of the Contracting Activity has authorized the use of non-procurement obligations for those with specific delegation of authority to use this in lieu of contracts when the conditions described herein occur. The implementation of the non-procurement obligation shall be carried out using a Non-Procurement Obligation Form.
- (1) The non-procurement Obligation process is supplemental to the contracting process. It is only used when contracts, the use of a purchase card, or the ATP process are not practical and will not result in receipt of a product or end item and will not be a recurring service. Purchases made via the Non-Procurement Obligation Form are not exempt from the policies set forth in the BPI; therefore, these purchases shall be tracked and monitored for compliance purposes by the Finance Office.
  - (2) Purchases in excess of the limits identified in this part must be approved by the Director of Contracts and Strategic Sourcing and the Chief Certifying Officer.
  - (3) Any purchases made in excess of the limits identified and/or not in accordance with these BPI provisions will not be accepted for payment on a Non-Procurement Obligation Form. See subpart 1.9.
  - (4) Contracting officers shall not use or approve the Non-Procurement Obligation Form for any reason.
  - (5) The non-procurement obligation authority is not governed under the Micro-Purchase Program. The limits and rules are distinct as outlined here in Part 30 and the subsequent sections.

### 30.5 AUTHORIZED USE OF NON-PROCUREMENT OBLIGATIONS

- (a) Utility services. Personnel who have been designated by their job function, or those authorized per subsection 11.2.1, may utilize the Non-Procurement Obligation Form to pay utility invoices 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) Fees for services that are non-recurring in nature.
- (c) Payments for insurance premiums that are not appropriate for a standard supply chain contract.
- (d) Memberships. Payment for memberships and dues must be in accordance with HR Directive 410-4. Payments for corporate or individual memberships and dues may be made using the procedures in (g) below. The supporting documentation shall also include a completed Bonneville Form 1130.01e.
- (e) Government bills of lading (GBL). The Traffic Manager, or designee named in writing, may use the Invoice Certification procedures in (g) below to submit GBLs for payment, for transport of goods according to tariff schedules, without ancillary loading and unloading services.
- (1) Procedure. Use of the Non-Procurement Obligation Form, Non-Procurement Obligation is authorized for the purchases described above. The form shall include –
    - (i) Name and routing symbol of originating (requesting) office or organization
    - (ii) Obligation number (provided by finance/budget office)
    - (iii) Date of request
    - (iv) Name of requester
    - (v) Choose type of purchase from the drop-down menu of the electronic form. If the category of what you're purchasing isn't identified in the drop-down box it may not be authorized. In this case, contact the finance/budget office for assistance.
    - (vi) Name and address of vendor



- (vii) Name and title of approving official
- (viii) Signature of approving official
- (ix) Date signed
- (x) Name of person obligating funds
- (xi) Date obligated
- (xii) Appropriation and accounting information.
- (xiii) Obligation amount
- (xiv) Obligation increase/decrease amount (if a change in obligation is being requested)
- (xv) Description/justification of purchase

### **30.6 PROHIBITED USES OF NON-PROCUREMENT OBLIGATIONS**

- (a) The Non-Procurement Obligation Form is not intended to be used for emergency purchases (field purchases). Part 27 outlines the purchasing policies, procedures, and authorities for emergency purchases. Urgent situations include unanticipated, non-repetitive, and non-recurring outages, quick and decisive actions to correct or mitigate loss of transmission capabilities and/or property, and unforeseen one-time events where a field project would be unduly delayed if services are not purchased immediately.
- (b) Limitations and Restrictions.
  - (1) The use of the Non-Procurement Obligation Form is for non-supply, non-recurring and non-repetitive purchases only.
  - (2) 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) or training and education courses.
- (c) Designated and Authorized Approving Official:
  - (1) Tier 1 and Tier 2 managers, and for Transmission Field Services, Tier 3 managers and;
  - (2) Purchase Card Holders

**31 [RESERVED]**

**32 [RESERVED]**

**33 [RESERVED]**

**34 [RESERVED]**

## 35 TEXT OF PROVISIONS AND CLAUSES

### 35.1 SCOPE OF PART

- (a) Gives instructions for using provisions and clauses in solicitations and/or contracts; and
- (b) Sets forth the solicitation provisions and contract clauses prescribed by the BPI.

#### 35.1.1 General

- (a) Definition. *Modification*, as used in this subpart, means a minor change in the details of a provision or clause that is specifically authorized by the BPI and does not alter the substance of the provision or clause
- (b) Numbering.
  - (1) BPI provisions and clauses. Subpart 35.2 sets forth the texts of all BPI provisions and clauses, each in its own separate subsection. The subpart is arranged by subject matter, in the same order as, and keyed to, the parts of the BPI.
  - (2) Provisions or clauses that supplement the BPI. Provisions or clauses that supplement the BPI are developed for use at the procurement suborganizational level, not meant for repetitive use, but intended to meet the needs of an individual acquisition and, thus, impractical to include in agency level BPI policy.
- (c) Prescriptions. Each provision or clause is prescribed at that place in the BPI text where the subject matter of the provision or clause receives its primary treatment. The prescription includes all conditions, requirements, and instructions for using the provision or clause and its alternates, if any. The provision or clause may be referred to in other BPI locations.
- (d) Introductory text. The introductory text of each provision or clause includes a cross-reference to the location in the BPI subject text that prescribes its use.

#### 35.1.2 Procedures for modifying and completing provisions and clauses

- (a) The CO shall not modify clauses unless the BPI specifically authorizes the modification. For example –
  - (1) “The Contracting Officer may use a period shorter than 60 days (but not less than 30 days) in paragraph (x) of the clause”; or
  - (2) “The Contracting Officer may substitute the words ‘task order’ for the work ‘Schedule’ wherever that word appears in the clause.”
- (b) When a clause is used with an authorized modification, insert “M” after the clause number and change the date to the month and year of the action (for example Clause 7-5M Indefinite Quantity Contract: Ordering (Jan 2016)). This is to identify a modification to the provision or clause. This shall not be done if the CO is completing the blanks or fill in portion of the provision or clause.
- (c) When modifying clauses incorporated by reference, insert the changed wording directly below the title of the provision or clause identifying to the lowest level necessary (e.g. paragraph, sentence, word), to clearly indicate what is being modified.
- (d) When modifying clauses incorporated in full text, modify the language directly by substituting the changed wording as permitted.
- (e) When completing blanks in clauses incorporated by reference, insert the fill in information directly below the title of the provision or clause identifying to the lowest level necessary to clearly indicate the blanks being filled in.
- (f) When completing blanks in provisions or clauses incorporated in full text, insert the fill in information in the blanks of the provision or clause.

## 35.2 PROVISIONS AND CLAUSES

### 35.2.1 Clause 1–1 Applicable Regulations

As prescribed in 1.4.1, insert the following clause in solicitations and contracts:

#### **APPLICABLE REGULATIONS (APR 2024)**

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 <https://www.bpa.gov/energy-and-services/customers-and-contractors/bonneville-purchasing-instructions>. Copies are available from the Head of the Contracting Activity – CGP, Bonneville Power Administration, P.O. Box 3621, Portland, OR 97208. Subscriptions are not available.

(End of clause)

### 35.2.2 Provision 3-1 Purchasing Standards of Conduct

As prescribed in 3.1.7, insert the following provision in solicitations:

#### **PURCHASING STANDARDS OF CONDUCT (MAR 2018)**

- (a) No person, other than as provided by law or authorized by the Contracting Officer, shall knowingly obtain contractor proposal information or source selection information before award of a Bonneville 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 Bonneville purchase, and includes any other person acting on behalf of such an entity.
- (c) During the conduct of any Bonneville 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 Bonneville employee participating personally and substantially during the conduct of a Bonneville 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 Bonneville employee participating personally and substantially during the conduct of a Bonneville purchase; or
  - (3) Solicit or obtain, directly or indirectly, from any Bonneville officer or employee, prior to the award of a contract any contractor proposal information or source selection information regarding such purchase.

(End of clause)

### 35.2.3 Clause 3-2 Organizational Conflicts of Interest

As prescribed in 3.3.3, insert the following clause in solicitations and contracts:

#### **ORGANIZATIONAL CONFLICTS OF INTEREST (MAR 2018)**

- (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 3.3.1, 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, Bonneville 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)

#### 35.2.4 Clause 3-3 Certification and Disclosure and Limitation Regarding Payments to Influence Certain Federal Transactions

As prescribed in 3.4.7, insert the following clause in solicitations and contracts:

##### **CERTIFICATION AND DISCLOSURE AND LIMITATION REGARDING PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS (MAR 2018)**

- (a) As used in this clause:

"Covered Federal action" means (1) the awarding of any Federal contract; and (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 \$10,000 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)

35.2.5 Clause 3-4 [Reserved]

35.2.6 Clause 3-5 [Reserved]

35.2.7 Clause 3-6 [Reserved]

35.2.8 Clause 3-7 [Reserved]

35.2.9 Clause 3-8 [Reserved]

35.2.10 Clause 3-9 Restriction on Commercial Advertising

As prescribed in 3.5.2, insert the following clause in solicitations and contracts:

**RESTRICTION ON COMMERCIAL ADVERTISING (FEB 2020)**

The Contractor agrees that without the Bonneville Power Administration’s (Bonneville) prior written consent, the Contractor shall not use the names, visual representations, service marks and/or trademarks of Bonneville, its employees 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 Bonneville endorses a product, project, or commercial line of endeavor.

(End of clause)

35.2.11 Clause 3-10 Contractor Employee Whistleblower Rights

As prescribed in 3.6.4, insert the following clause in solicitations and contracts:

**CONTRACTOR EMPLOYEE WHISTLEBLOWER RIGHTS (APR 2014)**

- (a) This contract and employees working on this contract will be subject to the whistleblower rights and remedies in the Contractor employee whistleblower protections established at 41 U.S.C. § 4712 by section 828 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239).
- (b) The Contractor shall inform its employees in writing, in the predominant language of the workforce, of employee whistleblower rights and protections under 41 U.S.C. § 4712.
- (c) The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts that exceed \$150,000.

(End of clause)

35.2.12 Clause 3-11 Contractor Code of Business Ethics and Conduct

As prescribed in 3.7.3, insert the following clause 3-11, Contractor Code of Business Ethics and Conduct, in solicitations and contracts:

**CONTRACTOR CODE OF BUSINESS ETHICS AND CONDUCT (FEB 2022)**

(a) *Definitions. As used in this clause—*

*Agent* means any individual, including a director, an officer, an employee, or an independent Contractor, authorized to act on behalf of the organization.

*Full cooperation-*

(1) Means disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals responsible for the conduct. It includes providing timely and complete response to Government auditors' and investigators' request for documents and access to employees with information;

(2) Does not foreclose any Contractor rights arising in law, the BPI, or the terms of the contract. It does not require-

(i) A Contractor to waive its attorney-client privilege or the protections afforded by the attorney work product doctrine; or

(ii) Any officer, director, owner, or employee of the Contractor, including a sole proprietor, to waive his or her attorney client privilege or Fifth Amendment rights; and

(3) Does not restrict a Contractor from-

(i) Conducting an internal investigation; or

(ii) Defending a proceeding or dispute arising under the contract or related to a potential or disclosed violation.

*Principal* means an officer, director, owner, partner, or a person having primary management or supervisory responsibilities within a business entity (e.g., general manager; plant manager; head of a division or business segment; and similar positions).

*Subcontract* means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

*Subcontractor* means any supplier, distributor, vendor, or firm that furnished supplies or services to or for a prime contractor or another subcontractor.

*United States*, means the 50 States, the District of Columbia, and U.S territories.

(b) *Code of business ethics and conduct.*

(1) Within 30 days after contract award, unless the Contracting Officer establishes a longer time period, the Contractor shall-

(i) Have a written code of business ethics and conduct; and

(ii) Make a copy of the code available to each employee engaged in performance of the contract.

(2) *The Contractor shall-*

(i) Exercise due diligence to prevent and detect criminal conduct and refer to <https://bpahotline.ethix360.com/#landing> and;

(ii) Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

(3) The Contractor shall-

(i) Timely disclose, in writing, to the agency Office of the Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed-

(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or

(B) A violation of the civil False Claims Act (31 U.S.C. 3729-3733).

(ii) The Government, to the extent permitted by law and regulation, will safeguard and treat information obtained pursuant to the Contractor's disclosure as confidential where the information has been marked "confidential" or "proprietary" by the company. To the extent permitted by law and regulation, such information will not be released by the Government to the public pursuant to a Freedom of Information Act request, 5 U.S.C. Section 552, without prior notification to the Contractor. The Government may transfer documents provided by the Contractor to any department or agency within the Executive Branch if the information relates to matters within the organization's jurisdiction.

(iii) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the Contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract.

(c) Business ethics awareness and compliance program and internal control system. This paragraph (c) does not apply if the Contractor has represented itself as a small business concern pursuant to the award of this contract or if this contract is for the acquisition of a commercial item as defined at BPI Part 28, Acquisition of Commercial Items and Services. The Contractor shall establish the following within 90 days after contract award, unless the Contracting Officer establishes a longer time period:

(1) An ongoing business ethics awareness and compliance program.

(i) This program shall include reasonable steps to communicate periodically and in a practical manner the Contractor's standards and procedures and other aspects of the Contractor's business ethics awareness and compliance program and internal control system, by conducting effective training programs and otherwise disseminating information appropriate to an individual's respective roles and responsibilities.

(ii) The training conducted under this program shall be provided to the Contractor's principals and employees, and as appropriate, the Contractor's agents and subcontractors.

(2) An internal control system.

(i) The Contractor's internal control system shall—

(A) Establish standards and procedures to facilitate timely discovery of improper conduct in connection with Government contracts; and

(B) Ensure corrective measures are promptly instituted and carried out.

(ii) At a minimum, the Contractor's internal control system shall provide for the following:

(A) Assignment of responsibility at a sufficiently high level and adequate resources to ensure effectiveness of the business ethics awareness and compliance program and internal control system.

(B) Reasonable efforts not to include an individual as a principal, whom due diligence would have exposed as having engaged in conduct that is in conflict with the Contractor's code of business ethics and conduct.

(C) Periodic reviews of company business practices, procedures, policies, and internal controls for compliance with the Contractor's code of business ethics and conduct and the special requirements of Government contracting, including-

(1) Monitoring and auditing to detect criminal conduct;

(2) Periodic evaluation of the effectiveness of the business ethics awareness and compliance program and internal control system, especially if criminal conduct has been detected; and

(3) Periodic assessment of the risk of criminal conduct, with appropriate steps to design, implement, or modify the business ethics awareness and compliance program and the internal control system as necessary to reduce the risk of criminal conduct identified through this process.

(D) An internal reporting mechanism, such as a hotline, which allows for anonymity or confidentiality, by which employees may report suspected instances of improper conduct, and instructions that encourage employees to make such reports.

(E) Disciplinary action for improper conduct or for failing to take reasonable steps to prevent or detect improper conduct.

(F) Timely disclosure, in writing, to the agency OIG, with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of any Government contract performed by the Contractor or a subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 U.S.C. or a violation of the civil False Claims Act (31 U.S.C. 3729-3733).

(1) If a violation relates to more than one Government contract, the Contractor may make the disclosure to the agency OIG and Contracting Officer responsible for the largest dollar value contract impacted by the violation.

(2) If the violation relates to an order against a Governmentwide acquisition contract, a multi-agency contract, a multiple-award schedule contract such as the Federal Supply Schedule, or any other procurement instrument intended for use by multiple agencies, the contractor shall notify the OIG of the ordering agency and the IG of the agency responsible for the basic contract, and the respective agencies' contracting officers.

(3) The disclosure requirement for an individual contract continues until at least 3 years after final payment on the contract.

(4) The Government will safeguard such disclosures in accordance with paragraph (b)(3)(ii) of this clause.

(G) Full cooperation with any Government agencies responsible for audits, investigations, or corrective actions.

(d) *Subcontracts.*

(1) The Contractor shall include the substance of this clause, including this paragraph (d), in subcontracts that exceed the threshold specified in BPI 3.7 on the date of subcontract award and a performance period of more than 120 days.

(2) In altering this clause to identify the appropriate parties, all disclosures of violation of the civil False Claims Act or of Federal criminal law shall be directed to the agency Office of the Inspector General, with a copy to the Contracting Officer.

(End of clause)

### 35.2.13 Provision 4-1 Taxpayer Identification Number

As prescribed in 4.5.2, insert the following provision in solicitations:

**TAXPAYER IDENTIFICATION NUMBER (MAR 2018)**

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 Bonneville 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)

35.2.14 Clause 4-2 Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities

As prescribed in 4.10.3, insert the following clause:

**PROHIBITION ON CONTRACTING FOR HARDWARE, SOFTWARE AND SERVICES DEVELOPED OR PROVIDED BY KASPERSKY LAB AND OTHER COVERED ENTITIES (FEB 2020)**

(a) Definitions. As used in this clause--

Covered article means any hardware, software, or service that—

- (1) Is developed or provided by a covered entity;
- (2) Includes any hardware, software, or service developed or provided in whole or in part by a covered entity; or
- (3) Contains components using any hardware or software developed in whole or in part by a covered entity.

Covered entity means--

- (1) Kaspersky Lab;
  - (2) Any successor entity to Kaspersky Lab;
  - (3) Any entity that controls, is controlled by, or is under common control with Kaspersky Lab; or
  - (4) Any entity of which Kaspersky Lab has a majority ownership.
- (b) Prohibition. Section 1634 of Division A of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91) prohibits Government use of any covered article. The Contractor is prohibited from--

- (1) Providing any covered article that the Government will use on or after October 1, 2018; and
- (2) Using any covered article on or after October 1, 2018, in the development of data or deliverables first produced in the performance of the contract.

(c) Reporting requirement.

- (1) In the event the Contractor identifies a covered article provided to the Government during contract performance, or the Contractor is notified of such by a subcontractor at any tier or any other source, the Contractor shall report, in writing, to the Contracting Officer. For indefinite delivery contracts, the Contractor shall report to the Contracting Officer for the indefinite delivery contract and the Contracting Officer(s) for any affected order.
- (2) The Contractor shall report the following information pursuant to paragraph (c)(1) of this clause:
  - (i) Within 1 business day from the date of such identification or notification: The contract number; the order number(s), if applicable; supplier name; brand; model number (Original Equipment Manufacturer (OEM) number, manufacturer part number, or wholesaler number); item description; and any readily available information about mitigation actions undertaken or recommended.
  - (ii) Within 10 business days of submitting the report pursuant to paragraph (c)(1) of this clause: Any further available information about mitigation actions undertaken or recommended. In addition, the Contractor shall describe the efforts it undertook to prevent use or submission of a covered article, any reasons that led to the use or submission of the covered article, and any additional efforts that will be incorporated to prevent future use or submission of covered articles.
- (d) Subcontracts. The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts, including subcontracts for the acquisition of commercial items.

(End of clause)

#### 35.2.15 Provision 4-3 Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment

As prescribed in 4.11.5(a), insert the following provision:

##### **REPRESENTATION REGARDING CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT (FEB 2022)**

- (a) Definitions. As used in this provision-- Backhaul, covered telecommunications equipment or services, critical technology, interconnection arrangements, reasonable inquiry, roaming, and substantial or essential component have the meanings provided in clause 4-4, Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment.
- (b) Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. Nothing in the prohibition shall be construed to —
  - (1) Prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or
  - (2) Cover telecommunications equipment that cannot route or redirect user data traffic or cannot permit visibility into any user data or packets that such equipment transmits or otherwise handles.



- (c) Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) prohibits the head of an executive agency on or after August 13, 2020, from entering into a contract or extending or renewing a contract with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract. Nothing in the prohibition shall be construed to —
- (1) Prohibit the head of an executive agency from procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or
  - (2) Cover telecommunications equipment that cannot route or redirect user data traffic or cannot permit visibility into any user data or packets that such equipment transmits or otherwise handles.
- (d) Representation. The Offeror represents that--It [ ] will, [ ] will not provide covered telecommunications equipment or services to Bonneville in the performance of any contract, subcontract or other contractual instrument resulting from this solicitation. After conducting a reasonable inquiry, for purposes of this representation, the Offeror represents that it [ ] does, [ ] does not use covered telecommunications equipment or services, or use any equipment, system, or service that uses covered telecommunications equipment or services.
- (e) Disclosures. If the Offeror has responded affirmatively to the representation in paragraph (d) of this provision, the Offeror shall provide the following information as part of the offer--
- (1) All covered telecommunications equipment and services offered (include brand; model number, such as original equipment manufacturer (OEM) number, manufacturer part number, or wholesaler number; and item description, as applicable);
  - (2) Explanation of the proposed use of covered telecommunications equipment and services and any factors relevant to determining if such use would be permissible under the prohibition in paragraph (b) of this provision;
  - (3) For services, the entity providing the covered telecommunications services (include entity name, unique entity identifier, and Commercial and Government Entity (CAGE) code, if known); and
  - (4) For equipment, the entity that produced the covered telecommunications equipment (include entity name, unique entity identifier, CAGE code, and whether the entity was the OEM or a distributor, if known).

(End of provision)

#### 35.2.16 Clause 4-4 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment

As prescribed in 4.11.5(b), insert the following clause:

##### **PROHIBITION ON CONTRACTING FOR CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT (FEB 2022)**

- (a) Definitions. As used in this clause—

“Backhaul” means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (e.g., connecting cell phones/towers to the core telephone network). Backhaul can be wireless (e.g., microwave) or wired (e.g., fiber optic, coaxial cable, Ethernet).

“Covered foreign country” means The People’s Republic of China.

“Covered telecommunications equipment or services” means–

- (1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities);
- (2) For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);
- (3) Telecommunications or video surveillance services provided by such entities or using such equipment; or
- (4) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

“Critical technology” means–

- (1) Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled-
  - (i) Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or
  - (ii) For reasons relating to regional stability or surreptitious listening;
- (2) Select agents and toxins covered by part 331 of title 7, Code of Federal Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code; or
- (3) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (50 U.S.C. 4817).

“Interconnection arrangements” means arrangements governing the physical connection of two or more networks to allow the use of another’s network to hand off traffic where it is ultimately delivered (e.g., connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.

“Reasonable inquiry” means an inquiry designed to uncover any information in the entity’s possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third-party audit.

“Roaming” means cellular communications services (e.g., voice, video, data) received from a visited network when unable to connect to the facilities of the home network either because signal coverage is too weak or because traffic is too high.

“Substantial or essential component” means any component necessary for the proper function or performance of a piece of equipment, system, or service.

- (b) Prohibition. Section 889(a)(1)(A) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) prohibits the head of an executive agency on or after August 13, 2019, from procuring or obtaining, or extending or renewing a contract to procure

or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. The Contractor is prohibited from providing to Bonneville any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (c) of this clause applies or the covered telecommunication equipment or services are covered by a waiver described in the Bonneville Purchasing Instructions 1.7. Section 889(a)(1)(B) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232) prohibits the head of an executive agency on or after August 13, 2020, from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph (c) of this clause applies or the covered telecommunication equipment or services are covered by a waiver described in the Bonneville Purchasing Instructions 1.7

- (c) Exceptions. This clause does not prohibit contractors from providing—
- (1) A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or
  - (2) Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.
- (d) Reporting requirement.
- (1) In the event the Contractor identifies covered telecommunications equipment or services used as a substantial or essential component of any system, or as critical technology as part of any system, during contract performance, or the Contractor is notified of such by a subcontractor at any tier or by any other source, the Contractor shall report the information in paragraph (d)(2) of this clause to the Contracting Officer, unless elsewhere in this contract are established procedures for reporting the information. For indefinite delivery contracts, the Contractor shall report to the Contracting Officer for the indefinite delivery contract and the Contracting Officer(s) for any affected order.
  - (2) The Contractor shall report the following information pursuant to paragraph (d)(1) of this clause
    - (i) Within one business day from the date of such identification or notification: the contract number; the order number(s), if applicable; supplier name; supplier unique entity identifier (if known); supplier Commercial and Government Entity (CAGE) code (if known); brand; model number (original equipment manufacturer number, manufacturer part number, or wholesaler number); item description; and any readily available information about mitigation actions undertaken or recommended.
    - (ii) Within 10 business days of submitting the information in paragraph (d)(2)(i) of this clause: any further available information about mitigation actions undertaken or recommended. In addition, the Contractor shall describe the efforts it undertook to prevent use or submission of covered telecommunications equipment or services, and any additional efforts that will be incorporated to prevent future use or submission of covered telecommunications equipment or services.
- (e) Subcontracts. The Contractor shall insert the substance of this clause, including this paragraph (e), in all subcontracts and other contractual instruments, including subcontracts for the acquisition of commercial items.

(End of clause)

## 35.2.17 Clause 4-5 Prohibition on a ByteDance Covered Application

As prescribed in 4.12.3 insert the following clause:

**PROHIBITION ON A BYTEDANCE COVERED APPLICATION (APR 2024)**

(a) Definitions. As used in this clause— Covered application means the social networking service TikTok or any successor application or service developed or provided by ByteDance Limited or an entity owned by ByteDance Limited. Information technology, as defined in 40 U.S.C. 11101(6)—

(1) Means any equipment or interconnected system or subsystem of equipment, used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the executive agency, if the equipment is used by the executive agency directly or is used by a contractor under a contract with the executive agency that requires the use—

(i) Of that equipment; or

(ii) Of that equipment to a significant extent in the performance of a service or the furnishing of a product;

(2) Includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources; but

(3) Does not include any equipment acquired by a Federal contractor incidental to a Federal contract. (b) Prohibition. Section 102 of Division R of the Consolidated Appropriations Act, 2023 (Pub. L. 117–328), the No TikTok on Government Devices Act, and its implementing guidance under Office of Management and Budget (OMB) Memorandum M–23–13, dated February 27, 2023, “No TikTok on Government Devices” Implementation Guidance, collectively prohibit the presence or use of a covered application on executive agency information technology, including certain equipment used by Federal contractors. The Contractor is prohibited from having or using a covered application on any information technology owned or managed by the Government, or on any information technology used or provided by the Contractor under this contract, including equipment provided by the Contractor’s employees; however, this prohibition does not apply if the Contracting Officer provides written notification to the Contractor that an exception has been granted in accordance with OMB Memorandum M–23–13. (c) Subcontracts. The Contractor shall insert the substance of this clause, including this paragraph (c), in all subcontracts, including subcontracts for the acquisition of commercial products or commercial services.

(End of clause)

## 35.2.18 Clause 4-6 Prohibition on the Procurement of Foreign-Made Unmanned Aircraft Systems-Representation

As prescribed in 4.13.4 insert the following clause:

**PROHIBITION ON THE PROCUREMENT OF FOREIGN-MADE UNMANNED AIRCRAFT SYSTEMS—REPRESENTATION (APR 2024)**

(a) Prohibition. Section 848 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116-92) prohibits BPA from using or procuring —

(1) An unmanned aircraft system (UAS), or any related services or equipment, that—

(i) Is manufactured in the People’s Republic of China or by an entity domiciled in the People’s Republic of China;

(ii) Uses flight controllers, radios, data transmission devices, cameras, or gimbals manufactured in the People’s Republic of China or by an entity domiciled in the People’s Republic of China;

(iii) Uses a ground control system or operating software developed in the People’s Republic of China or by an entity domiciled in the People’s Republic of China; or (iv) Uses network connectivity or data storage located in, or administered by an entity domiciled in, the People’s Republic of China; or

(2) A system for the detection or identification of a UAS, or any related services or equipment that is manufactured—

(i) In the People’s Republic of China; or

(ii) By an entity domiciled in the People’s Republic of China.

(b) The Offeror represents that it will not provide or use—

(1) A UAS, as described in paragraph (a)(1) of this clause, in the performance of any contract, subcontract, or other contractual instrument resulting from this solicitation; and

(2) A system for the detection or identification of a UAS, as described in paragraph (a)(2) of this provision, in the performance of any contract, subcontract, or other contractual instrument resulting from this solicitation.

(End of clause)

### 35.2.19 Clause 4-7 Records Management Obligations

As prescribed in 4.4.7, insert the following clause:

#### **RECORDS MANAGEMENT OBLIGATIONS (APR 2024)**

##### **A. *Applicability***

This clause applies to all Contractors whose employees create, work with, or otherwise handle Federal records, as defined in Section B, regardless of the medium in which the record exists.

##### **B. *Definitions***

“Federal record” as defined in 44 U.S.C. § 3301, includes all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them.

The term Federal record:

1. Includes Bonneville records.
2. Does not include personal materials.
3. Applies to records created, received, or maintained by Contractors pursuant to their Bonneville contract.
4. May include deliverables and documentation associated with deliverables.

### C. **Requirements**

1. Contractor shall comply with all applicable records management laws and regulations, as well as National Archives and Records Administration (NARA) records policies, including but not limited to the Federal Records Act (44 U.S.C. chs. 21, 29, 31, 33), NARA regulations at 36 CFR Chapter XII Subchapter B, and those policies associated with the safeguarding of records covered by the Privacy Act of 1974 (5 U.S.C. 552a). These policies include the preservation of all records, regardless of form or characteristics, mode of transmission, or state of completion.
2. In accordance with 36 CFR 1222.32, all data created for Government use and delivered to, or falling under the legal control of, the Government are Federal records subject to the provisions of 44 U.S.C. chapters 21, 29, 31, and 33, the Freedom of Information Act (FOIA) (5 U.S.C. 552), as amended, and the Privacy Act of 1974 (5 U.S.C. 552a), as amended and must be managed and scheduled for disposition only as permitted by statute or regulation.
3. In accordance with 36 CFR 1222.32, Contractor shall maintain all records created for Government use or created in the course of performing the contract and/or delivered to, or under the legal control of the Government and must be managed in accordance with Federal law. Electronic records and associated metadata must be accompanied by sufficient technical documentation to permit understanding and use of the records and data.
4. Bonneville and its contractors are responsible for preventing the alienation or unauthorized destruction of records, including all forms of mutilation. Records may not be removed from the legal custody of Bonneville, or destroyed except for in accordance with the provisions of the agency records schedules and with the written concurrence of the Head of the Contracting Activity. Willful and unlawful destruction, damage or alienation of Federal records is subject to the fines and penalties imposed by 18 U.S.C. 2701. In the event of any unlawful or accidental removal, defacing, alteration, or destruction of records, Contractor must report to Bonneville. Bonneville must report promptly to NARA in accordance with 36 CFR 1230.
5. The Contractor shall immediately notify the appropriate Contracting Officer upon discovery of any inadvertent or unauthorized disclosures of information, data, documentary materials, records, or equipment. Disclosure of non-public information is limited to authorized personnel with a need-to-know as described in the [contract vehicle]. The Contractor shall ensure that the appropriate personnel, administrative, technical, and physical safeguards are established to ensure the security and confidentiality of this information, data, documentary material, records and/or equipment is properly protected. The Contractor shall not remove material from Government facilities or systems, or facilities or systems operated or maintained on the Government's behalf, without the express written permission of the Head of the Contracting Activity. When information, data, documentary material, records and/or equipment is no longer required, it shall be returned to Bonneville control or the Contractor must hold it until otherwise directed. Items returned to the Government shall be hand carried, mailed,

emailed, or securely electronically transmitted to the Contracting Officer or address prescribed in the [contract vehicle]. Destruction of records is EXPRESSLY PROHIBITED unless in accordance with Paragraph (4).

6. The Contractor is required to obtain the Contracting Officer's approval prior to engaging in any contractual relationship (sub-contractor) in support of this contract requiring the disclosure of information, documentary material and/or records generated under, or relating to, contracts. The Contractor (and any sub-contractor) is required to abide by Government and Bonneville guidance for protecting sensitive, proprietary information, classified, and controlled unclassified information.
7. The Contractor shall only use Government IT equipment for purposes specifically tied to or authorized by the contract and in accordance with Bonneville policy.
8. The Contractor shall not create or maintain any records containing any non-public Bonneville information that are not specifically tied to or authorized by the contract.
9. The Contractor shall not retain, use, sell, or disseminate copies of any deliverable that contains information covered by the Privacy Act of 1974 or that which is generally protected from public disclosure by an exemption to the Freedom of Information Act.

#### 35.2.20 Clause 5-1 Privacy Assurance

As prescribed in 5.1.4, insert the following clause in solicitations and contracts:

##### **PRIVACY ASSURANCE (MAR 2018)**

The contractor acknowledges and agrees that, in the course of its contract with Bonneville, contractor may receive or access personally identifiable information (PII) belonging to Bonneville. Contractor represents and warrants that its collection, access, use, storage, disposal, and disclosure of PII will comply with all applicable privacy laws and regulations, including the Privacy Act (5 U.S.C. § 552a), the E-Government Act (44 U.S.C. § 101), and DOE regulations (10 CFR § 1008, et seq.). Contractor is responsible for the actions and omissions of its employees for the handling of PII. The contractor agrees not to share PII with any entity not explicitly authorized by the contract. The contractor agrees to report any security breach of PII within 24 hours of discovery of the breach. The contractor shall seek express consent from Bonneville before storing any PII on data servers, including redundant servers, which reside outside of the United States.

(End of clause)

#### 35.2.21 Clause 5-2 Privacy Protection

As prescribed in 5.1.4, insert the following clause into solicitations and contracts:

##### **PRIVACY PROTECTION (MAR 2018)**

The contractor acknowledges and agrees that, in the course of its contract with Bonneville, contractor will receive or access personally identifiable information (PII) belonging to Bonneville. Contractor represents and warrants that its collection, access, use, storage, disposal, and disclosure of PII will comply with all applicable privacy laws and regulations, including the Privacy Act (5 U.S.C. § 552a), the E-Government Act (44 U.S.C. § 101), and DOE regulations (10 CFR § 1008, et seq.). Contractor is responsible for the actions and omissions of its employees for the handling of PII. The contractor agrees to:

- (a) Maintain all PII in strict confidence, using such degree of care as is appropriate to avoid improper access, use, or disclosure;
- (b) Limit access to PII to contractor employees who need the information to complete a job function;
- (c) Have a documented process for training contractor employees on PII security and privacy;
- (d) Have a documented process for reporting and handling PII security breaches;
- (e) Report any PII security breach to Bonneville within 24 hours of the breach;
- (f) Use and disclose PII exclusively for the purposes for which the PII, or access to it, is provided, and not use, sell, rent, transfer, distribute, or otherwise disclose or make available PII for the contractor's own purposes or for the benefit of anyone other than Bonneville without prior written consent;
- (g) As permitted under current Federal law, allow access to data to authorized Federal agencies, and to individuals wishing to verify their own PII;
- (h) Agree that the Federal Government retains ownership of the data at all times;
- (i) Seek express written consent from Bonneville before storing any PII on data servers, including redundant servers, which physically reside outside of the United States;
- (j) Implement administrative, physical, and technical safeguards to protect PII that are no less rigorous than accepted industry and government practices (NIST 800-53 rev4 and Moderate FIPS-199), and ensure that all such safeguards comply with applicable Federal data protection and privacy laws, as well as the terms and conditions of this agreement;
- (k) Maintain a documented process to address the removal of PII upon termination of the contract; and
- (l) Upon completion or termination of the contract, promptly return to Bonneville a copy of all Bonneville data in its possession, securely destroy all other copies, and certify in writing to Bonneville that all Bonneville PII has been returned to Bonneville or securely destroyed.

(End of clause)

#### 35.2.22 Clause 5-3 Privacy Act

As prescribed in 5.1.4, insert the following clause in solicitations and contracts:

#### **PRIVACY ACT (MAR 2018)**

- (a) The Contractor shall be required to design, develop, or operate a Privacy Act system of records subject to the Privacy Act of 1974 (5 U.S.C. § 552a) and applicable DOE regulations.
- (b) The Contractor agrees to:
  - (1) Comply with the Privacy Act and the DOE rules and regulations issued under the Act in the design, development, or operation of any Privacy Act system of records.
  - (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 a violation of the Act, a civil action may be brought against Bonneville if the violation involves the design, development, or operation of a system of records on individuals. Employees of Bonneville may be subject to criminal penalties for violation of the Privacy Act. Under the Act, when a contract is for the operation of a Privacy Act system of records, the Contractor and its employees are considered employees of Bonneville.

(End of clause)

#### 35.2.23 Clause 6-1 Trade-In of Personal Property



As prescribed in 6.8.2.2, insert the following clause in solicitations and contracts that include the trade-in of Bonneville personal property:

**TRADE-IN OF PERSONAL PROPERTY (MAR 2018)**

The following property is offered for trade-in. The property is offered on an "as is/where is" basis. Bonneville'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 Bonneville's custody within 30 days after award.

Description of PropertyLocation

*CO FILL IN*

(End of clause)

35.2.24 Clause 6-2 Liquidated Damages – Supplies, Services, or Research and Development

As prescribed in 6.15.4, insert a clause in solicitations and contracts substantially the same as:

**Liquidated Damages – Supplies, Services, or Research and Development (MAR 2018)**

- (a) If the Contractor fails to deliver the supplies or perform the services within the time specified in this contract, the Contractor shall, in place of actual damages, pay to Bonneville liquidated damages of \$\_\_\_\_\_ per calendar day of delay [*CO fill in amount*].
- (b) If Bonneville terminates this contract in whole or in part under the Termination for Default clause, the Contractor is liable for liquidated damages accruing until Bonneville reasonably obtains delivery or performance of similar supplies or services. These liquidated damages are in addition to excess costs of repurchase under the Termination clause.
- (c) The Contractor will not be charged with liquidated damages when the delay in delivery or performance is beyond the control and without the fault or negligence of the Contractor as defined in the Termination for Default clause in this contract.

(End of clause)

35.2.25 Provision 7-1 Type of Contract

As prescribed in 7.2.4, complete and insert the following provision:

**TYPE OF CONTRACT (FEB 2020)**

Bonneville contemplates award of a [*see schedule of items*] contract resulting from this solicitation.

(End of provision)

35.2.26 Clause 7-2 Economic Price Adjustment – Supplies

As prescribed in 7.3.3.4(a), insert the following clause:

**ECONOMIC PRICE ADJUSTMENT – SUPPLIES (MAR 2018)**

- (a) The Contractor warrants that the supplies identified as line items \_\_\_\_\_ (*offeror insert Schedule line item number*) in the Schedule are, except for modifications required by the contract specifications, supplies for which it has an established price. The term “established price” means a price that (1) is an established catalog or market price for a commercial item sold in substantial quantities to the general public, and (2) is the net price after applying any standard trade discounts offered by the Contractor. The Contractor further warrants that, as of the date of this contract, any difference between the unit prices stated in the contract for these line items and the Contractor’s established prices for like quantities of the nearest commercial equivalents are due to compliance with contract specifications and with any contract requirements for preservation, packaging, and packing beyond standard commercial practice.
- (b) The Contractor shall promptly notify the Contracting Officer of the amount and effective date of each decrease in any applicable established price. Each corresponding contract unit price (exclusive of any part of the unit price that reflects modifications resulting from compliance with specifications or with requirements for preservation, packaging, and packing beyond standard commercial practice) shall be decreased by the same percentage that the established price is decreased. The decrease shall apply to those items delivered on and after the effective date of the decrease in the Contractor’s established price, and this contract shall be modified accordingly.
- (c) If the Contractor’s applicable established price is increased after the contract date, the corresponding contract unit price (exclusive of any part of the unit price resulting from compliance with specifications or with requirements for preservation, packaging, and packing beyond standard commercial practice) shall be increased, upon the Contractor’s written request to the Contracting Officer, by the same percentage that the established price is increased, and the contract shall be modified accordingly, subject to the following limitations:
- (1) The aggregate of the increase in any contract unit price under this clause shall not exceed 10 percent of the original contract unit price.
  - (2) The increased contract unit price shall be effective –
    - (i) On the effective date of the increase in the applicable established price if the Contracting Officer receives the Contractor’s written request within 10 days thereafter; or
    - (ii) If the written request is received later, on the date the Contracting Officer receives the request.
  - (3) The increased contract unit price shall not apply to quantities scheduled under the contract delivery before the effective date of the increased contract unit price, unless failure to deliver before that date results from causes beyond the control and without the fault or negligence of the Contractor, within the meaning of the Default clause.
  - (4) No modification increasing a contract unit price shall be executed under this paragraph (c) until the Contracting Officer verifies the increase in the applicable established price.
  - (5) Within 30 days after receipt of the Contractor’s written request, the Contracting Officer may cancel, without liability to either party, any undelivered portion of the contract items affected by the requested increase.
- (d) During the time allowed for the cancellation provided for in paragraph (c)(5) of this clause, and thereafter if there is no cancellation, the Contractor shall continue deliveries according to the contract delivery schedule, and Bonneville shall pay for such deliveries at the contract unit price, increased to the extent provided by paragraph (c) of this clause.

(End of clause)

### 35.2.27 Clause 7-3 Economic Price Adjustment – Labor and Material

As prescribed in 7.3.3.4(b), insert a clause that is substantially the same as the following:

**ECONOMIC PRICE ADJUSTMENT – LABOR AND MATERIAL (MAR 2018)**

- (a) The Contractor shall notify the Contracting Officer if, at any time during contract performance, the rate of pay for labor (including fringe benefits) or the unit prices for material shown in the Schedule either increase or decrease. The Contractor shall furnish this notice within 60 days after the increase or decrease, or within any additional period that the Contracting Officer may approve in writing, but not later than the date of final payment under this contract. The notice shall include the Contractor's proposal for an adjustment in the contract unit prices to be negotiated under paragraph (b) of this clause, and shall include, in the form required by the Contracting Officer, supporting data explaining the cause, effective date, and amount of the increase or decrease and the amount of the Contractor's adjustment proposal.
- (b) Promptly after the Contracting Officer receives the notices and data under paragraph (a) of this clause, the Contracting Officer and the Contractor shall negotiate a price adjustment in the contract unit prices and its effective date. However, the Contracting Officer may postpone the negotiation until an accumulation of increases and decreases in the labor rates (including fringe benefits) and unit prices of material shown in the Schedule results in an adjustment allowable under paragraph (c)(3) of this clause. The Contracting Officer shall modify this contract (1) to include the price adjustment and its effective date and (2) to revise the labor rates (including fringe benefits) or unit prices of material as shown in the Schedule to reflect the increases or decreases resulting from the adjustment. The Contractor shall continue performance pending agreement on, or determination of, any adjustment and its effective date.
- (c) Any price adjustment under this clause is subject to the following limitations:
- (1) Any adjustment shall be limited to the effect on unit prices of the increases or decreases in the rates of pay for labor (including fringe benefits) or unit prices for material shown in the Schedule. There shall be no adjustment for –
- (i) Supplies or services for which the production cost is not affected by such changes;
  - (ii) Changes in rates or unit prices other than those shown in the Schedule; or
  - (iii) Changes in the quantities of labor or material used from those shown in the Schedule for each item.
- (2) No upward adjustment shall apply to supplies or services that are required to be delivered or performed before the effective date of the adjustment, unless the Contractor's failure to deliver or perform according to the delivery schedule results from causes beyond the Contractor's control and without its fault or negligence, within the meaning of the Default clause.
- (3) There shall be no adjustment for any changes in rates of pay for labor (including fringe benefits) or unit prices for material which would not result in a net change of at least 3 percent of the then-current total contract price. This limitation shall not apply, however, if after final delivery of all contract line items, either party requests an adjustment under paragraph (b) of this clause.
- (4) The aggregate of the increases in any contract unit price made under this clause shall not exceed 10 percent of the original unit price. There is no percentage limitation on the amount of decreases that may be made under this clause.
- (5) The Contracting Officer may examine the Contractor's books, records, and other supporting data relevant to the cost of labor (including fringe benefits) and material during all reasonable times until the end of 3 years after the date of final payment under this contract.

(End of clause)

### 35.2.28 Clause 7-4 Price Adjustment

As prescribed in 7.3.3.4(c), insert a clause that is substantially the same as the following:

#### **PRICE ADJUSTMENT (MAR 2018)**

- (a) From \_\_\_\_\_ [CO 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 \_\_\_\_\_ [CO 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 \_\_\_\_\_ [CO 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 \_\_\_\_\_ [CO FILL IN], dated \_\_\_\_\_ [CO FILL IN].
- (b) On \_\_\_\_\_ [CO 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 \_\_\_\_\_ [CO 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)

### 35.2.29 Clause 7-5 Price Redetermination – Prospective

As prescribed in 7.3.5.4, insert the following clause:

#### **PRICE REDETERMINATION – PROSPECTIVE (MAR 2018)**

- (a) General. The unit prices and the total price stated in this contract shall be periodically redetermined in accordance with this clause, except that –
- (1) The prices for supplies delivered and services performed before the first effective date of price redetermination (see paragraph (c) of this clause) shall remain fixed; and
  - (2) In no event shall the total amount paid under this contract exceed any ceiling price included in the contract.
- (b) Definition. "Costs," as used in this clause, means allowable costs in accordance with Part 13 and Appendix 13 of the Bonneville Purchasing Instructions in effect on the date of this contract.

- (c) Price redetermination periods. For the purpose of price redetermination, performance of this contract is divided into successive periods. The first period shall extend from the date of the contract to \_\_\_\_\_, (see Note (1)) and the second and each succeeding period shall extend for \_\_\_\_\_ [CO fill in appropriate number] months from the end of the last preceding period, except that the parties may agree to vary the length of the final period. The first day of the second and each succeeding period shall be the effective date of price redetermination for that period.
- (d) Data submission
- (1) Not more than \_\_\_\_\_ nor less than \_\_\_\_\_ (see Note (2)) days before the end of each redetermination period, except the last, the Contractor shall submit –
- (i) Proposed prices for supplies that may be delivered or services that may be performed in the next succeeding period, and –
    - (A) An estimated breakdown of the costs of these supplies or services in any form on which the parties may agree;
    - (B) Sufficient data to support the accuracy and reliability of this estimate; and
    - (C) An explanation of the differences between this estimate and the original (or last preceding) estimate for the same supplies or services; and
  - (ii) A statement of all costs incurred in performing this contract through the end of the \_\_\_\_\_ month (see Note (3)) before the submission of proposed prices of which the parties may agree, with sufficient supporting data to disclose unit costs and cost trends for –
    - (A) Supplies delivered and services performed; and
    - (B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary).
- (2) The Contractor shall also submit, to the extent that it becomes available before negotiations on redetermined prices are concluded –
- (i) Supplemental statements of costs incurred after the date stated in subdivision (d)(1)(ii) of this section for –
    - (A) Supplies delivered and services performed; and
    - (B) Inventories of work in process and undelivered contract supplies on hand (estimated to the extent necessary); and
  - (ii) Any other relevant data that the Contracting Officer may reasonably require.
- (3) If the Contractor fails to submit the data required by paragraphs (d)(1) and (2) of this section, within the time specified, the Contracting Officer may suspend payments under this contract until the data are furnished. If it is later determined that Bonneville has overpaid the Contractor, the Contractor shall repay the excess to Bonneville immediately. Unless repaid within 30 days after the end of the data submittal period, the amount of the excess shall bear interest, computed from the date the data were due to the date of repayment, at the rate established in accordance with the Interest on Amounts Due BPA clause.
- (e) Price redetermination. Upon the Contracting Officer's receipt of the data required by paragraph (d) of this section, the Contracting Officer and the Contractor shall promptly negotiate to redetermine fair and reasonable prices for supplies that may be delivered or services that may be performed in the period following the effective date of price redetermination.
- (f) Contract modifications. Each negotiated redetermination of prices shall be evidenced by a modification to this contract, signed by the Contractor and the Contracting Officer, stating the redetermined prices that apply during the redetermination period.
- (g) Adjusting billing prices. Pending execution of the contract modification (see paragraph (f) of this section), the Contractor shall submit invoices or vouchers in accordance with the billing prices stated in this contract. If at any time it appears that the then-current billing prices will

be substantially greater than the estimated final prices, or if the Contractor submits data showing that the redetermined price will be substantially greater than the current billing prices, the parties shall negotiate an appropriate decrease or increase in billing prices. Any billing price adjustment shall be reflected in a contract modification and shall not affect the redetermination of prices under this clause. After the contract modification for price redetermination is executed, the total amount paid or to be paid on all invoices or vouchers shall be adjusted to reflect the agreed-upon prices, and any requested additional payments, refunds, or credits shall be made promptly.

- (h) Quarterly limitation on payments statement. This paragraph (h) applies only during periods for which firm prices have not been established.
- (1) Within 45 days after the end of the quarter of the Contractor's fiscal year in which a delivery is first made (or services are first performed) and accepted by Bonneville under this contract, and for each quarter thereafter, the Contractor shall submit the Contracting Officer a statement, cumulative from the beginning of the contract, showing –
    - (i) The total contract price of all supplies delivered (or services performed) and accepted by Bonneville and for which final prices have been established;
    - (ii) The total costs (estimated to the extent necessary) reasonably incurred for, and properly allocable solely to, the supplies delivered (or services performed) and accepted by Bonneville and for which final prices have not been established;
    - (iii) The portion of the total interim profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (h)) that is in direct proportion to the supplies delivered (or services performed) and accepted by Bonneville and for which final prices have not been established; and
    - (iv) The total amount of all invoices or vouchers for supplies delivered (or services performed) and accepted by Bonneville (including amounts applied or to be applied to liquidate progress payments).
  - (2) The statement required by paragraph (h)(1) of this section need not be submitted for any quarter for which either no costs are to be reported under subdivision (h)(1)(ii) of this section, or revised billing prices have been established in accordance with paragraph (g) of this section, and do not exceed the existing contract price, the Contractor's price-redetermination proposal, or a price based on the most recent quarterly statement, whichever is least.
  - (3) Notwithstanding any provision of this contract authorizing greater payments, if on any quarterly statement the amount under subdivision (h)(1)(iv) of this section exceeds the sum due the Contractor, as computed in accordance with subdivision (h)(1)(i), (ii), and (iii) of this section, the Contractor shall immediately refund or credit to Bonneville the amount of this excess. If any portion of the excess has been applied to the liquidating of progress payments, then that portion may, instead of being refunded, be added to the unliquidated progress payment account, consistent with the Progress Payments clause. The Contractor shall provide complete details to support any claimed reductions in refunds.
  - (4) If the Contractor fails to submit the quarterly statement within 45 days after the end of each quarter and it is later determined that Bonneville has overpaid the Contractor, the Contractor shall repay the excess to Bonneville immediately. Unless repaid within 30 days after the end of the statement submittal period, the amount of the excess shall bear interest, computed from the date the quarterly statement was due to the date of repayment, at the rate established in accordance with the Interest clause.
- (i) Subcontracts. No subcontract placed under this contract may provide for payment on a cost-plus-percentage-of-cost basis.
  - (j) Disagreements. If the Contractor and the Contracting Officer fail to agree upon redetermined prices for any price redetermined period within 60 days (or within such other period as the

parties agree) after the date on which the data required by paragraph (d) of this section are to be submitted, the Contracting Officer shall promptly issue a decision in accordance with the Disputes clause. For the purpose of paragraphs (f), (g), and (h) of this section, and pending final settlement of the disagreement on appeal, by failure to appeal, or by agreement, this decision shall be treated as an executed contract modification. Pending final settlement, price redetermination for subsequent periods, if any, shall continue to be negotiated as provided in this clause.

- (k) Termination. If this contract is terminated, prices shall continue to be established in accordance with this clause for (1) completed supplies and services accepted by Bonneville and (2) those supplies and services not terminated under a partial termination. All other elements of the termination shall be resolved in accordance with other applicable clauses of this contract.

(End of clause)

NOTES:

- (1) Express in terms of units delivered, or as a date; but in either case the period should end on the last day of a month.
- (2) Insert the number of days chosen so that the Contractor's submission will be late enough to reflect recent cost experience (taking into account the Contractor's accounting system), but early enough to permit review, audit (if necessary), and negotiation before the start of the prospective period.
- (3) Insert "first," except that "second" may be inserted if necessary to achieve compatibility with the Contractor's accounting system.

35.2.30 Clause 7-6 [Reserved]

35.2.31 Clause 7-7 Allowable Cost and Payment

As prescribed in 7.5.7(a) and 7.6.6(b), insert the following clause:

**ALLOWABLE COST AND PAYMENT (MAR 2018)**

(a) Invoicing.

- (1) Bonneville will make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more often than once every 2 weeks, in amounts determined to be allowable by the Contracting Officer in accordance with BPI Part 13 and Appendix 13 in effect on the date of this contract and terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice for the claimed allowable costs for performing this contract.
- (2) Contract financing payments are not subject to the interest penalty provisions of the Prompt Payment Act. Interim payments made prior to the final payment under the contract are contract financing payments.
- (3) Interim payments will be made for contract financing on the 30th day after receipt of a proper payment request. In the event that Bonneville requires an audit or other review of a specific payment request to ensure compliance with the terms and conditions of the contract, Bonneville is not compelled to make payment by the specified due date.

(b) Reimbursing costs.

- (1) For the purpose of reimbursing allowable costs (except as provided in paragraph (b)(2) of this clause, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term "costs" includes only –

- (i) 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;
  - (ii) 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 –
    - (A) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments determined due will be made –
      - (1) In accordance with the terms and conditions of a subcontract or invoice; and
      - (2) Ordinarily within 30 days of the submission of the Contractor's payment request to Bonneville;
    - (B) Materials issued from the Contractor's inventory and placed in the production process for use on the contract;
    - (C) Direct labor;
    - (D) Direct travel;
    - (E) Other direct in-house costs; and
    - (F) Properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts; and
  - (iii) The amount of financing payments that have been paid by cash, check, or other forms of payment to subcontractors.
- (2) Accrued costs of Contractor contributions under employee pension plans shall be excluded until actually paid unless –
- (i) The Contractor's practice is to make contributions to the retirement fund quarterly or more frequently; and
  - (ii) The contribution does not remain unpaid 30 days after the end of the applicable quarter or shorter payment period (any contribution remaining unpaid shall be excluded from the Contractor's indirect costs for payment purposes).
- (3) Notwithstanding the audit and adjustment of invoices or vouchers under paragraph (g) of this clause, allowable indirect costs under this contract shall be obtained by applying indirect cost rates established in accordance with paragraph (d) of this clause.
- (4) 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 Bonneville shall be disregarded for purposes of cost-reimbursement under this clause.
- (c) Small business concerns. A small business concern may receive more frequent payments than every 2 weeks.
- (d) 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 submit an adequate final indirect cost rate proposal to the Contracting Officer within the 6-month period following the expiration of each of its fiscal years. Reasonable extensions, for exceptional circumstances only, may be requested in writing by the Contractor and granted in writing by the Contracting Officer. The Contractor shall support its proposal with adequate supporting data.
    - (i) The proposed rates shall be based on the Contractor's actual cost experience for that period. The appropriate Government representative and the Contractor shall establish the final indirect cost rates as promptly as practical after receipt of the Contractor's proposal.



- (ii) An adequate indirect cost rate proposal shall include the following data:
  - (A) A summary of all claimed indirect expense rates, including pool, base, and calculated indirect rate.
  - (B) General and Administrative expenses (final indirect cost pool). Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts).
  - (C) Overhead expense (intermediate indirect cost pool). Schedule of claimed expenses by element of cost as identified in accounting records (Chart of Accounts) for each final indirect cost pool.
  - (D) Occupancy expenses (intermediate indirect cost pool). Schedule of claimed expenses by element of cost as identified in accounting records (Charts of Accounts) and expense reallocation to final indirect cost pools.
  - (E) Claimed allocation bases, by element of cost, used to distribute indirect costs.
  - (F) Facilities capital cost of money factors computation.
  - (G) Reconciliation of books account (i.e., General Ledger) and claimed direct costs by major cost element.
  - (H) Schedule of direct costs by contract and subcontract and indirect expense applied at claimed rates, as well as a subsidiary schedule of Government participation percentages in each of the allocation base amounts.
  - (I) Schedule of cumulative direct and indirect costs claimed and billed by contract and subcontract.
  - (J) Subcontract information. Listing of subcontracts awarded to companies for which the contractor is the prime or upper-tier contractor (including prime and subcontract numbers; subcontract value and award type; amount claimed during the fiscal year; and the subcontractor name, address, and point of contact information).
  - (K) Summary of each time-and-materials and labor-hour contract information, including labor categories, labor rates, hours, and amounts; direct materials, other direct costs; and indirect expense applied at claimed rates.
  - (L) Reconciliation of total payroll per IRS form 941 to total labor costs distribution.
  - (M) Listing of decisions/agreements/approvals and description of accounting/organizational changes.
  - (N) Certificate of final indirect costs.
  - (O) Contract closing information for contracts physically completed in this fiscal year (include contract number, period of performance, contract ceiling amounts, contract fee computations, level of effort, and indicate if the contract is ready to close).
- (iii) The following supplemental information is not required to determine if a proposal is adequate, but may be required during the audit process:
  - (A) A comparative analysis of indirect expense pools detailed by account to prior fiscal year and budgetary data.
  - (B) General organizational information and limitation on allowability of compensation for certain contractor personnel. See BPI Appendix 13.
  - (C) Identification of prime contracts under which the contractor performs as a subcontractor.
  - (D) Description of accounting system (excludes contractors required to submit a CAS Disclosure Statement or contractors where the description of the accounting system has not changed from the previous year's submission).

- (E) Procedures for identifying and excluding unallowable costs from the costs claimed and billed (excludes contractors where the procedures have not changed from the previous year's submission).
  - (F) Financial statements and other financial data (e.g., trial balance, compilation, review, etc.).
  - (G) Management letter from outside CPAs concerning any internal control weaknesses.
  - (H) Actions that have been and/or will be implemented to correct the weaknesses described in the management letter from subparagraph (G) of this section.
  - (I) List of all internal audit reports issued since the last disclosure of internal audit reports to Bonneville.
  - (J) Annual internal audit plan of scheduled audits to be performed in the fiscal year when the final indirect cost rate submission is made.
  - (K) Federal and State income tax returns.
  - (L) Securities and Exchange Commission 10-K annual report.
  - (M) Minutes from board of directors meetings.
  - (N) Listing of delay claims and termination claims submitted which contain costs relating to the subject fiscal year.
  - (O) Contract briefings, which generally include a synopsis of all pertinent contract provisions, such as: contract type, contract amount, product or service(s) to be provided, contract performance period, rate ceilings, advance approval requirements, pre-contract cost allowability limitations, and billing limitations.
- (iv) The Contractor shall update the billings on all contracts to reflect the final settled rates and update the schedule of cumulative direct and indirect costs claimed and billed, as required in paragraph (d)(2)(iii)(l) of this section, within 60 days after settlement of final indirect cost rates.
- (3) The Contractor and appropriate Government representative shall execute a written understanding setting forth the final indirect cost rates. The understanding shall specify (i) the agreed-upon final annual indirect cost rates, (ii) the bases to which the rates apply, (iii) the periods for which the rates apply, (iv) any specific indirect cost items treated as direct costs in the settlement, and (v) the affected contract and/or subcontract, identifying any with advance agreements or special terms and the applicable rates. The understanding shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract. The understanding 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.
- (5) Within 120 days (or longer period if approved in writing by the Contracting Officer) after settlement of the final annual indirect cost rates for all years of a physically complete contract, the Contractor shall submit a completion invoice or voucher to reflect the settled amounts and rates. The completion invoice or voucher shall include settled subcontract amounts and rates. The prime contractor is responsible for settling subcontractor amounts and rates included in the completion invoice or voucher and providing status of subcontractor audits to the Contracting Officer upon request.
- (6) (i) If the Contractor fails to submit a completion invoice or voucher within the time specified in paragraph (d)(5) of this clause, the Contracting Officer may –
- (A) Determine the amounts due to the Contractor under the contract; and
  - (B) Record this determination in a unilateral modification to the contract.
- (ii) This determination constitutes the final decision of the Contracting Officer in accordance with the Disputes clause.

- (e) Billing rates. Until final annual indirect cost rates are established for any period, Bonneville shall reimburse the Contractor at billing rates established by the Contracting Officer 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.
- (f) Quick-closeout procedures. Quick-closeout procedures are applicable when the conditions in BPI 14.17.7 are satisfied.
- (g) Audit. At any time or times before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of cost audited. Any payment may be –
- (1) Reduced by amounts found by the Contracting Officer not to constitute allowable costs; or
  - (2) Adjusted for prior overpayments or underpayments.
- (h) Final payment.
- (1) Upon approval of a completion invoice or voucher submitted by the Contractor in accordance with paragraph (d)(5) of this clause, and upon the Contractor's compliance with all terms of this contract, Bonneville 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 Bonneville 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 Bonneville. Reasonable expenses incurred by the Contractor for securing refunds, rebates, credits, or other amounts shall be allowable costs if approved by the Contracting Officer. 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 –
    - (i) An assignment to Bonneville, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including interest, if any) properly allocable to costs for which the Contractor has been reimbursed by Bonneville under this contract; and
    - (ii) A release discharging Bonneville its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, except –
      - (A) Specified claims stated in exact amounts, or in estimated amounts when the exact amounts are not known;
      - (B) Claims (including reasonable incidental expenses) based upon liabilities of the Contractor to third parties arising out of the performance of this contract; provided, that the claims are not known to the Contractor on the date of the execution of the release, and that the Contractor gives notice of the claims in writing to the Contracting Officer within 6 years following the release date or notice of final payment date, whichever is earlier; and
      - (C) Claims for reimbursement of costs, including reasonable incidental expenses, incurred by the Contractor under the patent clauses of this contract, excluding, however, any expenses arising from the Contractor's indemnification of Bonneville against patent liability.

(End of clause)

*Alternate I (Mar 2018).* As prescribed in 7.5.7(a)(2), substitute the following paragraph (b)(1)(iii) for paragraph (b)(1)(iii) of the basic clause:

- (b) (1)(iii) The amount of progress and other payments to the Contractor’s subcontractors that either have been paid, or that the Contractor is required to pay pursuant to the clause of this contract entitled “Payment – Construction Contracts.” Payments shall be made by cash, check, or other form of payment to the Contractor’s subcontractors under similar cost standards.

*Alternate II (Mar 2018).* As prescribed in 7.5.7(a)(3), substitute the following paragraph (a)(1) for paragraph (a)(1) of the basic clause:

- (a) (1) Bonneville will make payments to the Contractor when requested as work progresses, but not more often than once every two weeks, in amounts determined to be allowable by the Contracting Officer in accordance with BPI Appendix 13 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice supported by a statement of the claimed allowable cost for performing this contract.

*Alternate III (Mar 2018).* As prescribed in 7.5.7(a)(4), substitute the following paragraph (a)(1) for paragraph (a)(1) of this basic clause:

- (a) (1) Bonneville will make payments to the Contractor when requested as work progresses, but no more often than once every two weeks, in amounts determined to be allowable by the Contracting Officer in accordance with BPI Appendix 13 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice supported by a statement of the claimed allowable cost for performing this contract.

35.2.32 Clause 7-8 Fixed Fee

As prescribed in 7.5.7(b), insert the following clause:

**FIXED FEE (MAR 2018)**

- (a) Bonneville shall pay the Contractor for performing this contract the fixed fee specified in the Schedule.
- (b) Payment of the fixed fee shall be made as specified in the Schedule; provided that the Contracting Officer withholds a reserve not to exceed 15 percent of the total fixed fee or \$100,000, whichever is less, to protect Bonneville’s interest. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of an adequate final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years’ settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor’s past performance related to the submission and settlement of final indirect cost rate proposals.

(End of clause)

35.2.33 Clause 7-9 Fixed Fee – Construction

As prescribed in 7.5.7(c), insert the following clause:

**FIXED FEE – CONSTRUCTION (MAR 2018)**

- (a) Bonneville shall pay to the Contractor for performing this contract the fixed fee specified in the Schedule.
- (b) Payment of the fixed fee shall be made in installments based upon the percentage of completion of the work as determined from estimates submitted to and approved by the Contracting Officer, but subject to the withholding provisions of paragraph (c) of this section.
- (c) The Contracting Officer shall withhold a reserve not to exceed 15 percent of the total fixed fee or \$100,000, whichever is less, to protect Bonneville's interest. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of an adequate final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

(End of clause)

#### 35.2.34 Clause 7-10 Incentive Fee

As prescribed in 7.5.7(d) and 7.6.6(c), insert the following clause:

#### **INCENTIVE FEE (MAR 2018)**

- (a) General. Bonneville shall pay the Contractor for performing this contract a fee determined as provided in this contract.
- (b) Target cost and target fee. The target cost and target fee specified in the Schedule are subject to adjustment if the contract is modified in accordance with paragraph (d) of this clause.
  - (1) "Target cost," as used in this contract, means the estimated cost of this contract as initially negotiated adjusted in accordance with paragraph (d) of this clause.
  - (2) "Target fee," as used in this contract, means the fee initially negotiated on the assumption that this contract would be performed for a cost equal to the estimated cost initially negotiated, adjusted in accordance with paragraph (d) of this clause.
- (c) Withholding of payment.
  - (1) Normally, Bonneville shall pay the fee to the Contractor as specified in the Schedule. However, when the Contracting Officer considers that performance or cost indicates that the Contractor will not achieve target, Bonneville shall pay on the basis of an appropriate lesser fee. When the Contractor demonstrates that performance or cost clearly indicates that the Contractor will earn a fee significantly above the target fee, Bonneville may, at the sole discretion of the Contracting Officer, pay on the basis of an appropriate higher fee.
  - (2) Payment of the incentive fee shall be made as specified in the Schedule; provided that the Contracting Officer withholds a reserve not to exceed 15 percent of the total incentive fee or \$100,000, whichever is less, to protect Bonneville's interest. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of an adequate final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

- (d) Equitable adjustments. When the work under this contract is increased or decreased by a modification to this contract or when any equitable adjustment in the target cost is authorized under any other clause, equitable adjustments in the target cost, target fee, minimum fee, and maximum fee, as appropriate, shall be stated in a supplemental agreement to this contract.
- (e) Fee payable.
- (1) The fee payable under this contract shall be the target fee increased by \_\_\_\_\_ *[CO insert Contractor's participation]* cents for every dollar that the total allowable cost is less than the target cost or decreased by \_\_\_\_\_ *[CO insert Contractor's participation]* cents for every dollar that the total allowable cost exceeds the target cost. In no event shall the fee be greater than \_\_\_\_\_ *[CO insert percentage]* percent or less than \_\_\_\_\_ *[CO insert percentage]* percent of the target cost.
  - (2) The fee shall be subject to adjustment, to the extent provided in paragraph (d) of this clause, and within the minimum and maximum fee limitations in paragraph (e)(1) of this clause, when the total allowable cost is increased or decreased as a consequence of –
    - (i) Payments made under assignments; or
    - (ii) Claims excepted from the release as required by paragraph (h)(2) of the Allowable Cost and Payment clause.
  - (3) If this contract is terminated in its entirety, the portion of the target fee payable shall not be subject to an increase or decrease as provided in this paragraph. The termination shall be accomplished in accordance with other applicable clauses of this contract.
  - (4) For the purpose of fee adjustment, “total allowable cost” shall not include allowable costs arising out of –
    - (i) Any of the causes covered by the Excusable Delays clause to the extent that they are beyond the control and without the fault or negligence of the Contractor or any subcontractor;
    - (ii) The taking effect, after negotiating the target cost, of a statute, court decision, written ruling, or regulation that results in the Contractor’s being required to pay or bear the burden of any tax or duty or rate increase in a tax or duty;
    - (iii) Any direct cost attributed to the Contractor’s involvement in litigation as required by the Contracting Officer pursuant to any clause of this contract;
    - (iv) The purchase and maintenance of additional insurance not in the target cost and required by the Contracting Officer, or claims for reimbursement for liabilities to third persons pursuant to the Insurance Liability to Third Persons clause;
    - (v) Any claim, loss or damage resulting from a risk for which the Contractor has been relieved of liability by Bonneville; or
    - (vi) Any claim, loss, or damage resulting from a risk defined in the contract as unusually hazardous or as a nuclear risk and against which Bonneville has expressly agreed to indemnify the Contractor.
  - (5) All other allowable costs are included in “total allowable cost” for fee adjustment in accordance with this paragraph (e), unless otherwise specifically provided in this contract.
- (f) Contract modification. The total allowable cost and the adjusted fee determined as provided in this clause shall be evidenced by a modification to this contract signed by the Contractor and Contracting Officer.
- (g) Inconsistencies. In the event of any language inconsistencies between this clause and provisioning documents or Government options under this contract, compensation for spare parts or other supplies and services ordered under such documents shall be determined in accordance with this clause.

(End of clause)

## 35.2.35 Clause 7-11 Cost Contract – No Fee

As prescribed in 7.5.7(e), insert the following clause:

**COST CONTRACT – NO FEE (MAR 2018)**

- (a) Bonneville shall not pay the Contractor a fee for performing this contract.
- (b) After payment of 80 percent of the total estimated cost shown in the Schedule, the Contracting Officer may withhold further payment of allowable cost until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect Bonneville's interest. This reserve shall not exceed one percent of the total estimated cost shown in the Schedule or \$100,000, whichever is less.

(End of clause)

*Alternate I (Mar 2018).* In a contract for research and development with an educational institution or a nonprofit organization, for which the Contracting Officer has determined that withholding of a portion of allowable costs is not required, delete paragraph (b) of the basic clause.

## 35.2.36 Clause 7-12 Cost-Sharing Contract – No Fee

As prescribed in 7.5.7(f), insert the following clause:

**COST SHARING CONTRACT – NO FEE (MAR 2018)**

- (a) Bonneville shall not pay the Contractor a fee for performing this contract.
- (b) After payment of 80 percent of the total estimated cost shown in the Schedule, the Contracting Officer may withhold further payment of allowable cost until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect Bonneville's interest. This reserve shall not exceed one percent of the total estimated cost shown in the Schedule or \$100,000, whichever is less.

(End of clause)

*Alternate I (Mar 2018).* In a contract for research and development with an educational institution or a nonprofit organization, for which the Contracting Officer has determined that withholding of a portion of allowable costs is not required, delete paragraph (b) of the basic clause.

## 35.2.37 Clause 7-14 [Reserved]

## 35.2.38 Clause 7-15 Predetermined Indirect Cost Rates

As prescribed in 7.5.7(g), insert the following clause:

**PREDETERMINED INDIRECT COST RATES (MAR 2018)**

- (a) Notwithstanding the Allowable Cost and Payment clause of this contract, the allowable indirect costs under this contract shall be obtained by applying predetermined indirect cost rates to bases agreed upon by the parties, as specified below.
- (b) (1) The Contractor shall submit an adequate final indirect cost rate proposal to the Contracting Officer and auditor within the 6-month period following the expiration of each of its Contracting Officer and auditor within the 6-month period following the expiration of each of its fiscal years (or other period agreed to by the parties). Reasonable extensions, for

exceptional circumstances only, may be requested in writing by the Contractor and granted in writing by the Contracting Officer. The Contractor shall support its proposal with adequate supporting data.

- (1) The proposal rates shall be based on the Contractor's actual cost experience for that period. The Contracting Officer and the Contractor shall establish the final indirect cost rates as promptly 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 BPI Appendix 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 Schedule. The Contracting Officer and Contractor shall negotiate rates for subsequent periods and execute a written indirect cost rate agreement setting forth the results. The agreement shall specify (1) the agreed-upon predetermined indirect cost rates, (2) the bases to which the rates apply, (3) the period for which the rates apply, and (4) the specific items treated as direct costs or any changes in the items previously agreed to be direct costs. 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 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 Contracting Officer subject to appropriate adjustment when the final rates for that period are established.
- (f) Any failure by the parties to agree on any predetermined indirect cost rates under this clause shall not be considered a dispute within the meaning of the Disputes clause. If for any fiscal year (or other period specified in the Schedule) the parties fail to agree to predetermined indirect cost rates, the allowable indirect costs shall be obtained by applying final indirect cost rates established in accordance with the Allowable Cost and Payment clause.
- (g) Allowable indirect costs for the period from the beginning of performance until the end of the Contractor's fiscal year (or other period specified in the Schedule) shall be obtained using the predetermined indirect cost rates and the bases shown in the Schedule.

(End of clause)

### 35.2.39 Clause 7-16 Incentive Price Revision – Firm Target

As prescribed in 7.6.6(a), insert the following clause:

#### **INCENTIVE PRICE REVISION – FIRM TARGET (MAR 2018)**

- (a) General. The supplies or services identified in the Schedule as Items \_\_\_\_\_ [*CO fill in contract line item numbers*] are subject to price revision in accordance with this clause; provided, that in no event shall the total final price of these items exceed the ceiling price of \_\_\_\_\_ dollars (\$ \_\_\_\_\_). Any supplies or services that are to be (1) ordered separately under, or otherwise added to, this contract and (2) subject to price revision in accordance with the terms of this clause shall be identified as such in a modification to this contract.
- (b) Definition. "Costs," as used in this clause, means allowable costs in accordance with BPI Appendix 13 in effect on the date of this contract.
- (c) Data submission.
- (1) Within \_\_\_\_\_ [*CO fill in number of days*] days after the end of the month in which the Contractor has delivered the last unit of supplies and/or completed the services specified by item number in paragraph (a) of this clause, the Contractor shall submit:



- (i) A detailed statement of all costs incurred up to the end of that month in performing all work under the items;
  - (ii) An estimate of costs of further performance, if any, that may be necessary to complete performance of all work under the items;
  - (iii) A list of all residual inventory and an estimate of its value; and
  - (iv) Any other relevant data that the Contracting Officer may reasonably require.
- (2) If the Contractor fails to submit the data required by paragraph (c)(1) of this clause within the time specified and it is later determined that Bonneville has overpaid the Contractor, the Contractor shall repay the excess to Bonneville immediately. Unless repaid within 30 days after the end of the data submittal period, the amount of the excess shall bear interest, computed from the date the data were due to the date of repayment, at the rate established in accordance with the Interest on Amounts Due BPA clause.
- (d) Price revision.
- (1) On the basis of the information required by paragraph (c) of this clause, together with any other pertinent information, the Contracting Officer and the Contractor shall promptly establish the total final price of the items specified in (a) of this clause by negotiating the total final cost incurred or to be incurred for supplies delivered (or services performed) and accepted by Bonneville and which are subject to price revision under this clause.
- (2) The total final price shall be established by applying to the total final negotiated cost an adjustment for profit or loss, as follows:
- (i) If the total final negotiated cost is equal to the total target cost, the adjustment is the total target profit.
  - (ii) If the total final negotiated cost is greater than the total target cost, the adjustment is the total target profit, less \_\_\_\_\_ *[CO fill in percent]* percent of the amount by which the total final negotiated cost exceeds the total target cost.
  - (iii) If the final negotiated cost is less than the total target cost, the adjustment is the total target profit plus \_\_\_\_\_ *[CO fill in percent]* percent of the amount by which the total final negotiated cost is less than the total target cost.
- (e) Contract modification. The total final price of the items specified in paragraph (a) of this clause shall be evidenced by a modification to this contract, signed by both the Contractor and the Contracting Officer. This price shall not be subject to revision, notwithstanding any changes in the cost of performing the contract, except to the extent that –
- (1) The parties may agree in writing, before the determination of total final price, to exclude specific elements of cost from this price and to a procedure for subsequent disposition of those elements; and
  - (2) Adjustments or credits are explicitly permitted or required by this or any other clause in this contract.
- (f) Adjusting billing prices.
- (1) Pending execution of the contract modification (see paragraph (e) of this clause), the Contractor shall submit invoices in accordance with billing prices as provided in this paragraph. The billing prices shall be the target prices shown in this contract.
- (2) If at any time it appears from information provided by the Contractor under paragraph (g)(2) of this clause that the then-current billing prices will be substantially greater than the estimated final prices, the parties shall negotiate a reduction in the billing prices. Similarly, the parties may negotiate an increase in billing prices by any or all of the difference between the target prices and the ceiling price, upon the Contractor's submission of factual data showing that final cost under this contract will be substantially greater than the target cost.
- (3) Any billing price adjustment shall be reflected in a contract modification and shall not affect the determination of the total final price under paragraph (d) of this clause. After the contract modification establishing the total final price is executed, the total amount

- paid or to be paid on all invoices shall be adjusted to reflect the total final price, and any resulting additional payments, refunds, or credits shall be made promptly.
- (g) Quarterly limitation on payments statement. This paragraph (g) shall apply until final price revision under this contract has been completed.
- (1) Within 45 days after the end of each quarter of the Contractor's fiscal year in which a delivery is first made (or services are first performed) and accepted by Bonneville under this contract, and for each quarter thereafter, the Contractor shall submit to the Contracting Officer a statement, cumulative from the beginning of the contract, showing
- (i) The total contract price of all supplies delivered (or services performed) and accepted by Bonneville and for which final prices have been established;
  - (ii) The total costs (estimated to the extent necessary) reasonably incurred for, and properly allocable solely to, the supplies delivered (or services performed) and accepted by Bonneville and for which final prices have not been established;
  - (iii) The portion of the total target profit (used in establishing the initial contract price or agreed to for the purpose of this paragraph (g)) that is in direct proportion to the supplies delivered (or services performed) and accepted by Bonneville and for which final prices have not been established – increased or decreased in accordance with paragraph (d)(2) of this clause, when the amount stated under subdivision (g)(1)(ii) of this clause differs from the aggregate target costs of the supplies or services; and
  - (iv) The total amount of all invoices for supplies delivered (or services performed) and accepted by Bonneville (including amounts applied or to be applied to liquidate progress payments).
- (2) Notwithstanding any provision of this contract authorizing greater payment, if on any quarterly statement the amount under subdivision (g)(1)(iv) of this clause exceeds the sum due the Contractor, as computed in accordance with subdivisions (g)(1)(i), (ii), and (iii) of this clause, the Contractor shall immediately refund or credit to Bonneville the amount of this excess. If any portion of the excess has been applied to the liquidation of progress payments, then that portion may, instead of being refunded, be added to the unliquidated progress payment account consistent with the Basis of Payment – Progress Payments clause. The Contractor shall provide complete details to support any claimed reductions in refunds.
- (3) If the Contractor fails to submit the quarterly statement within 45 days after the end of each quarter and it is later determined that Bonneville has overpaid the Contractor, the Contractor shall repay the excess to Bonneville immediately. Unless repaid within 30 days after the end of the statement submittal period, the amount of the excess shall bear interest, computed from the date the quarterly statement was due to the date of repayment, at the rate established in accordance with the Interest on Amounts Due BPA clause.
- (h) Subcontracts. No subcontract placed under this contract may provide for payment on a cost-plus-a-percentage-of-cost basis.
- (i) Disagreements. If the Contractor and the Contracting Officer fail to agree upon the total final price within 60 days (or within such other period as the Contracting Officer may specify) after the date on which the data required by paragraph (c) of this clause are to be submitted, the Contracting Officer shall promptly issue a decision in accordance with the Disputes clause.
- (j) Termination. If this contract is terminated before the total final price is established, prices of supplies or services subject to price revision shall be established in accordance with this clause for (1) completed supplies and services accepted by Bonneville and (2) those supplies and services not terminated under a partial termination. All other elements of the termination shall be resolved in accordance with other applicable clauses of this contract.

- (k) Equitable adjustment under other clauses. If an equitable adjustment in the contract price is made under any other clause of this contract before the total final price is established, the adjustment shall be made in the total target cost and may be made in the maximum dollar limit on the total final price, the total target profit, or both. If the adjustment is made after the total final price is established, only the total final price shall be adjusted.
- (l) Exclusion from target price and total final price. If any clause of this contract provides that the contract price does not or will not include an amount for a specific purpose, then neither any target price nor the total final price includes or will include any amount for that purpose.
- (m) Separate reimbursement. If any clause of this contract expressly provides that the cost of performance of an obligation shall be at Government expense, that expense shall not be included in any target price or in the total final price, but shall be reimbursed separately.
- (n) Taxes. As used in the Federal, State, and Local Taxes clause or in any other clause that provides for certain taxes or duties to be included in, or excluded from, the contract price, the term "contract price" includes the total target price or, if it has been established, the total final price. When any of these clauses requires that the contract price be increased or decreased as a result of changes in the obligation of the Contractor to pay or bear the burden of certain taxes or duties, the increase or decrease shall be made in the total target price or, if it has been established, in the total final price, so that it will not affect the Contractor's profit or loss on this contract.

(End of clause)

*Alternate I (Mar 2018).* As prescribed in 7.6.6(a), add the following paragraph (o) to the basic clause:

- (o) Options. Parts, other supplies, or services that are to be furnished under this contract on the basis of a Government option shall be subject to price revision in accordance with this clause. Any prices established for these parts, other supplies, or services under a Government option shall be treated as target prices. Target cost and profit covering these parts, other supplies, or services may be established separately, in the aggregate, or in any combination, as the parties may agree.

#### 35.2.40 Clause 7-17 Basic Agreement

As prescribed in 7.9.2.1, insert the following clause in solicitations and contracts for non-commercial acquisitions only:

#### **BASIC AGREEMENT (FEB 2022)**

- (a) By signing the Basic Agreement cover page, Bonneville and the Contractor agree that Bonneville is under no obligation until a binding order, subject to the Basic 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. Bonneville is obligated only to the extent of authorized orders actually placed against this Basic Agreement.
- (b) This Basic Agreement shall become effective upon Bonneville's receipt of the fully executed Basic Agreement. The task/delivery orders become binding contracts upon Bonneville's receipt of the Contractor's written confirmation of the order. The Basic Agreement shall continue until the earlier of its expiration or termination pursuant to Clause 20-3, Termination for Default or Clause 20-2, Termination for the Convenience of Bonneville Convenience.
- (c) Orders shall identify the number of the task/delivery order and the Basic 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 Items.

(End of clause)

35.2.41 Clause 7-18 Ordering

As prescribed in 7.7.6(a), insert the following clause:

**ORDERING (FEB 2020)**

- (a) Any supplies and services to be furnished under this contract shall be ordered by issuance of delivery orders or task orders by the individuals or activities designated in the Schedule.
- (b) All delivery orders or task orders are subject to the terms and conditions of this contract. In the event of conflict between a delivery order or a task order and this contract, the contract shall control.
- (c) If mail, a delivery order or task order is considered “issued” when Bonneville deposits the order in the mail. Orders may be issued orally, by facsimile, or by electronic commerce methods on if authorized in the Schedule.

(End of clause)

35.2.42 Clause 7-19 Order Limitations

As prescribed in 7.7.6(b), insert a clause substantially the same as follows:

**ORDER LIMITATIONS (FEB 2020)**

- (a) Minimum order.
  - (1) When Bonneville requires supplies or services covered by this contract in an amount less than \_\_\_\_\_ [CO fill in dollar figure or quantity], Bonneville is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract.
  - (2) Bonneville will order at least \_\_\_\_\_ [CO fill in dollar figure or quantity] this quantity of supplies or services.
- (b) Maximum order. The Contractor is not obligated to honor –
  - (1) Any order for a single item in excess of \_\_\_\_\_ [CO fill in dollar figure or quantity];
  - (2) Any order for a combination of items in excess of \_\_\_\_\_ [CO fill in dollar figure or quantity]; or
  - (3) A series of orders from the same ordering office within \_\_\_\_\_ days that together call for quantities exceeding the limitation in paragraph (b)(1) or (2) of this section.
  - (4) Total orders that exceed \_\_\_\_\_ [CO fill in dollar figure or quantity].
- (c) Notwithstanding paragraph (b) of this section, the Contractor shall honor any order exceeding the maximum order limitation in paragraph (b), unless that order (or orders) is returned to the ordering office within \_\_\_\_\_ days after issuance, with written notice stating the Contractor’s intent not to ship the item (or items) called for and the reasons. Upon receiving this notice, Bonneville may acquire the supplies or services from another source.

(End of clause)

35.2.43 Clause 7-20 Definite Quantity

As prescribed in 7.7.6(c), insert the following clause:

**DEFINITE QUANTITY (FEB 2020)**

- (a) This is a definite-quantity, indefinite-delivery contract for the supplies or services specified, and effective for the period stated, in the Schedule.
- (b) Bonneville shall order the quantity of supplies or services specified in the Schedule, and the Contractor shall furnish them when ordered. Delivery or performance shall be at locations designated in orders issued in accordance with the Ordering clause and the Schedule.
- (c) Except for any limitation on quantities in the Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued. Bonneville may issue orders requiring delivery to multiple destinations or performance at multiple locations.
- (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 Government'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.

(End of clause)

35.2.44 Clause 7-21 [Reserved]

35.2.45 Clause 7-22 Indefinite Quantity

As prescribed in 7.7.6(d), insert the following clause:

**INDEFINITE QUANTITY (FEB 2020)**

- (a) This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.
- (b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. The Contractor shall furnish to Bonneville, when and if ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the "maximum." Bonneville shall order at least the quantity of supplies or services designated in the Schedule as the "minimum."
- (c) Except for any limitations on quantities in the Order Limitations clause or in the Schedule, there is no limit on the number of orders that may be issued. Bonneville may issue orders requiring delivery to multiple destinations or performance at multiple locations.
- (d) Any order issued during the effective period of this contract and not completed within that period shall be completed by the Contractor within the time specified in the order. The contract shall govern the Contractor's and Government'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.

(End of clause)

35.2.46 Clause 7-23 Execution and Commencement of Work

As prescribed in 7.8.4.4(b)(1), insert the following clause:

**EXECUTION AND COMMENCEMENT OF WORK (MAR 2018)**

The Contractor shall indicate acceptance of this letter contract by signing \_\_\_\_\_ [CO fill in] copies of the contract and returning them to the Contacting Officer not later than \_\_\_\_\_

*[CO fill in date]*. Upon acceptance by both parties, the Contractor shall proceed with performance of the work, including purchase of necessary materials.

(End of clause)

#### 35.2.47 Clause 7-24 Limitation of Government Liability

As prescribed in 7.8.4.4(b)(2), insert the following clause:

##### **LIMITATION OF GOVERNMENT LIABILITY (MAR 2018)**

- (a) In performing this contract, the Contractor is not authorized to make expenditures or incur obligations exceeding \_\_\_\_\_ *[CO fill in appropriate amount]* dollars.
- (b) The maximum amount for which Bonneville shall be liable if this contract is terminated is \_\_\_\_\_ *[CO fill in appropriate amount]* dollars.

(End of clause)

#### 35.2.48 Clause 7-25 Contract Definitization

As prescribed in 7.8.4.4(b)(3), insert the following clause:

##### **CONTRACT DEFINITIZATION (MAR 2018)**

- (a) A \_\_\_\_\_ *[CO fill in specific type of contract]* definitive contract is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive contract that will include (1) all clauses required by the Bonneville Purchasing Instructions (BPI) on the date of execution of the letter contract, and (2) any other mutually agreeable clauses, terms, and conditions. The Contractor agrees to submit a \_\_\_\_\_ *[insert specific type of proposal (e.g., fixed-price or cost-and-fee) proposal, including data other than cost or pricing data, and cost or pricing data, sufficient to support its proposal.*
- (b) The schedule for definitizing this contract is *[CO shall insert target date for definitization of the contract and dates for submission of proposal, beginning of negotiations, and, if appropriate, submission of make-or-buy and subcontracting plans and cost or pricing data]*:
- (c) If agreement on a definitive contract to supersede this letter contract is not reached by the target date in paragraph (b) of this section, or within any extension of it granted by the Contracting Officer, the Contracting Officer may, with the approval of the head of the contracting activity, determine a reasonable price or fee, subject to Contractor appeal as provided in the Disputes clause. In any event, the Contractor shall proceed with completion of the contract.
  - (1) After the Contracting Officer's determination of price or fee, the contract shall be governed by –
    - (i) All clauses required by the BPI on the date of execution of this letter contract for either fixed-price or cost-reimbursement contracts, as determined by the Contracting Officer under this paragraph (c); and
    - (ii) Any other clauses, terms, and conditions mutually agreed upon.
  - (2) To the extent consistent with paragraph (c)(1) of this section, all clauses, terms, and conditions included in this letter contract shall continue to effect, except those that by their nature apply only to a letter contract.

(End of clause)

*Alternate I (Mar 2018)*. In letter contracts awarded on the basis of price competition, add the following paragraph (d) to the basic clause:

- (d) The definitive contract resulting from this letter contract will include a negotiated \_\_\_\_\_ *[CO fill in selection of "price ceiling" or "firm fixed price"]* in no event to exceed \_\_\_\_\_ *[CO fill in the proposed price upon which the award was based]*.

#### 35.2.49 Clause 7-26 Payments of Allowable Costs Before Definitization

As prescribed in 7.8.4.4(c), insert the following clause:

#### **PAYMENTS OF ALLOWABLE COSTS BEFORE DEFINITIZATION (MAR 2018)**

- (a) Reimbursement rate. Pending the placing of the definitive contract referred to in this letter contract, Bonneville will promptly reimburse the Contractor for all allowable costs under this contract at the following rates:
- (1) One hundred percent of approved costs representing financing payments to subcontractors under fixed-price subcontracts, provided that Bonneville's payments to the Contractor will not exceed 80 percent of the allowable costs of those subcontractors.
  - (2) One hundred percent of approved costs representing cost-reimbursement subcontractors; provided, that Bonneville's payments to the Contractor shall not exceed 85 percent of the allowable costs of those subcontractors.
  - (3) Eighty-five percent of all other approved costs.
- (b) Limitation of reimbursement. To determine the amounts payable to the Contractor under this letter contract, the Contracting Officer shall determine allowable costs in accordance with the applicable cost principles in Appendix 13 of the Bonneville Purchasing Instructions (BPI). The total reimbursement made under this paragraph shall not exceed 85 percent of the maximum amount of Bonneville's liability, as stated in this contract.
- (c) Invoicing. Payments shall be made promptly to the Contractor when requested as work progresses, but (except for small business concerns) not more often than every 2 weeks, in amounts approved by the Contracting Officer. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost incurred by the Contractor in the performance of this contract.
- (d) Allowable costs. For the purpose of determining allowable costs, the term "costs" includes –
- (1) Those recorded costs that result, at the time of the request for reimbursement, from payment by cash, check, or other form of actual payment for items or services purchased directly for the contract;
  - (2) When the Contractor is not delinquent in payment of costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for –
    - (i) Supplies and services purchased directly for the contract and associated financing payments to subcontractors, provided payments determined due will be made –
      - (A) In accordance with the terms and conditions of a subcontract or invoice; and
      - (B) Ordinarily within 30 days of the submission of the Contractor's payment request to Bonneville;
    - (ii) Materials issued from the Contractor's stores inventory and placed in the production process for use on the contract;
    - (iii) Direct labor;
    - (iv) Direct travel;
    - (v) Other direct in-house costs; and
    - (vi) Properly allocable and allowable indirect costs as shown on the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts; and

- (3) The amount of financing payments that the Contractor has paid by cash, check, or other forms of payment to subcontractors.
- (e) Small business concerns. A small business concern may receive more frequent payments than every 2 weeks.
- (f) Audit. At any time before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of costs audited. Any payment may be –
- (1) Reduced by any amounts found by the Contracting Officer not to constitute allowable costs; or
  - (2) Adjusted for overpayments or underpayments made on preceding invoices or vouchers.

(End of clause)

#### 35.2.50 Provision 7-27 Single or Multiple Awards

As prescribed in 7.7.6(e), insert the following provision:

##### **SINGLE OR MULTIPLE AWARDS (MAR 2018)**

Bonneville may elect to award a single delivery order contract or task order contract or to award multiple delivery order contracts or task order contracts for the same or similar supplies or services to two or more sources under this solicitation.

(End of provision)

#### 35.2.51 Provision 7-28 Multiple Awards for Advisory and Assistance Services

As prescribed in 7.7.6(f), insert the following provision:

##### **MULTIPLE AWARDS FOR ADVISORY AND ASSISTANCE SERVICES (MAR 2018)**

Bonneville intends to award multiple contracts for the same or similar advisory and assistance services to two or more sources under this solicitation unless the Government determines, after evaluation of offers, that only one offeror is capable of providing the services at the level of quality required.

(End of provision)

#### 35.2.52 Clause 7-29 [Reserved]

#### 35.2.53 Clause 7-30 [Reserved]

#### 35.2.54 Provision 7-31 Time-and-Materials/Labor-Hour Proposal Requirements

As prescribed in 7.8.2(f), insert the following provision:

##### **TIME-AND-MATERIALS/LABOR-HOUR PROPOSAL REQUIREMENTS (MAR 2018)**

- (a) Bonneville contemplates award of a Time-and-Materials or Labor-Hour type of contract resulting from this solicitation.
- (b) The offeror must specify fixed hourly rates in its offer that include wages, overhead, general, and administrative expenses, and profit. The offeror must specify whether the fixed hourly rate for each labor category applies to labor performed by –
- (1) The offeror;
  - (2) Subcontractors; and/or
  - (3) Divisions, subsidiaries, or affiliates of the offeror under a common control.



(End of provision)

35.2.55 Clause 7-32 [Reserved]

35.2.56 Clause 7-33 [Reserved]

35.2.57 Provision 7-34 Evaluation Exclusive of Options

As prescribed in 7.10.8(a), insert a provision substantially the same as the following:

**EVALUATION EXCLUSIVE OF OPTIONS (MAR 2018)**

Bonneville will evaluate offers for award purposes by including only the price for the basic requirements; i.e., options will not be included in the evaluation for award purposes.

(End of provision)

35.2.58 Provision 7-35 Evaluation of Options Exercised at Time of Contract Award

As prescribed in 7.10.8(b), insert a provision substantially the same as the following:

**EVALUATION OF OPTIONS EXERCISED AT TIME OF CONTACT AWARD (MAR 2018)**

Except when it is determined in accordance with 7.10.6(b) not to be in Bonneville's best interests, Bonneville will evaluate the total price for the basic requirement together with any option(s) exercised at the time of award.

(End of provision)

35.2.59 Provision 7-36 Evaluation of Options

As prescribed in 7.10.8(c), insert a provision substantially the same as the following:

**EVALUATION OF OPTIONS (FEB 2020)**

Except when it is determined in accordance with 7.9.6(b) not to be in Bonneville's best interests, Bonneville will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate Bonneville to exercise the option(s).

(End of provision)

35.2.60 Clause 7-37 Option for Increased Quantity

As prescribed in 7.10.8(d), insert a clause substantially the same as the following:

**OPTION FOR INCREASED QUANTITY (MAR 2018)**

Bonneville may increase the quantity of supplies called for in the Schedule at the unit price specified. The Contracting Officer may exercise the option by written notice to the Contractor within 30 calendar days. Delivery of the added items shall continue at the same rate as the like items called for under the contract unless the parties otherwise agree.

(End of clause)

35.2.61 Clause 7-38 Option for Increased Quantity – Separately Priced Line Item

As prescribed in 7.10.8(e), insert a clause substantially the same as the following:

**OPTION FOR INCREASED QUANTITY – SEPARATELY PRICED LINE ITEM (MAR 2018)**

Bonneville may require the delivery of the numbered line item, identified in the Schedule as an option item, in the quantity and at the price stated in the Schedule. The Contracting Officer may exercise the option by written notice to the Contractor within \_\_\_\_\_ [CO fill in the period of time in which the Contracting Officer has to exercise the option]. Delivery of added items shall continue at the same rate that like items are called for under the contract unless the parties otherwise agree.

(End of clause)

35.2.62 Clause 7-39 Option to Extend Services

As prescribed in 7.10.8(f), insert a clause substantially the same as the following:

**OPTION TO EXTEND SERVICES (APR 2024)**

Bonneville may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within \_\_\_\_\_ [CO fill in the period of time in which the Contracting Officer has to exercise the option], calendar days.

(End of clause)

35.2.63 Clause 7-40 Option to Extend the Term of the Contract

As prescribed in 7.10.8(g), insert a clause substantially the same as the following:

**OPTION TO EXTEND THE TERM OF THE CONTRACT (APR 2024)**

- (a) Bonneville may extend the term of this contract by written notice to the Contractor within 5 calendar days before contract expiration; provided that Bonneville gives the Contractor a preliminary written notice of its intent to extend at least \_\_\_\_\_ [CO fill in the period of time in which the Contracting Officer has to exercise the option], calendar days, before the contract expires. The preliminary notice does not commit Bonneville to an extension.
- (b) If Bonneville exercises this option, the extended contract shall be considered to include this option clause.
- (c) The total duration of this contract, including the exercise of any options under this clause; shall not exceed 5 years.

(End of clause)

35.2.64 Clause 7-41 [Reserved]

35.2.65 Clause 7-42 [Reserved]

35.2.66 Provision 8-1 Supplier Diversity Program Award Representation

As prescribed 8.3.1.1, insert the following provision in all solicitations:

**SUPPLIER DIVERSITY PROGRAM AWARD REPRESENTATION (MAR 2018)**

(a) [CO Fill in]

NAICS CODE	Size Standard in Millions of Dollars <u>OR</u> 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 HUBZone small business concern.
- (3) it is , is not  a disadvantaged small business concern (this includes Native American owned small business, 8(a) program and any other disadvantaged small business concerns).
- (4) it is , is not  a women-owned small business concern.
- (5) it is , is not  a economically disadvantaged women-owned small business concern.
- (6) it is , is not  a veteran-owned small business concern.
- (7) it is , is not  a disabled veteran-owned small business concern

(End of provision)

35.2.67 Clause 8-2 [Reserved]

35.2.68 Clause 8-3 Utilization of Supplier Diversity Program Categories

As prescribed in 8.3.1.1, insert the following clause in all solicitations and contracts, except when the award is to a small business or to an individual:

**UTILIZATION OF SUPPLIER DIVERSITY PROGRAM CATEGORIES (MAR 2018)**

- (a) It is the policy of the United States that supplier diversity program categories; small businesses, HUBZone small businesses, disadvantaged small businesses, women-owned small businesses, veteran-owned small businesses, and service-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 "HUBZone small business", and "disadvantaged small business", "veteran owned small business", and "service-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)

**35.2.69 Provision 8-4 Subcontracting Plan Requirement**

As prescribed in 8.3.4.1(a), insert the following provision in solicitations that exceed \$750,000 (\$1.5M for construction) and offer opportunities for subcontracting, except if the award is to a small business or an individual:

**SUBCONTRACTING PLAN REQUIREMENT (MAR 2018)**

Offerors who are not small businesses as defined in the provision 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 prior to award if the nature of the contract offers subcontracting possibilities. The plan shall provide maximum practicable opportunity for small business, disadvantaged small business, HUBZone small business, veteran-owned small business, disabled veteran-owned small business, and women-owned small business to participate in performance of the contract. The plan will be incorporated into the contract.

(End of provision)

**35.2.70 Clause 8-5 Liquidated Damages – Small Business Subcontracting Plan**

As prescribed in 8.3.4.1(b), insert the following clause in all solicitations and contracts that exceed \$750,000 (\$1.5M for construction) and offer opportunities for subcontracting, except if the award is to a small business or an individual:

**LIQUIDATED DAMAGES – SMALL BUSINESS SUBCONTRACTING PLAN (MAR 2018)**

- (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 Bonneville 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 Bonneville 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 make 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)

35.2.71 Provision 9-1 Buy American Certificate– Supplies and Services

As prescribed in 9.1.6, insert the following provision in all solicitations for supplies, or for services involving the furnishing the supplies, expected to exceed \$50,000, except for the purchase of (1) civil aircraft and related articles, (2) supplies subject to trade agreement thresholds; and (3) commercial IT equipment and supplies:

**BUY AMERICAN CERTIFICATE– SUPPLIES AND SERVICES (APR 2024)**

- (a) The Offeror certifies the product and that each domestic end product listed below in this provision contains a critical component, , 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.

FOREIGN END PRODUCTS

Line-Item No. (Contains Critical Component)	Country of Origin	Exceeds 55%domestic content (yes/no)

(List as necessary)

- (b) An Offeror who proposes to furnish domestic source end products containing components of foreign origin the cost of which exceeds 55 percent of the domestic content of the offered price, except for those that are commercially available off-the-shelf (COTS) items, 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

- (c) 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 Bonneville, such additional information as the Contracting Officer may request in order to verify the foregoing in evaluating the offer.

- (d) 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.
- (e) 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, Bonneville assumes that domestic firms intend to furnish domestic end products and that foreign firms intend to furnish products of foreign origin.
- (f) Bonneville will evaluate offers in accordance with the policies and procedures of part 9 of the Bonneville Purchasing Instructions.

(End of provision)

### 35.2.72 Provision 9-2 Waiver of Buy American Act for Civil Aircraft and Related Articles

As prescribed in 9.1.6, insert the following provision in solicitations for the acquisition of civil aircraft and related articles:

#### **WAIVER OF BUY AMERICAN ACT FOR CIVIL AIRCRAFT AND RELATED ARTICLES (APR 2024)**

- (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, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Macao, Montenegro, the Netherlands, North Macedonia, 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 provision)

### 35.2.73 Clause 9-3 Buy American Act – Supplies

As prescribed in 9.1.6, insert the following clause in all solicitations and contracts for supplies, or for services involving the furnishing the supplies, expected to exceed \$50,000, except for the purchase of (1) civil aircraft and related articles, (2) supplies subject to trade agreement thresholds; and (3) commercial IT equipment and supplies:

### **BUY AMERICAN ACT – SUPPLIES (APR 2024)**

(a) Definitions. As used in this clause–

“Commercially available off-the-shelf (COTS) item” –

- (1) Means any item of a supply (including construction material) that is:
  - (i) A commercial product (as defined in BPI subpart 2.2);
  - (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 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

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

“Cost of components” means –

- (1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- (2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

“Critical Component” means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain.

*Domestic end product* means –

- (1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both -
  - (i) An unmanufactured construction material mined or produced in the United States; or
  - (ii) An end product manufactured in the United States, if –
    - (A) The cost of its components mined, produced, or manufactured in the United States exceeds 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or
    - (B) The end product is a commercially available off-the-shelf (COTS) item; or
- (2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components

used in the end product. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of “cost of components” in this section.

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

"Fastener" means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.

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

"Foreign iron and steel" means iron or steel products not produced in the United States. Produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign.

"Predominantly of iron or steel or a combination of both" means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

"Steel" means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

"United States" means the 50 States, the District of Columbia, and outlying areas.

- (b) 41 U.S.C. chapter 83, Buy American, provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for an end product that is a COTS item, except that for an end product that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the end products, excluding COTS fasteners.
- (c) The Contractor shall deliver only domestic end products, except those
  - (1) That Bonneville 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 Bonneville determines that domestic preference would be inconsistent with the public interest; or
  - (3) For which Bonneville determines the cost to be unreasonable.
- (d) The Contractor shall deliver only domestic end products except to the extent that it specified delivery of foreign end products in the provision of the solicitation entitled "Buy American Certificate– Supplies and Services".

(End of clause)



**35.2.74 Provision 9-4 Foreign Offers**

As prescribed in 9.1.6, insert the following provision in solicitations where foreign firms may submit offers, or offers contain foreign end products which will exceed \$50,000; except for solicitations for civil aircraft and related articles or purchases which exceed the trade agreement thresholds:

**FOREIGN OFFERS (OCT 2022)**

- (a) Offers proposing to furnish material or equipment produced or manufactured outside the United States will be considered on a DAP or DDP, 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 20 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 30 percent in the event that the low domestic Offeror qualifies as a small business concern.

(End of provision)

**35.2.75 Clause 9-5 Buy American Act – Construction Materials**

As prescribed in 9.2.4, insert the following clause in solicitations and contracts over \$50,000 for construction, unless subject to certain trade agreement:

**BUY AMERICAN ACT – CONSTRUCTION MATERIALS (APR 2024)**

- (a) Definitions. As used in this clause –
  - “Commercially available off-the-shelf (COTS) item” –
    - (1) Means any item of supply (including construction material) that is –
      - (i) A commercial product as defined in paragraph (1) of the definition of “commercial product” at Bonneville Purchasing Instruction (BPI) 2.2;
      - (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 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

“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 alarms, 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.

“Cost of components” means –

- (1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- (2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the construction material.

“Critical Component” means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain.

“Critical Item” means a domestic construction material or domestic end product that is deemed critical U.S. supply chain resiliency.

“Domestic construction material” means –

- (1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both-
  - (i) An unmanufactured construction material mined or produced in the United States; or
  - (ii) A construction material manufactured in the United States, if –
    - (A) The cost of its components mined, produced, or manufactured in the United States exceeds 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or
    - (B) The construction material is a COTS item; or
- (2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all components used in such construction material. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of

all the materials used in such construction material is calculated in accordance with the definition of "cost of components".

"Fastener" means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.

"Foreign construction material" means a construction material other than a domestic construction material.

"Foreign iron and steel" means iron or steel products not produced in the United States. Produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign.

"Predominantly of iron or steel or a combination of both" means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

"Steel" means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

"United States" means the 50 States, the District of Columbia, and outlying areas.

(b) Domestic preference.

- (1) This clause implements 41 U.S.C. chapter 83, Buy American, by providing a preference for domestic construction material, in accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for construction material that is a COTS item, except that for construction material that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the construction materials, excluding COTS fasteners. The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.
- (2) This requirement does not apply to information technology that is a commercial product or to the construction materials or components listed by the Government as follows:

---

*[Contracting Officer to list applicable excepted materials or indicate "none"]*

- (3) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(2) of this clause if the Government determines that –
  - (i) The cost of domestic construction material would be unreasonable.
    - (A) The cost of domestic construction material would be unreasonable. For domestic construction material that is not a critical item or does not contain critical components. The cost of a particular domestic construction material subject to the requirements of the Buy American statute is unreasonable

when the cost of such material exceeds the cost of foreign material by more than 20 percent;

(B) For domestic construction material that is a critical item or contains critical components. The cost of a particular domestic construction material that is a critical item or critical components, subject to the requirements of the Buy American statute, is unreasonable when the cost of such material exceeds cost of foreign material by more than 20 percent plus the additional preference factor identified for the critical item or construction material containing critical components.

- (ii) The application of the restriction of the Buy American statute to a particular construction material would be impractical or inconsistent with the public interest; or
- (iii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(c) Request for determination of inapplicability of the Buy American statute.

(1) (i) Any Contractor request to use foreign construction material in accordance with the paragraph (b)(3) 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) Price;
- (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)(3) of this clause.

- (ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed price comparison table in the format in paragraph (d) of this clause.
- (iii) The price of construction material shall include all delivery costs to the construction site and any applicable duty (whether or not a duty-free certificate may be issued).
- (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 the Buy American statute applies 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 price of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(3)(i) of this clause.

(3) Unless the Government determines that an exception to the Buy American statute applies, use of foreign construction material is noncompliant with the Buy American statute.

(d) Data. To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information any applicable supporting data based on the survey of suppliers:

Foreign and Domestic Construction Materials Price Comparison					
Item No.	Construction Material Description	Unit of Measure	Quantity	Price (dollars)*	
	Item1:				
	Foreign construction material				
	Domestic construction material				
	Item2:				
	Foreign construction material				
	Domestic construction material				

*[\* Include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate is issued)].*  
*[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary]*  
*[Include other applicable supporting information]*

(End of clause)

35.2.76 Provision 9-6 Buy American Act Representations

As prescribed in 9.2.4, insert the following provision in solicitations for construction expected to exceed \$50,000, unless the materials are subject to certain trade agreements:

**BUY AMERICAN ACT REPRESENTATIONS (JUL 1994)**

(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      Quantity and UnitCost Delivered  
 comparable to offered foreign material      (Weight, feet, etc.)

_____	_____	_____
_____	_____	_____
_____	_____	_____

- (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 provision)

35.2.77 Provision 9-7 Buy American Act Notice

As prescribed in 9.2.4, insert the following provision in solicitations for construction expected to exceed \$50,000, unless the materials are subject to certain trade agreements:

**BUY AMERICAN ACT NOTICE (FEB 2022)**

- (a) The Buy American Act (41 U.S.C. chapter 83) 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:

\_\_\_\_\_

*[Contracting Officer to list applicable excepted materials 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 20 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, Bonneville shall add to the offer 20 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 provision)

35.2.78 Clause 9-8 Restrictions on Certain Foreign Purchases

As prescribed in 9.3.2.1, insert the following clause in all solicitations and contracts:

**RESTRICTIONS ON CERTAIN FOREIGN PURCHASES (APR 2024)**

- (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 <https://ofac.treasury.gov/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists>. 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 <https://ofac.treasury.gov>.
- (c) The contractor shall insert this clause, including this paragraph (c), in all subcontracts.

(End of clause)

### 35.2.79 Provision 9-9 Offeror Representation and Certifications – Prohibited Foreign Transactions

As prescribed in 9.3.2.1, insert the following provision in all solicitations:

#### **OFFEROR REPRESENTATION AND CERTIFICATIONS – PROHIBITED FOREIGN TRANSACTIONS (MAR 2018)**

- (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).

(End of provision)

### 35.2.80 Clause 9-46 Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials

As prescribed in 9.2.5.9, insert the following clause in solicitation and contracts for construction, funded in whole or in part to the Recovery Act that is performed in the United States and valued less than \$6,708,000:

**REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS –  
BUY AMERICAN ACT – CONSTRUCTION MATERIALS (FEB 2022)**

(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:

*[Contracting Officer to list applicable excepted materials or indicate “none”]*



- (1) 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 20 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, as necessary]*

\*Include all delivery costs to the construction site.

(End of clause)

35.2.81 Provision 9-47 Notice of Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials

As prescribed in 9.2.5.9, insert the following provision in solicitations for construction, funded in whole or in part to the Recovery Act, when Clause 9-46 is used:

**NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER  
MANUFACTURED GOODS – BUY AMERICAN ACT – CONSTRUCTION MATERIALS  
(FEB 2022)**

- (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) 20 percent of the cost of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material. (d) Alternate offers.
  - (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.
- (b) 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 Bonneville 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 provision)

*Alternate 1 (FEB 2022).* If insufficient time is available to process a determination, substitute the following paragraph (b) for paragraph (b) of the basic clause:

- (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.

### 35.2.82 Clause 9-48 Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials Under Trade Agreements

As prescribed in 9.2.5.9, insert the following clause in solicitations and contracts for construction, funded in whole or in part to the Recovery Act that is performed in the United States and valued at \$6,708,000 or more:

**REQUIRED USE OF AMERICAN IRON, STEEL AND OTHER MANUFACTURED GOODS –  
BUY AMERICAN ACT – CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS  
(APR 2024)**

(a) Definitions. As used in this clause—

“Caribbean Basin country construction material” means a construction material that –

- (1) Is wholly grown, 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 subpart 2.2);
  - (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, Canada, Croatia, 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, Montenegro, the Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, Ukraine, or United Kingdom);
- (2) A Free Trade Agreement country (FTA)(Australia, Bahrain, Chile, Columbia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, 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, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

“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 a FTA country; or  
 (2) In the case of construction material that consists in whole or in part of materials from another country, has been substantially transformed in a 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 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 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:
- [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.
  - (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 costs, 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, as necessary]*

\*Include all delivery costs to the construction site.

(End of clause)

*Alternate 1 (FEB 2022).* If the acquisition is valued between \$6,708,000 but less than \$13,296,489, adding *Bahrainian, Mexican, and Omani* construction material exceptions and substitute the following paragraph (b) for paragraph (b) of the basic clause:

*“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.

- (d) Construction materials.
  - (2) 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—
    - (ii) 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

- (iii) The Buy American Act providing a preference for unmanufactured domestic construction material.
- (3) 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.

### 35.2.83 Provision 9-49 Notice of Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials Under Trade Agreements

As prescribed in 9.2.5.9, insert the following provision in solicitations which include Clause 9-48:

#### **NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL AND OTHER MANUFACTURED GOODS – BUY AMERICAN ACT – CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (FEB 2022)**

- (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—
    - (ii) 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
    - (iii) 20 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 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.

- (3) 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.

(End of provision)

*Alternate I (FEB 2022).* If insufficient time is available to process a determination, substitute the following paragraph (b) for paragraph (b) of the basic clause:

- (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 9-48.

*Alternate II (FEB 2022).* If the acquisition value more than \$7,008,000, but less than \$10,802,884, substitute the following paragraph (d) for paragraph (d) of the basic clause:

(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 the 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.

*Alternate III (FEB 2022).* If the conditions of Alternate I and Alternate II both exist, substitute paragraphs (b) and (d) of the basic clause with paragraph (b) at Alternate I and paragraph (d) at Alternate II.

#### 35.2.84 Clause 10-1 Equal Opportunity

As prescribed in 10.1.4.3, insert the following clause in all solicitations and contracts:

#### **EQUAL OPPORTUNITY (JUN 2016)**

## (a) Definition. As used in this clause.

“Gender identity” has the meaning given by the Department of Labor’s Office of Federal Contract Compliance Programs, and is found at [https://www.dol.gov/ofccp/LGBT/LGBT\\_FAQs.html](https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html).

“Sexual orientation” has the meaning given by the Department of Labor’s Office of Federal Contract Compliance Programs, and is found at [https://www.dol.gov/ofccp/LGBT/LGBT\\_FAQs.html](https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html).

“United States,” as used in this clause, means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

## (b)

(1) If, during any 12-month period (including the 12 months preceding the award of this contract), the Contractor has been or is awarded nonexempt federal contracts and/or subcontracts that have an aggregate value in excess of \$10,000, the Contractor shall comply with this clause, except for work performed outside the United States by employees who were not recruited within the United States. Upon request, the Contractor shall provide information necessary to determine the applicability of this clause.

(2) If the Contractor is a religious corporation, association, educational institution, or society, the requirements of this clause do not apply with respect to the employment of individuals of a particular religion to perform work connected with the carrying on of the Contractor’s activities (41 CFR 60-1.5).

(3)

## (c)

(1) The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. However, it shall not be a violation of this clause for the Contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation, in connection with employment opportunities on or near an Indian reservation, as permitted by 41 CFR 60-1.5.

(2) The Contractor shall take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. This shall include, but not be limited to –

- (i) Employment;
- (ii) Upgrading;
- (iii) Demolition;
- (iv) Transfer;
- (v) Recruitment or recruitment advertising;
- (vi) Layoff or termination;
- (vii) Rates of pay or other forms of compensation; and
- (viii) Selection for training, including apprenticeship.

(3) The Contractor shall post in conspicuous places available to employees and applicants for employment the notices to be provided by the Contracting Officer that explain this clause.

(4) The Contractor shall, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

- (5) The Contractor shall send, to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, the notice to be provided by the Contracting Officer advising the labor union or workers' representative of the Contractor's commitments under this clause, and post copies of the notice in conspicuous places available to employees and applicants for employment.
  - (6) The Contractor shall comply with Executive Order 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor.
  - (7) The Contractor shall furnish to the contracting agency all information required by Executive Order 11246, as amended, and by the rules, regulations, and orders of the Secretary of Labor. The Contractor shall also file Standard Form 100 (EEO-1), or any successor form, as prescribed in 41 CFR Part 60-1. Unless the Contractor has filed within the 12 months preceding the date of contract award, the Contractor shall, within 30 days after contract award, apply to either the regional Office of Federal Contract Compliance Programs (OFCCP) or the local office of the Equal Employment Opportunity Commission for the necessary forms.
  - (8) The Contractor shall permit access to its premises, during normal business hours, by the contracting agency or the (OFCCP) for the purpose of conducting on-site compliance evaluations and complaint investigations. The Contractor shall permit the Government to inspect and copy any books, accounts, records (including computerized records), and other material that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246, as amended, and rules and regulations that implement the Executive Order.
  - (9) If the OFCCP determines that the Contractor is not in compliance with this clause or any rule, regulation, or order of the Secretary of Labor, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts, under the procedures authorized in Executive Order 11246, as amended. In addition, sanctions may be imposed and remedies invoked against the Contractor as provided in Executive Order 11246, as amended, in the rules, regulations, and orders of the Secretary of Labor, or as otherwise provided by law.
  - (10) The Contractor shall include the terms and conditions of this clause in every subcontract or purchase order that is not exempted by the rules, regulations, or orders of the Secretary of Labor issued under Executive Order 11246, as amended, so that these terms and conditions will be binding upon each subcontractor or vendor.
  - (11) The Contractor shall take such action with respect to any subcontract or purchase order as the contracting officer may direct as a means of enforcing these terms and conditions, including sanctions for noncompliance; provided, that if the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of any direction, the Contractor may request the United States to enter into the litigation to protect the interests of the United States.
- (d) Notwithstanding any other clause in this contract, disputes relative to this clause will be governed by the procedures in 41 CFR 60-1.1.

(End of clause)

### 35.2.85 Clause 10-2 Affirmative Action for Workers with Disabilities

As prescribed in 10.1.5.3, insert the following clause in solicitations and contracts:

#### **AFFIRMATIVE ACTION FOR WORKERS WITH DISABILITIES (OCT 2014)**

(a) General.

- (1) Regarding any position for which the employee or applicant for employment is qualified, the Contractor shall not discriminate against any employee or applicant because of physical or mental disability. The Contractor agrees to take affirmative action to employ, advance in employment, and otherwise treat qualified individuals with disabilities without discrimination based upon their physical or mental disability in all employment practices such as –
- (i) Recruitment, advertising, and job application procedures;
  - (ii) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
  - (iii) Rates of pay or any other form of compensation and changes in compensation;
  - (iv) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
  - (v) Leaves of absence, sick leave, or any other leave;
  - (vi) Fringe benefits available by virtue of employment, whether or not administered by the Contractor;
  - (vii) Selection and financial support for training, including apprenticeships, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;
  - (viii) Activities sponsored by the Contractor, including social or recreational programs; and
  - (ix) Any other term, condition, or privilege of employment.
- (2) The Contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor (Secretary) issued under the Rehabilitation Act of 1973 (29 U.S.C. § 793) (the Act), as amended.
- (b) Postings.
- (1) The Contractor agrees to post employment notices stating –
- (i) The Contractor's obligation under the law to take affirmative action to employ and advance in employment qualified individuals with disabilities; and
  - (ii) The rights of applicants and employees.
- (2) These notices shall be posted in conspicuous places that are available to employees and applicants for employment. The Contractor shall ensure that applicants and employees with disabilities are informed of the contents of the notice (e.g., the Contractor may have the notice read to a visually disabled individual, or may lower the posted notice so that it might be read by a person in a wheelchair). The notices shall be in a form prescribed by the Deputy Assistant Secretary for Federal Contract Compliance of the U.S. Department of Labor (Deputy Assistant Secretary) and shall be provided by or through the Contracting Officer.
- (3) 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 Section 503 of the Act and is committed to take affirmative action to employ, and advance in employment, qualified individuals with physical or mental disabilities.
- (c) Noncompliance. If the Contractor does not comply with the requirements of this clause, appropriate actions may be taken under the rules, regulations, and relevant orders of the Secretary issued pursuant to the Act.
- (d) Subcontracts. The Contractor shall include the terms of this clause in every subcontract or purchase order in excess of \$15,000 unless exempted by rules, regulations, or orders of the Secretary. The Contractor shall act as specified by the Deputy Assistant Secretary to enforce the terms, including action for noncompliance.

(End of clause)

### 35.2.86 Clause 10-3 Service Contract Labor Standards

As prescribed in 10.2.2.3, insert the following clause in solicitations and contracts for services covered by the statute:

#### **SERVICE CONTRACT LABOR STANDARDS (MAR 2018)**

(a) Definitions. As used in this clause-

"Act" means the Service Contract Labor Standards statute (41 U.S.C. § 6701-6707, et seq.).

"Contractor" when used in any subcontract, shall include the subcontractor, except in the term "Bonneville 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.
    - (iii) 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 Bonneville 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 Bonneville 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 Bonneville 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 Bonneville 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 Bonneville 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)

### 35.2.87 Clause 10-4 Fair Labor and Service Contract Standards – Price Adjustment

As prescribed in 10.2.3.3.2, insert the following clause in solicitations and contracts if the contract is expected to be a firm-fixed-price, or time-and-materials, service contract which contains clause 10-3 and has a performance period exceeding two years or an option for which a differing wage determination may apply:

#### **FAIR LABOR AND SERVICE CONTRACT STANDARDS – PRICE ADJUSTMENT (MAR 2018)**

- (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 Bonneville 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)

### 35.2.88 Clause 10-5 Service Contract Wage Determination

As prescribed in 10.2.2.3, insert the following clause in solicitations and contracts for services subject to the statute:

**SERVICE CONTRACT WAGE DETERMINATION (OCT 2014)**

The wage determination(s) referred to in the Clause 10-3, Service Contract Labor Standards, are incorporated into the contract, and are identified as follows:

Decision Number: *[CO fill in wage determination decision number]* Date: *[CO fill in decision date]*

Last Modifications Number: *[CO fill in number]* Date: *[CO fill in modification date]*

(End of clause)

35.2.89 Clause 10-6 Notification of Employee Rights Under the National Labor Relations Act

As prescribed in 10.1.7.2, insert the following clause in solicitations and contracts unless the excepted conditions exist for the procurement action:

**NOTIFICATION OF EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT  
(OCT 2014)**

- (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 (a) or (b) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be 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 noncompliance: 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)

35.2.90 Clause 10-7 Construction Wage Rate Requirements

As prescribed in 10.3.2.3, insert the following clause in all solicitations and contracts for construction in excess of \$2,000:

**CONSTRUCTION WAGE RATE REQUIREMENTS (OCT 2014)**

- (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 Construction Wage Rate Requirements statute 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 Construction Wage Rate Requirements (Davis-Bacon Act) 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 Contracting Officer (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:
- (i) 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.
  - (ii) The classification is utilized in the area by the construction industry.
  - (iii) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.
  - (iv) 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 Construction Wage Rate Requirements statute 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.

(End of clause)

### 35.2.91 Clause 10-8 Withholding – Labor Violations

As prescribed in 10.3.2.3, insert the following clause in all solicitations and contracts for construction, which exceed \$2,000:

#### **WITHHOLDING – LABOR VIOLATIONS (OCT 2014)**

The Contracting Officer (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)

### 35.2.92 Clause 10-9 Payrolls and Basic Records

As prescribed in 10.3.2.3, insert the following clause in all solicitations and contracts for construction which exceed \$2,000:

#### **PAYROLLS AND BASIC RECORDS (OCT 2014)**

- (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 40 U.S.C. 3141(2)(B) (Construction Wage Rate Requirement statute)), daily and weekly number of hours worked, deductions made, and actual wages paid. Whenever the Secretary of Labor has found under paragraph (d) of Clause 10-7 Construction Wage Rate Requirements 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 40 U.S.C. 3141(2)(B), 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) Submission of payroll records to the Contracting Officer (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.
- (1) 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
  - (2) 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;
    - (i) 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

- (ii) 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.
  - (iii) 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.
  - (iv) 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)

### 35.2.93 Clause 10-10 Apprentices, Trainees and Helpers

As prescribed in 10.3.2.3, insert the following clause in solicitations and contracts for construction which exceeds \$2,000:

#### **APPRENTICES, TRAINEES AND HELPERS (OCT 2014)**

- (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.

(1) 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.

(2) 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 Contract Wage Rate Requirements 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)

#### 35.2.94 Clause 10-11 Subcontracts (Labor Standards)

As prescribed in 10.3.2.3, insert the following clause in solicitations and contracts for construction which exceeds \$2,000:

##### **SUBCONTRACTS (LABOR STANDARDS) (OCT 2014)**

The Contractor or subcontractor shall include in any subcontracts the clauses entitled: "Construction Wage Rate Requirements," "Contract Work Hours and Safety Standards-Overtime Compensation" (if the clause is included in this contract), "Apprentices, Trainees and Helpers," "Payrolls and Basic Records," "Compliance with Copeland Act Requirements," "Withholding -- Labor Violations," "Subcontracts (Labor Standards)," "Contract Termination-Debarment," "Disputes Concerning Labor Standards," Certification of Eligibility," and "Construction Wage Determination." 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)

#### 35.2.95 Clause 10-12 Certification of Eligibility

As prescribed in 10.3.2.3, insert the following clause in solicitations and contracts for construction which exceeds \$2,000:

##### **CERTIFICATION OF ELIGIBILITY (OCT 2014)**

- (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 40 U.S.C. 3144(b)(2) 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 40 U.S.C. 3144(b)(2) 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)

#### 35.2.96 Clause 10-13 Construction Wage Determination

As prescribed in 10.3.2.3, insert the following clause in solicitations and contracts for construction which exceeds \$2,000:

##### **CONSTRUCTION WAGE DETERMINATION (OCT 2014)**

The wage determination(s) referred to in the Clause 10-7, Construction Wage Rate Requirements, are incorporated into the contract, and are identified as follows:

Decision Number: *[CO fill in wage determination decision number]* Date: *[CO fill in decision date]*

Last Modifications Number: *[CO fill in number]* Date: *[CO fill in modification date]*

(End of clause)

**35.2.97 Clause 10-14 Approval of Wage Rates**

As prescribed in 10.3.2.3, insert the following clause in solicitations and contracts for construction which exceeds \$2,000:

**APPROVAL OF WAGE RATES (MAR 2018)**

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 Contracting Officer or their representative expressly designated for this purpose, if the straight time wages exceed the rates for corresponding classifications contained in the applicable Construction Wage Rate Requirements 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 Bonneville. If the Bonneville 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)

**35.2.98 Provision 10-15 Pre-Award On-Site Equal Opportunity Compliance Review**

As prescribed in 10.1.4.3, insert the following provision in solicitations:

**PRE-AWARD ON-SITE EQUAL OPPORTUNITY COMPLIANCE REVIEW (APR 2024)**

An award in the amount of \$10,000 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 \$10,000 or more) are found by the Office of Federal Contract Compliance Programs, on the basis of a compliance review, to be able to comply with Executive Order 11246.

(End of provision)

**35.2.99 Clause 10-16 Affirmative Action Compliance Requirements for Construction**

As prescribed in 10.1.4.3, insert the following clause in solicitations and contracts for construction which exceed \$25,000:

**AFFIRMATIVE ACTION COMPLIANCE REQUIREMENTS FOR CONSTRUCTION (SEP 1998)**

(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 \$10,000 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 \$10,000 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 Equal Opportunity 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.
- (l) Nothing contained herein shall be construed as a limitation upon the application of other laws that establish different standards of compliance.

(End of clause)

#### 35.2.100 Clause 10-17 Equal Opportunity Pre-Award Clearance of Subcontracts

As prescribed in 10.1.4.3, insert the following clause in solicitations and contracts which exceed \$10,000 if there is a reasonable opportunity for subcontracts:

#### **EQUAL OPPORTUNITY PRE-AWARD CLEARANCE OF SUBCONTRACTS (APR 2024)**

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 \$10,000 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)

### 35.2.101 Clause 10-18 Employment Eligibility Verification

As prescribed in 10.1.8.3, insert the following clause in solicitations and contracts:

#### **EMPLOYMENT ELIGIBILITY VERIFICATION (Oct 2014)**

- (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:
    - (i) Enroll. Enroll as a Federal Contractor in the E-Verify program within 30 calendar days of contract award;
    - (ii) 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 (1)(iii) of this section); and
    - (iii) 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 (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—
    - (i) All new employees.
      - (A) 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 (C) of this section); or
      - (B) 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 (C) of this section); or
    - (ii) 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—
- (i) Enrollment in the E-Verify program; or
  - (ii) 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.
- (i) 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 Department of Energy suspension or debarment official.
  - (ii) 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:
    - (i) 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;
    - (ii) Construction.
  - (2) Has a value of more than \$3,000; and
  - (3) Includes work performed in the United States.

(End of clause)

### 35.2.102 Clause 10-19 Equal Opportunity for Veterans

As prescribed in 10.1.9.4, insert the following clause:

**EQUAL OPPORTUNITY FOR VETERANS (JUN 2016)**

(a) Definitions. As used in this clause –

“Active duty wartime or campaign badge veteran,” “Armed Forces service medal veteran,” “disabled veteran,” “protected veteran,” “qualified disabled veteran,” and “recently separated veteran” have the meanings given at BPI 10.1.9.1.

- (b) Equal Opportunity clause. The Contractor shall abide by the requirements of the equal opportunity clause at 41 CFR 60-300.5(a), as of March 24, 2014. This clause prohibits discrimination against qualified protected veterans, and requires affirmative action by the Contractor to employ and advance in employment qualified protected veterans.
- (c) Subcontracts. The Contractor shall insert the terms of this clause in subcontracts of \$150,000 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. Such necessary changes in language may be made as shall be appropriate to identify properly the parties and their undertakings.

(End of clause)

**35.2.103 Clause 10-20 Employment Reports on Veterans**

As prescribed in 10.1.9.4, insert the following clause in solicitations and contracts which contain clause 10-19:

**EMPLOYMENT REPORTS ON VETERANS (JUN 2016)**

(a) Definitions. As used in this clause –

“Active duty wartime or campaign badge veteran,” “Armed Forces service medal veteran,” “disabled veteran,” “protected veteran,” “qualified disabled veteran,” and “recently separated veteran” have the meanings given at BPI 10.1.9.1.

- (b) 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.
- (c) The Contractor shall report the above items by filing the VETS-4212 “Federal Contractor Veterans’ Employment Report (see “VETS-4212 Federal Contractor Reporting” and “Filing Your VETS-4212 Report” at <http://www.dol.gov/vets/vets4212.htm>).”
- (d) The Contractor shall submit VETS-4212 Reports no later than September 30 of each year.
- (e) The employment activity report required by paragraphs (b)(2) and (b)(3) of this clause shall reflect total new hires, and maximum and minimum number of employees, during the most 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).
- (f) The number of veterans reported must be based on data known to the contractor when completing the VETS-4212. 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.
- (g) The Contractor shall insert the terms of this clause in subcontracts of \$150,000 or more unless exempted by rules, regulations, or orders of the Secretary of Labor.

(End of clause)

#### 35.2.104 Clause 10-21 Contract Work Hours and Safety Standards – Overtime Compensation

As prescribed in 10.3.4.2.3, insert the following clause in solicitations and contracts when the work may require or involve the employment of laborers or mechanics:

#### **CONTRACT WORK HOURS AND SAFETY STANDARDS – OVERTIME COMPENSATION (OCT 2014)**

- (a) Overtime requirements. No Contractor or subcontractor employing laborers or mechanics shall require or permit them to work over 40 hours in any workweek unless they are paid at least 1 and 1/2 times the basic rate of pay for each hour worked over 40 hours.
- (b) Violation; liability for unpaid wages; liquidated damages. The responsible Contractor and subcontractor are liable for unpaid wages if they violate the terms in paragraph (a) of this clause. In addition, the Contractor and subcontractor are liable for liquidated damages payable to the Government. The Contracting Officer will assess liquidated damages at the rate of \$10 per affected employee for each calendar day on which the employer required or permitted the employee to work in excess of the standard workweek of 40 hours without payment of the overtime wages required by the Contract Work Hours and Safety Standards statute (found at 40 U.S.C. chapter 37).
- (c) Withholding for unpaid wages and liquidated damages. The Contracting Officer will withhold from payments due under the contract sufficient funds required to satisfy any Contractor or subcontractor liabilities for unpaid wages and liquidated damages. If amounts withheld under the contract are insufficient to satisfy Contractor or subcontractor liabilities, the Contracting Officer will withhold payments from other federal or federally assisted contracts held by the same Contractor that are subject to the Contract Work Hours and Safety Standards statute.
- (d) Payrolls and basic records.
  - (1) The Contractor and its subcontractors shall maintain payrolls and basic payroll records for all laborers and mechanics working on the contract during the contract and shall make them available to the Government until 3 years after contract completion. The records shall contain the name and address of each employee, social security number, labor classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. The records need not duplicate those required for construction work by Department of Labor regulations at 29 CFR 5.5(a)(3) implementing the Construction Wage Rate Requirements statute.

- (2) The Contractor and its subcontractors shall allow authorized representatives of the Contracting Officer or the Department of Labor to inspect, copy, or transcribe records maintained under paragraph (d)(1) of this clause. The Contractor or subcontractor also shall allow authorized representatives of the Contracting Officer or Department of Labor to interview employees in the workplace during working hours.
- (e) Subcontracts. The Contractor shall insert the provisions set forth in paragraphs (a) through (d) of this clause in subcontracts may require or involve the employment of laborers and mechanics and require subcontractors to include these provisions in any such lower-tier subcontracts. The Contractor shall be responsible for compliance by any subcontractor or lower-tier subcontractor with the provisions set forth in paragraphs (a) through (d) of this clause.

(End of clause)

35.2.105 Clause 10-22 Paid Sick Leave Under Executive Order 13706

As prescribed in 10.1.12.9, insert the following clause in all solicitations and contracts:

**PAID SICK LEAVE UNDER EXECUTIVE ORDER 13706 (MAR 2018)**

(a) *Definitions.* As used in this clause (in accordance with 29 CFR 13.2) –

“Child”, “domestic partner”, and “domestic violence” have the meaning given in 29 CFR 13.2.

“Employee” –

(1)

- (i) Means any person engaged in performing work on or in connection with a contract covered by Executive Order (E.O.) 13706, and
  - (A) Whose wages under such contract are governed by the Service Contract Labor Standards statute (41 U.S.C. chapter 67), the Wage Rate Requirements (Construction) statute (40 U.S.C. chapter 31, subchapter IV), or the Fair Labor Standards Act (29 U.S.C. chapter 8),
  - (B) Including employees who qualify for an exemption from the Fair Labor Standards Act’s minimum wage and overtime provisions,
  - (C) Regardless of the contractual relationship alleged to exist between the individual and the employer; and
- (ii) Includes any person performing work on or in connection with the contract and individually registered in a bona fide apprenticeship or training program registered with the Department of Labor’s Employment and Training Administration, Office of Apprenticeship, or with a State Apprenticeship Agency recognized by the Office of Apprenticeship.

(2)

- (i) An employee performs “on” a contract if the employee directly performs the specific services called for by the contract; and
- (ii) An employee performs “in connection with” a contract if the employee’s work activities are necessary to the performance of a contract but are not the specific services called for by the contract.

“Individual related by blood or affinity whose close association with the employees is the equivalent of a family relationship” has the meaning given in 29 CFR 13.2.

“Multiemployer” plan means a plan to which more than one employer is required to contribute and which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer.

“Paid sick leave” means compensated absence from employment that is required by E.O. 13706 and 29 CFR 13.

“Parent”, “sexual assault”, “spouse”, and “stalking” have the meaning given in 29 CFR 13.2.

“United States” means the 50 States and the District of Columbia.

- (b) Executive Order 13706.
- (1) This contract is subject to E.O. 13706 and the regulations issued by the Secretary of Labor in 29 CFR part 13 pursuant to the E.O.
  - (2) If this contract is not performed wholly within the United States, this clause only applies with respect to that part of the contract that is performed within the United States.
- (c) *Paid sick leave*. The Contractor shall –
- (1) Permit each employee engaged in performing work on or in connection with this contract to earn not less than 1 hour of paid sick leave for every 30 hours worked;
  - (2) Allow accrual and use of paid sick leave as required by E.O. 13706 and 29 CFR part 13;
  - (3) Comply with the accrual, use, and other requirements set forth in 29 CFR 13.5 and 13.6, which are incorporated by reference in this contract;
  - (4) Provide paid sick leave to all employees when due free and clear and without subsequent deduction (except as otherwise provided by 29 CFR 13.24), rebate, or kickback on any account;
  - (5) Provide pay and benefits for paid sick leave used no later than one pay period following the end of the regular pay period in which the paid sick leave was taken; and
  - (6) Be responsible for the compliance by any subcontractor with the requirements of E.O. 13706, 29 CFR part 13, and this clause.
- (d) Contractors may fulfill their obligations under E.O. 13706 and 29 CFR part 13 jointly with other contractors through a multiemployer plan, or may fulfill their obligations through an individual fund, plan, or program (see 29 CFR 13.8).
- (e) *Withholding*. The Contracting Officer will, upon his or her own action or upon written request of an authorized representative of the Department of Labor, withhold or cause to be withheld from the Contractor under this or any other Federal contract with the same Contractor, so much of the accrued payments or advances as may be considered necessary to pay employees the full amount owed to compensate for any violation of the requirements of E.O. 13706, 29 CFR part 13, or this clause, including –
- (1) Any pay and/or benefits denied or lost by reason of the violation;
  - (2) Other actual monetary losses sustained as a direct result of the violation; and
  - (3) Liquidated damages.
- (f) Payment suspension/contract termination/contractor debarment.
- (1) In the event of a failure to comply with E.O. 13706, 29 CFR part 13, or this clause, Bonneville may, on its own action or 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, advance, or guarantee of funds until such violations have ceased.
  - (2) Any failure to comply with the requirements of this clause may be grounds for termination for default or cause.
  - (3) A breach of the contract clause may be grounds for debarment as a contractor and subcontractor as provided in 29 CFR 13.52.
- (g) The paid sick leave required by E.O. 13706, 29 CFR part 13, and this clause is in addition to the Contractor’s obligations under the Service Contract Labor Standards statute and Wage Rate Requirements (Construction) statute, and the Contractor may not receive credit toward

its prevailing wage or fringe benefit obligations under those Acts for any paid sick leave provided in satisfaction of the requirements of E.O. 13706 and 29 CFR part 13.

- (h) Nothing in E.O. 13706 or 29 CFR part 13 shall excuse noncompliance with or supersede any applicable Federal or State law, any applicable law or municipal ordinance, or a collective bargaining agreement requiring greater paid sick leave or leave rights than those established under E.O. 13706 and 29 CFR part 13.
- (i) Recordkeeping.
  - (1) The Contractor shall make and maintain, for no less than three (3) years from the completion of the work on the contract, records containing the following information for each employee, which the Contractor shall make available upon request for inspection, copying, and transcription by authorized representatives of the Administrator of the Wage and Hour Division of the Department of Labor:
    - (i) Name, address, and social security number of each employee.
    - (ii) The employee's occupation(s) or classification(s).
    - (iii) The rate or rates of wages paid (including all pay and benefits provided).
    - (iv) The number of daily and weekly hours worked.
    - (v) Any deductions made.
    - (vi) The total wages paid (including all pay and benefits provided) each pay period.
    - (vii) A copy of notifications to employees of the amount of paid sick leave the employee has accrued, as required under 29 CFR 13.5(a)(2).
    - (viii) A copy of employees' requests to use paid sick leave, if in writing, or, if not in writing, any other records reflecting such employee requests.
    - (ix) Dates and amounts of paid sick leave taken by employees (unless the Contractor's paid time off policy satisfies the requirements of E.O. 13706 and 29 CFR part 13 described in 29 CFR 13.5(f)(5), leave shall be designated in records as paid sick leave pursuant to E.O. 13706(d)(3).
    - (x) A copy of any written responses to employees' requests to use paid sick leave, including explanations for any denials of such requests, as required under 29 CFR 13.5(d)(3).
    - (xi) Any records reflecting the certification and documentation the Contractor may require an employee to provide under 29 CFR 13.5(e), including copies of any certification or documentation provided by an employee.
    - (xii) Any other records showing any tracking of or calculations related to an employee's accrual or use of paid sick leave.
    - (xiii) The relevant contract.
    - (xiv) The regular pay and benefits provided to an employee for each use of paid sick leave.
    - (xv) Any financial payment made for unused paid sick leave upon a separation from employment intended, pursuant to 29 CFR 13.5(b)(5), to relieve the Contractor from the obligation to reinstate such paid sick leave as otherwise required by 29 CFR 13.5(b)(4).
  - (2)
    - (i) If the Contractor wishes to distinguish between an employees' covered and noncovered work, the Contractor shall keep records or other proof reflecting such distinctions. Only if the Contractor adequately segregates the employee's time will time spent on noncovered work be excluded from hours worked counted toward the accrual of paid sick leave. Similarly, only if the Contractor adequately segregates the employee's time may the Contractor properly refuse an employee's request to use paid sick leave on the ground that the employee was scheduled to perform noncovered work during the time he or she asked to use paid sick leave.

- (ii) If the Contractor estimates covered hours worked by an employee who performs work in connection with contracts covered by the E.O. pursuant to 29 CFR 13.5(a)(i) or (iii), the Contractor shall keep records or other proof of the verifiable information on which such estimates are reasonably based. Only if the Contractor relies on an estimate that is reasonable and based on verifiable information will an employee's time spent in connection with noncovered work be excluded from hours worked counted toward the accrual of paid sick leave. If the Contractor estimates the amount of time an employee spends performing in connection with contracts covered by the E.O., the Contractor shall permit the employee to use his or her paid sick leave during any work time the Contractor.
- (3) In the event the Contractor is not obligated by the Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, or the Fair Labor Standards Act to keep records of an employee's hours worked, such as because the employee is exempt from the Fair Labor Standards Act's minimum wage and overtime requirements, and the Contractor chooses to use the assumption permitted by 29 CFR 13.5(a)(1)(iii), the Contractor is excused from the requirement in paragraph (i)(1)(iv) of this clause and 29 CFR 13.25(a)(4) to keep records of the employee's number of daily and weekly hours worked.
- (4)
  - (i) Records relating to medical histories or domestic violence, sexual assault, or stalking, created for purposes of E.O. 13706, whether of an employee or an employee's child, parent, spouse, domestic partner, or other individual related by blood or affinity whose close association with the employee is the equivalent of a family relationship, shall be maintained as confidential records in separate files/records from the usual personnel files.
  - (ii) If the confidentiality requirements of the Genetic Information Nondiscrimination Act of 2008 (GINA), section 503 of the Rehabilitation Act of 1973, and/or the Americans with Disabilities Act (ADA) apply to records or documents created to comply with the recordkeeping requirements in this contract clause, the records and documents shall also be maintained in compliance with the confidentiality requirements of the GINA, section 503 of the Rehabilitation Act of 1973, and/or ADA as described in 29 CFR 1635.9, 41 CFR 60-741.23(d), and 29 CFR 1630.14(c)(1), respectively.
  - (iii) The Contractor shall not disclose any documentation used to verify the need to use 3 or more consecutive days of paid sick leave for the purposes listed in 29 CFR 13.5(c)(1)(iv) (as described in 29 CFR 13.5(e)(1)(ii) and shall maintain confidentiality about any domestic abuse, sexual assault, or stalking, unless the employee consents or when disclosure is required by law.
- (5) The Contractor shall permit authorized representatives of the Wage and Hour Division to conduct interviews with employees at the worksite during normal working hours.
- (6) Nothing in this contract clause limits or otherwise modifies the Contractor's recordkeeping obligations, if any, under the Service Contract Labor Standards statute, the Wage Rate Requirements (Construction) statute, the Fair Labor Standards Act, the Family and Medical Leave Act, E.O. 13658, their respective implementing regulations, or any other applicable law.
- (j) Interference/discrimination.
  - (1) The Contractor shall not in any manner interfere with an employee's accrual or use of paid sick leave as required by E.O. 13706 or 29 CFR part 13. Interference includes, but is not limited to –
    - (i) Miscalculating the amount of paid sick leave an employee has accrued;

- (ii) Denying or unreasonably delaying a response to a proper request to use paid sick leave;
  - (iii) Discouraging an employee from using paid sick leave;
  - (iv) Reducing an employee's accrued paid sick leave by more than the amount of such leave used;
  - (v) Transferring an employee to work on contracts not covered by the E.O. to prevent the accrual or use of paid sick leave;
  - (vi) Disclosing confidential information contained in certification or other documentation provided to verify the need to use paid sick leave; or
  - (vii) Making the use of paid sick leave contingent on the employee's finding a replacement worker or the fulfillment of the Contractor's operational needs.
- (2) The Contractor shall not discharge or in any other manner discriminate against any employee for –
- (i) Using, or attempting to use, paid sick leave as provided for under E.O. 13706 and 29 CFR part 13;
  - (ii) Filing any complaint, initiating any proceeding, or otherwise asserting any right or claim under E.O. 13706 and 29 CFR part 13;
  - (iii) Cooperating in any investigation or testifying in any proceeding under E.O. 13706 and 29 CFR part 13; or
  - (iv) Informing any other person about his or her rights under E.O. 13706 and 29 CFR part 13.
- (k) *Notice.* The Contractor shall notify all employees performing work on or in connection with a contract covered by the E.O. of the paid sick leave requirements of E.O. 13706, 29 CFR part 13, and this clause by posting a notice provided by the Department of Labor in a prominent and accessible place at the worksite so it may be readily seen by employees. Contractors that customarily post notices to employees electronically may post the notice electronically, provided such electronic posting is displayed prominently on any website that is maintained by the Contractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment.
- (l) *Disputes concerning labor standards.* Disputes related to the application of E.O. 13706 to this contract shall not be subject to the general disputes clause of the contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR part 13. Disputes within the meaning of this contract clause include disputes between the Contractor (or any of its subcontractors) and Bonneville Power Administration, the Department of Labor, or the employees or their representatives.
- (m) *Subcontracts.* The Contractor shall insert the substance of this clause, including this paragraph (m), in all subcontracts, regardless of the dollar value, that are subject to the Service Contract labor Standards statute or the Wage Rate Requirements (Construction) statute, and are to be performed in whole or in part in the United States.

(End of clause)

### 35.2.106 Clause 10-23 Compliance with Copeland Act Requirements

As prescribed in 10.3.3.3, insert the following clause in all solicitations and contracts for construction which exceeds \$2,000:

#### **COMPLIANCE WITH COPELAND ACT REQUIREMENTS (OCT 2014)**

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 lesser compensation than they are entitled to under a contract of employment. Contractor shall submit the prepared weekly statements required per 29 CFR Part 3 to the contracting officer only upon written request.

(End of clause)

### 35.2.107 Clause 10-24 Child Labor – Cooperation with Authorities and Remedies

As prescribed in 10.1.11.3, insert the following clause in solicitations and contracts which requires the acquisition of supplies expected to exceed the micro-purchase threshold:

#### **CHILD LABOR – COOPERATION WITH AUTHORITIES AND REMEDIES (APR 2024)**

- (a) Applicability. This clause does not apply to the extent that the Contractor is supplying end products mined, produced, or manufactured in—
- (1) Canada, and the anticipated value of the acquisition is \$25,000 or more;
  - (2) Israel, and the anticipated value of the acquisition is \$50,000 or more;
  - (3) Mexico, and the anticipated value of the acquisition is \$102,280, or more; or
  - (4) Armenia, Aruba, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, Ukraine or the United Kingdom and the anticipated value of the acquisition is \$174,000 or more.
- (b) Cooperation with Authorities. To enforce the laws prohibiting the manufacture of importation of products mined, produced, or manufactured by forced or indentured child labor, authorized officials may need to conduct investigations to determine whether forced or indentured child labor was used to mine, produce, or manufacture any product furnished under this contract. The Contractor agrees to cooperate fully with authorized officials of the contracting agency, the Department of the Treasury, or the Department of Justice by providing reasonable access to relevant records, documents, persons, or premises upon reasonable request by the authorized official.
- (c) Violations. The Government may impose remedies set forth in paragraph (d) for the following violations:
- (1) The Contractor has submitted a false certification regarding knowledge of the use of forced or indentured child labor for listed end products.
  - (2) The Contractor has failed to cooperate, if required, in accordance with paragraph (b) of this clause, with an investigation of the use of forced or indentured child labor by an Inspector General, Attorney General, or the Secretary of the Treasury.
  - (3) The Contractor used forced or indentured child labor in its mining, production, or manufacturing processes.
  - (4) The Contractor has furnished under the contract end products or components that have been mined, produced, or manufactured wholly or in part by forced or indentured child labor. (The Government will not pursue remedies at paragraph (d)(2) or paragraph (d)(3) of this clause unless sufficient evidence indicates that the Contractor knew of the violation.)
- (d) Remedies.
- (1) The Contracting Officer may terminate the contract.
  - (2) The Department of Energy suspending official may suspend the Contractor in accordance with Department procedures.
  - (3) The debarring official may debar the Contractor for a period not to exceed 3 years in accordance with Departmental procedures.

(End of clause)

### 35.2.108 Clause 10-25 Combating Trafficking in Persons

As prescribed in 10.1.10.4, insert the following clause in all solicitations and contracts:

#### **COMBATING TRAFFICKING IN PERSONS (OCT 2014)**

(a) Definitions. As used in this clause:

“Coercion” means:

- (1) Threats of serious harm to or physical restraint against any person;
- (2) Any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person;  
or
- (3) The abuse or threatened abuse of the legal process.

“Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

“Commercial sex act” means any sex act on account of which anything of value is given to or received by any person.

“Debt bondage” means the status or condition of a debtor arising from a pledge by the debtor of his or her personal services or of those of a person under his or her control as a security for debt if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined.

“Employee” means an employee of the Contractor directly engaged in the performance of work under the contract who has other than a minimal impact or involvement in contract performance.

“Forced labor” means knowingly providing or obtaining the labor or services of a person:

- (1) By threats of serious harm to, or physical restraint against, that person or another person;
- (2) By means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or
- (3) By means of the abuse or threatened abuse of law or the legal process.

“Involuntary servitude” includes a condition of servitude induced by means of:

- (1) Any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such conditions, that person or another person would suffer serious harm or physical restraint; or
- (2) The abuse or threatened abuse of the legal process.

“Severe forms of trafficking in persons” means:

- (1) Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or
- (2) The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.



“Sex trafficking” means the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act.

- (b) Policy. The United States Government has adopted a zero tolerance policy regarding trafficking in persons. Contractors and contractor employees shall not:
  - (1) Engage in severe forms of trafficking in persons during the period of performance of the contract;
  - (2) Procure commercial sex acts during the period of performance of the contract; or
  - (3) Use forced labor in the performance of the contract.
- (c) Contractor requirements. The Contractor shall:
  - (1) Notify its employees of:
    - (i) The United States Government's zero tolerance policy described in paragraph (b) of this clause; and
    - (ii) The actions that will be taken against employees for violations of this policy. Such actions may include, but are not limited to, removal from the contract, reduction in benefits, or termination of employment; and
  - (2) Take appropriate action, up to and including termination, against employees or subcontractors that violate the policy in paragraph (b) of this clause.
- (d) Notification. The Contractor shall inform the Contracting Officer immediately of:
  - (1) Any information it receives from any source (including host country law enforcement) that alleges a Contractor employee, subcontractor, or subcontractor employee has engaged in conduct that violates this policy; and
  - (2) Any actions taken against Contractor employees, subcontractors, or subcontractor employees pursuant to this clause.
- (e) Remedies. In addition to other remedies available to the Government, the Contractor's failure to comply with the requirements of paragraphs (c), (d), or (f) of this clause may result in:
  - (1) Requiring the Contractor to remove a Contractor employee or employees from the performance of the contract;
  - (2) Requiring the Contractor to terminate a subcontract;
  - (3) Suspension of contract payments;
  - (4) Loss of award fee, consistent with the award fee plan, for the performance period in which the Government determined Contractor non-compliance;
  - (5) Termination of the contract for default or cause, in accordance with the termination clause of this contract; or
  - (6) Suspension or debarment.
- (f) Subcontracts. The Contractor shall include the substance of this clause, including this paragraph (f), in all subcontracts.
- (g) Mitigating Factor. The Contracting Officer may consider whether the Contractor had a Trafficking in Persons awareness program at the time of the violation as a mitigating factor when determining remedies. Additional information about Trafficking in Persons and examples of awareness programs can be found at the website for the Department of State's Office to Monitor and Combat Trafficking in Persons at <http://www.state.gov/g/tip>.

(End of clause)

### 35.2.109 Clause 10-26 Contract Termination – Debarment

As prescribed in 10.3.5.3, insert the following clause in solicitations and contracts for construction which will exceed \$2,000:

**CONTRACT TERMINATION – DEBARMENT (OCT 2014)**

Breach of the following clauses may be grounds for termination of the contract and debarment as a contractor and subcontractor as provided in 29 CFR 5.12: Clause 10-7 Construction Wage Rates Requirements; Clause 10-9 Payrolls and Basic Records; Clause 10-10 Apprentices, Trainees and Helpers; Clause 10-11 Subcontract (Labor Standards); Clause 10-12 Certification of Eligibility; Clause 10-21 Contract Work Hours and Safety Standards Act-Overtime Compensation; and Clause 10-23 Compliance with Copeland Act Requirements.

(End of clause)

35.2.110 Clause 10-27 Disputes Concerning Labor Standards

As prescribed in 10.3.6.3, insert the following clause in solicitations and contracts for construction in excess of \$2,000:

**DISPUTES CONCERNING LABOR STANDARDS (MAR 2018)**

The United States 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 Bonneville, the U.S. Department of Labor, or the employees or their representatives.

(End of clause)

35.2.111 Clause 10-28 Minimum Wage for Federal Contracts

As prescribed in 10.2.3.1.3, insert the following clause in all solicitations and contracts, unless work is to be performed outside the United States:

**MINIMUM WAGE FOR FEDERAL CONTRACTS (APR 2024)**

This clause implements Executive Order 14026, Establishing a Minimum Wage for Contractors, dated April 27, 2021.

- (a) Each service employee, laborer, or mechanic employed in the United States (the 50 States and the District of Columbia) in the performance of this contract by the prime Contractor or any subcontractor, regardless of any contractual relationship which may be alleged to exist between the Contractor and service employee, laborer, or mechanic, shall be paid not less than the applicable minimum wage under Executive Order 14026. Effective January 30, 2022 the minimum wage required to be paid to each service employee, laborer, or mechanic performing work on this contract shall be \$15.00 per hour.
- (b) The Contractor shall adjust the minimum wage paid under this contract each time the Secretary of Labor's annual determination of the applicable minimum wage under section 2(a)(ii) of Executive Order 14026 results in a higher minimum wage. Adjustments to the Executive Order minimum wage under section 2(a)(ii) of Executive Order 14026 will be effective for all service employees, laborers, or mechanics subject to the Executive Order beginning January 1 of the following year. The Secretary of Labor will publish annual determinations in the Federal Register no later than 90 days before such new wage is to

take effect. The Secretary will also publish the applicable minimum wage on [www.wdol.gov](http://www.wdol.gov) (or any successor website). The applicable published minimum wage is incorporated by reference into this contract.

- (c) The Contracting Officer will adjust the contract price or contract unit price under this clause only for the increase in labor costs resulting from the annual inflation increases in the Executive Order 14026 minimum wage beginning on January 1, 2023. The Contracting Officer shall consider documentation as to the specific costs and workers impacted in determining the amount of the adjustment.
- (d) The Contracting Officer will not adjust the contract price under this clause for any costs other than those identified in paragraph (c) of this clause, and will not provide price adjustments under this clause that result in duplicate price adjustments with the respective clause of this contract implementing the Service Contract Labor Standards statute (formerly known as the Service Contract Act) or the Wage Rate Requirements (Construction) statute (formerly known as the Davis Bacon Act).
- (e) The Contractor shall include the substance of this clause, including this paragraph (e) in all subcontracts.

(End of clause)

#### 35.2.112 Clause 10-29 Construction Wage Rate Requirements – Price Adjustment (None or Separately Specified Pricing Method)

As prescribed in 10.3.4.3.3, insert the following clause in solicitations and contracts for construction:

#### **CONSTRUCTION WAGE RATE REQUIREMENTS – PRICE ADJUSTMENT (NONE OR SEPARATELY SPECIFIED PRICING METHOD) (OCT 2014)**

- (a) The wage determination issued under the Construction Wage Rate Requirements statute by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, that is effective for an option to extend the term of the contract, will apply to that option period.
- (b) The Contracting Officer will make no adjustment in contract price, other than provided for elsewhere in this contract, to cover any increases or decreases in wages and benefits as a result of—
  - (1) Incorporation of the Department of Labor’s wage determination applicable at the exercise of the option to extend the term of the contract.
  - (2) Incorporation of a wage determination otherwise applied to the contract by operation of law; or
  - (3) An increase in wages and benefits resulting from any other requirement applicable to workers subject to the Construction Wage Rate Requirements statute.

(End of clause)

#### 35.2.113 Clause 10-30 Construction Wage Rate Requirements – Price Adjustment (Percentage Method)

As prescribed in 10.3.4.3.3, insert the following clause in solicitations and contracts for construction:

**CONSTRUCTION WAGE RATE REQUIREMENTS – PRICE ADJUSTMENT  
(PERCENTAGE METHOD) (OCT 2014)**

- (a) The wage determination issued under the Construction Wage Rate Requirements statute by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, that is effective for an option to extend the term of the contract, will apply to that option period.
- (b) The Contracting Officer will adjust the portion of the contract price or contract unit price(s) containing the labor costs subject to the Construction Wage Rate Requirements statute to provide for an increase in wages and fringe benefits at the exercise of each option to extend the term of the contract in accordance with the following procedures:
  - (1) The Contracting Officer has determined that the portion of the contract price or contract unit price(s) containing labor costs subject to the Construction Wage Rate Requirements statute is \_\_\_\_\_ *[CO insert percentage rate]* percent.
  - (2) The Contracting Officer will increase the portion of the contract price or contract unit price(s) containing the labor costs subject to the Construction Wage Rate Requirements statute by the percentage rate published in \_\_\_\_\_ *[CO insert publication]*.
- (c) The Contracting Officer will make the price adjustment at the exercise of each option to extend the term of the contract. This adjustment is the only adjustment that the Contracting Officer will make to cover any increases in wages and benefits as a result of:
  - (1) Incorporation of the Department of Labor’s wage determination applicable at the exercise of the option to extend the term of the contract;
  - (2) Incorporation of a wage determination otherwise applied to the contract by operation of law; or
  - (3) An increase in wages and benefits resulting from any other requirement applicable to workers subject to the Construction Wage Rate Requirements statute.

(End of clause)

35.2.114 Clause 10-31 Construction Wage Rate Requirements – Price Adjustment (Actual Method)

As prescribed in 10.3.4.3.3, insert the following clause in solicitations and contracts for construction:

**CONSTRUCTION WAGE RATE REQUIREMENTS – PRICE ADJUSTMENT  
(ACTUAL METHOD) (OCT 2014)**

- (a) The wage determination issued under the Construction Wage Rate Requirements statute by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, that is effective for an option to extend the term of the contract, will apply to that option period.
- (b)
  - (1) The Contractor states that if the prices in this contract contain an allowance for wage or benefit increases, such allowance will not be included in any request for contract price adjustment submitted under this clause.

- (2) The Contractor shall provide with each request for contract price adjustment under this clause a statement that the prices in the contract do not include any allowance for any increased cost for which adjustment is being requested.
- (c) The Contracting Officer will adjust the contract price or contract unit price labor rates to reflect the Contractor's actual increase or decrease in wages and fringe benefits to the extent that the increase is made to comply with, or the decrease is voluntarily made by the Contractor as a result of—
- (1) Incorporation of the Department of Labor's Construction Wage Rate Requirements wage determination applicable at the exercise of an option to extend the term of the contract; or
  - (2) Incorporation of a Construction Wage Rate Requirements wage determination otherwise applied to the contract by operation of law.
- (d) Any adjustment will 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 will not otherwise include any amount for general and administrative costs, overhead, or profit.
- (1) The Contractor shall notify the Contracting Officer of any increase claimed under this clause within 30 days after receiving a revised wage determination unless this notification period is extended in writing by the Contracting Officer. The Contractor shall notify the Contracting Officer promptly of any decrease under this clause, but nothing in this clause precludes the Government 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 Contracting Officer may reasonably require. Upon agreement of the parties, the Contracting Officer will modify the contract price or contract unit price in writing. The Contractor shall continue performance pending agreement on or determination of any such adjustment and its effective date.
  - (2) Contract price adjustment computation shall be computed as follows:
    - (i) Computation for contract unit price per single craft hour for schedule of indefinite-quantity work. For each labor classification, the difference between the actual wage and benefit rates (combined) paid and the wage and benefit rates (combined) required by the new wage determination shall be added to the original contract unit price if the difference results in a combined increase. If the difference computed results in a combined decrease, the contract unit price shall be decreased by that amount if the Contractor provides notification as provided in paragraph (e) of this clause.
    - (ii) Computation for contract unit price containing multiple craft hours for schedule of indefinite-quantity work. For each labor classification, the difference between the actual wage and benefit rates (combined) paid and the wage and benefit rates (combined) required by the new wage determination shall be multiplied by the actual number of hours expended for each craft involved in accomplishing the unit-priced work item. The product of this computation will then be divided by the actual number of units ordered in the preceding contract period. The total of these computations for each craft will be added to the current contract unit price to obtain the new contract unit price. The extended amount for the contract line item will be obtained by multiplying the new unit price by the estimated quantity. If actual hours are not available from the preceding contract period for computation of the adjustment for a specific contract unit of work, the Contractor, in agreement with the Contracting Officer, shall estimate the total hours per craft per contract unit of work.

Example: Asphalt Paving – Current Price \$3.38 per Square Yard

DBA Craft	New WD		Hourly Rate Paid	=	Diff		Actual Hours	Actual Units (sq.yd.)	=	Increase/sq.yd.
Equip Opr	\$18.50	-	\$18.00	=	\$0.50	X	600	3,000	=	\$0.10
Truck Driver	\$19.00	-	\$18.25	=	\$0.75	X	525	3,000	=	\$0.13
Laborer	\$11.50	-	\$11.25	=	\$0.25	X	750	3,000	=	\$0.06

Total increase per square yard = \$0.29\*

\*Note: Adjustment for labor rate increases or decreases may be accompanied by social security and unemployment taxes and workers' compensation insurance.

Current unit price = \$3.38 per square yard

Add DBA price adj. + .29

New unit price \$3.67 per square yard

(End of clause)

35.2.115 Clause 10-32 Construction Wage Rate Requirements for Oregon Port Morrow Lease Finance Projects

As prescribed in 10.3.2.3 insert the clause Construction Wage Rate Requirements for Oregon Port of Morrow Lease Finance Projects in solicitations, contracts, and task orders for construction work in Oregon when the Port of Morrow is the lease financier.

**CONSTRUCTION WAGE RATE REQUIREMENTS FOR OREGON PORT OF MORROW LEASE FINANCE PROJECTS (FEB 2020)**

- (a) The Contractor shall pay all laborers and mechanics employed or working upon a site of the work in the State of Oregon not less than the higher of the applicable federal or existing State prevailing wage rates.
- (b) All laborers and mechanics employed or working upon the site of the work will be paid 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 or the Oregon Bureau of Labor and Industries whichever is higher. The contractor shall comply with the clause titled: "Construction Wage Rate Requirements" The contractor shall comply with Oregon Bureau of Labor and Industries prevailing wage requirements.

(End of clause)

35.2.116 Provision 11-1 Type of Business Organization

As prescribed in 11.12.3, insert the following provision in solicitations. The provision may be modified by removing paragraph (c) and the designation in paragraph (a) if the potential offers are only sought from domestic suppliers:

**TYPE OF BUSINESS ORGANIZATION (SEP 2002)**

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 provision)

35.2.117 Provision 11-2.1 Instructions to Offerors – and Evaluation Factors – Lowest Price Technically Acceptable

As prescribed in 11.12.3, insert a provision similar to the following in written solicitations for supplies, construction and/or services.

**INSTRUCTONS TO OFFERORS AND EVALUATION FACTORS – LOWEST PRICE TECHNICALLY ACCEPTABLE (FEB 2022)**

- (a) Submission of Offers.
  - (1) Offers shall be valid for a minimum of \_\_\_ [CO fill in days] 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 21.2.
  - (3) Bonneville may reject late offers. Bonneville 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) 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 below.
    - (i) Bonneville 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.
    - (ii) 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.
  - (2) Business Proposal.
    - (i) 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.

(ii) Where the Business Proposal includes pricing for option years, Bonneville shall evaluate offers for award purposes in accordance with: (CO check one).

Provision 7-34 Evaluation Exclusive of Options

Provision 7-35 Evaluation of Options Exercised at Time of Contract Award

Provision 7-36 Evaluation of Options

(iii) **Required materials:** Offerors shall submit the following materials subject to the formatting, content, and restrictions set forth below.

(a) 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.

(b) Completed and signed Form 4220.5X (Section A of the RFP/RFQ)

(c) Completed Section F, Attachment 5 of the RFP/RFQ.

(d) The offeror's price/cost proposal shall consist of a completed Schedule as it appears in Section B of the RFP/RFQ draft contract. Offeror shall copy, complete, and submit the Schedule as its pricing submission under this Business Proposal requirement.

(e) 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 RFP/RFQ to assist suppliers in submitting the required information in a uniform format.)

(1) Example: pricing of option years

(2) \_\_\_\_\_

(3) \_\_\_\_\_

(2) Technical Proposal.

(i) **Lowest Price Technically Acceptable.** The evaluation factors as identified in the RFP/RFQ are evaluated against the stated minimum standard for acceptability and given a pass/fail 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.

(ii) **Required materials:** Offerors shall submit the following materials subject to the formatting, content, and restrictions set forth below  
 (A) 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 below. No reference to specific costs shall be made in the technical proposal.



- (1) 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 Bonneville provided materials are not needed.
- (2) Bonneville is seeking offers that provide the best combination of attributes in order to select the "best buy" offer. Bonneville 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:

(i) \_\_\_\_\_ (CO fill in)

(ii) \_\_\_\_\_ (CO fill in)

**(iii) Past Performance:** *(CO paragraph (a) maybe be modified as needed, including adding criteria for other than the acceptable level. Paragraph (b) to (e) cannot be changed. This entire factor may be deleted if Past Performance is not used as an evaluation factor)*

- a. Past Performance Reference Form is included as an attachment to this RFP/RFQ. Relevant projects involve work that is the same or similar in nature, size, or complexity to the services being procured under this Solicitation. Projects included should be from within the last (CO fill in) years. Minimum of (CO fill in) questionnaires returned (no more than 10) with all ratings of at least acceptable or higher.
- b. 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.
- c. 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 RFP/RFQ requirements. A firm without a record of relevant past performance shall receive a neutral rating for this category

- d. References other than those identified by the offeror may be used by Bonneville. All such information may be used in the evaluation of the offeror's past performance.
- e. Bonneville 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) Selection for Award.

- (1) Award shall be made to the offeror who has submitted an offer which provides the best buy to Bonneville as evaluated in accordance with the basis identified above.
- (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 provision)

35.2.118 Provision 11-2.2 Instructions to Offerors and Evaluation Factors – Tradeoff

As prescribed in 11.12.3, insert a provision similar to the following in written solicitations for supplies, construction and/or services.

**INSTRUCTIONS TO OFFERORS AND EVALUATION FACTORS – TRADEOFF (APR 2024)**

(a) Submission of Offers.

- (1) Offers shall be valid for a minimum of \_\_\_ [CO fill in days] 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 subpart 21.2.
- (3) Bonneville may reject late offers. Bonneville 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) 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 below
  - (i) Bonneville 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.

- (ii) 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.

(2) Business Proposal.

- (i) 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.
- (ii) Where the Business Proposal includes pricing for option years, Bonneville shall evaluate offers for award purposes. in accordance with: (CO check one).
  - Provision 7-34 Evaluation Exclusive of Options
  - Provision 7-35 Evaluation of Options Exercised at Time of Contract Award
  - Provision 7-36 Evaluation of Options

- (iii) **Required materials.** Offerors shall submit the following materials subject to the formatting, content, and restrictions set forth below

(A) 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.

- (1) Completed and signed Form 4220.5X (Section A of the RFP/RFQ)
- (2) Completed Section F, Attachment 5 of the RFP/RFQ.
- (3) The offeror's price/cost proposal shall consist of a completed Schedule as it appears in Section B of the RFP/RFQ draft contract. Offeror shall copy, complete, and submit the Schedule as its pricing submission under this Business Proposal requirement.
- (4) 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 RFP/RFQ to assist suppliers in submitting the required information in a uniform format.)*
  - (i) *Example: pricing of option years*
  - (ii) \_\_\_\_\_
  - (iii) \_\_\_\_\_

(3) Technical Proposal.

- (i) Tradeoff. Under a tradeoff procurement, the non-price evaluation factors may be traded for pricing resulting in a best buy for Bonneville 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
- (ii) **Required Materials:** Offerors shall submit the following materials subject to the formatting, content, and restrictions set forth below

(A) 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 below. No reference to specific costs shall be made in the technical proposal.

(1) 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 Bonneville provided materials are not needed.

(2) Bonneville is seeking offers that provide the best combination of attributes in order to select the "best buy" offer. Bonneville shall determine which offer represents the best buy based on a tradeoff analysis between price and the evaluation factors identified below.

(i) \_\_\_\_\_ (CO fill in) \_\_\_\_\_

(ii) \_\_\_\_\_ (CO fill in) \_\_\_\_\_

(iii) **Past Performance:** *(CO paragraph (a) maybe be modified as needed, including adding criteria for other than the acceptable level. Paragraph (b) to (e) cannot be changed. This entire factor may be deleted if Past Performance is not used as an evaluation factor).*

- a. Past Performance Reference Form is included as an attachment to this RFP/RFQ. Relevant projects involve work that is the same or similar in nature, size, or complexity to the services being procured under this Solicitation. Projects included should be from within the last (CO fill in) years. Minimum of (CO fill in) questionnaires returned (no more than 10) with all ratings of at least acceptable or higher.
- b. 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.
- c. 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 RFP/RFQ requirements. A firm without a record of relevant past performance shall receive a neutral rating for this category
- d. References other than those identified by the offeror may be used by Bonneville. All such information may be used in the evaluation of the offeror's past performance.
- e. Bonneville 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.

(3) 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.

(4) As a result of trade-off analysis, Bonneville may select other than the lowest price offer.

(c) Selection for Award.

(1) Award shall be made to the offeror who has submitted an offer which provides the best buy to Bonneville as evaluated in accordance with the basis identified above.

(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 provision)

### 35.2.119 Provision 11-3.1 Reverse Auction

As prescribed in 11.13.3.3, insert the following provision in solicitations when procuring commercial items utilizing a reverse auction technique:

#### **REVERSE AUCTION (APR 2024)**

(a) Bonneville 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 Bonneville utilizing the evaluation factors identified in Provision 11-2.1 Instructions to Offerors – and Evaluation Factors – Lowest Price Technically Acceptable. Lowest price shall be determined utilizing a reverse auction method as determined by Bonneville.

(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. Bonneville 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) Bonneville may reject late offers. Bonneville reserves the right to not consider proposals from potential suppliers other than those solicited by the CO.

(End of provision)

### 35.2.120 [Reserved]

### 35.2.121 Provision 11-4.1 Innovative Approaches

As prescribed in 11.13.5.3, insert the following provision in solicitations when encouraging the submission of innovative, cost-effective approaches to meeting Bonneville's needs to potential offerors:

#### **INNOVATIVE APPROACHES (MAR 2018)**

Bonneville encourages proposals offering innovative, cost-effective approaches to meeting Bonneville's requirements from a technical, work performance, delivery, pricing, or other standpoint which produce an improved result for Bonneville. 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 Bonneville's requirements. In making an award decision, innovative approaches shall be evaluated under a tradeoff analysis.

(End of provision)

#### 35.2.122 Provision 11-5 Inspection of Premises

As prescribed in 11.13.8.1, insert a provision in solicitations similar to:

##### **INSPECTION OF PREMISES (FEB 2020)**

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 the Contracting Officer.

(End of provision)

*Alternate I (Mar 2018).* If contract requires performance on Bonneville rights-of-way, add the following paragraph the basic clause:

Land rights obtained by Bonneville 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.

#### 35.2.123 Provision 11-6 Site Tour

As prescribed in 11.13.8.1, insert a provision in solicitations similar to:

##### **SITE TOUR (FEB 2020)**

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 Contact the Contracting Officer to register for this tour.

(End of provision)

*Alternate I (Mar 2018).* If contract requires performance on Bonneville rights-of-way, add the following paragraph the basic clause:

Land rights obtained by Bonneville 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.

#### 35.2.124 Clause 11-7 Subcontracting with Debarred or Suspended Entities

As prescribed in 11.10.1, insert the following clause in all solicitations and contracts, except IGCs:

**SUBCONTRACTING WITH DEBARRED OR SUSPENDED ENTITIES (FEB 2022)**

- (a) “Commercially available off-the-shelf (COTS) item,” as used in this clause means any item of 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.
- (b) The Government suspends or debar 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 \$35,000 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 \$35,000, 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](http://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 \$35,000 in value and is not a subcontract for commercially available off-the-shelf items.

(End of clause)

35.2.125 Provision 11-8 Alternative to Brand Name Requirement

As prescribed in 11.13.9.1, insert the following provision in solicitations:

**ALTERNATIVE TO BRAND NAME REQUIREMENTS (MAR 2018)**

Notwithstanding the requirement for a specific brand name contained in this solicitation, Bonneville 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 Bonneville to meet its basic requirements. Unless the Offeror clearly indicates otherwise, the offer shall be considered as offering a brand name product specified. Bonneville’s judgment concurring the acceptability of alternative products will be final.

(End of provision)

35.2.126 Clause 11-9 Printing

As prescribed in 11.1.4.1, insert the following clause in solicitations and contracts:

**PRINTING (MAR 2018)**

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, and 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 Bonneville'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)

#### 35.2.127 Clause 11-10 Vehicle Lease Payments

As prescribed in 11.3.1.5, insert the following clause in solicitations and contracts for leasing motor vehicles:

#### **VEHICLE LEASE PAYMENTS (MAR 2018)**

- (a) Upon submission of proper invoices or vouchers, Bonneville shall pay rent for each vehicle at the rate(s) specified in this contract.
- (b) Rent shall accrue from the beginning of this contract, or from the date each vehicle is delivered to Bonneville, whichever is later, and shall continue until expiration of the contract term or the termination of this contract. However, rent shall accrue only for the period that each vehicle is in the possession of Bonneville.
- (c) Rent shall not accrue for any vehicle that the Contracting Officer determines does not comply with the Condition of Leased Vehicles clause of this contract or otherwise does not comply with the requirements of this contract, until the vehicle is replaced or the defects are corrected.
- (d) Rent shall not accrue for any vehicle during any period when the vehicle is unavailable or unusable as a result of the Contractor's failure to render services for the operation and maintenance of the vehicle as prescribed by this contract.
- (e) Rent stated in monthly terms shall be prorated on the basis of 1/30 of the monthly rate for each day the vehicle is in Bonneville's possession. If this contract contains a mileage provision, Bonneville shall pay rent as provided in the Schedule.

(End of clause)

#### 35.2.128 Clause 11-11 Condition of Leased Vehicles

As prescribed in 11.3.1.5, insert the following clause in solicitations and contracts for leasing motor vehicles:

#### **CONDITION OF LEASED VEHICLES (MAR 2018)**



Each vehicle furnished under this contract shall be of good quality and in safe operating condition, and shall comply with the Federal Motor Vehicle Safety Standards (49 CFR 571) and State safety regulations applicable to the vehicle. Bonneville shall accept or reject the vehicles promptly after receipt. If the Contracting Officer determines that any vehicle furnished is not in compliance with this contract, the Contracting Officer shall promptly inform the Contractor in writing. If the Contractor fails to replace the vehicle or correct the defects as required by the Contracting Officer, Bonneville may –

- (a) By contract or otherwise, correct the defect or arrange for the lease of a similar vehicle and shall charge or set off against the Contractor any excess costs occasioned thereby; or
- (b) Terminate the contract under the Default clause of this contract.

(End of clause)

#### 35.2.129 Clause 11-12 Marking of Leased Vehicles

As prescribed in 11.3.1.5, insert the following clause in solicitations and contracts for leasing motor vehicles:

##### **MARKING OF LEASED VEHICLES (MAR 2018)**

- (a) Bonneville may place nonpermanent markings or decals, identifying the using agency, on each side, and on the front and rear bumpers, of any motor vehicle leased under this contract. Bonneville shall use markings or decals that are removable without damage to the vehicle.
- (b) The Contractor may use placards for temporary identification of vehicles except that the placards may not contain any references to the Contractor that may be construed as advertising or endorsement by Bonneville, or the Government, of the Contractor.

(End of clause)

#### 35.2.130 Clause 11-13 Tagging of Leased Vehicles

As prescribed in 11.3.1.5, insert in solicitations and contract a clause substantially similar to as follows:

##### **TAGGING OF LEASED VEHICLES (MAR 2018)**

While it is the intent that vehicles leased on this contract will operate of Federal tags, Bonneville reserves the right to utilize State tags if necessary to accomplish its mission. Should State tags be required, the Contractor shall furnish Bonneville documentation necessary to allow acquisition of such tags, Federal tags are the responsibility of Bonneville.

(End of clause)

#### 35.2.131 Clause 11-14 Equipment Lease Payments

As prescribed in 11.3.15, insert the following clause in solicitations and contracts for leasing equipment.

##### **EQUIPMENT LEASE PAYMENTS (FEB 2022)**

- (a) Upon submission of proper invoices or vouchers, Bonneville shall pay rent for each piece of equipment at the rate(s) specified in this contract.

- (b) Rent shall accrue from the beginning of this contract, or from the date each piece of equipment is delivered to Bonneville, whichever is later, and shall continue until expiration of the contract term or the termination of this contract. However, rent shall accrue only for the period that each piece of equipment is in the possession of Bonneville.
- (c) Rent shall not accrue for any vehicle that the Contracting Officer determines does not comply with the Condition of Leased Equipment clause of this contract or otherwise does not comply with the requirements of this contract, until the equipment is replaced or the defects are corrected.
- (d) Rent shall not accrue for any equipment during any period when the equipment is unavailable or unusable as a result of the Contractor's failure to render services for the operation and maintenance of the equipment as prescribed by this contract.
- (e) Rent stated in monthly terms shall be prorated on the basis of 1/30 of the monthly rate for each day the equipment is in Bonneville's possession. If this contract contains a mileage provision, Bonneville shall pay rent as provided in the Schedule.

(End of clause)

#### 35.2.132 Clause 11-15 Condition of Leased Equipment

As prescribed in 11.3.15, insert the following clause in solicitations and contracts for leasing equipment:

##### **CONDITION OF LEASED EQUIPMENT (FEB 2020)**

Each piece of equipment furnished under this contract shall be of good quality and in safe operating condition. Bonneville shall accept or reject the equipment promptly after receipt. If the Contracting Officer determines that any equipment furnished is not in compliance with this contract, the Contracting Officer shall promptly inform the Contractor in writing. If the Contractor fails to replace the equipment or correct the defects as required by the Contracting Officer, Bonneville may –

- (a) By contract or otherwise, correct the defect or arrange for the lease of a similar equipment and shall charge or set off against the Contractor any excess costs occasioned thereby; or
- (b) Terminate the contract under the Default clause of this contract.

(End of clause)

#### 35.2.133 Clause 11-16 Policy Authorization to Utilize GSA Vehicles

As prescribed in 11.3.1.5 (b) insert the following clause in cost reimbursement solicitations and contracts:

##### **POLICY AUTHORIZATION TO UTILIZE GSA VEHICLES (JUNE 2022)**

- (a) If it is in the Bonneville Power Administration's (BPA) interest, the Contracting Officer may authorize cost-reimbursement Contractors to obtain, for official purposes only, Interagency Fleet Management System (IFMS) vehicles and related services, including:
  - (1) Fuel and lubricants;
  - (2) Vehicle inspection, maintenance, and repair;
  - (3) Vehicle storage; and
  - (4) Commercially rented vehicles for short-term use.
- (b) Complete rebuilding of major components of contractor-owned or leased equipment requires the approval of the Contracting Officer in each instance.

- (c) BPA Contractors shall not be authorized to obtain IFMS vehicles and related services for use in performance of any contract other than a cost-reimbursement contract, except as otherwise specifically approved by the Administrator of the General Services Administration at the request of the agency involved.

(End of clause)

#### 35.2.134 Clause 11-17 Authorization to Utilize GSA Vehicles

As prescribed in 11.3.1.5 (b) insert the following clause in cost reimbursement solicitations and contracts:

#### **AUTHORIZATION TO UTILIZE GSA VEHICLES (JUNE 2022)**

- (a) The Contracting Officer may authorize a cost-reimbursement contractor to obtain Interagency Fleet Management System (IFMS) vehicles and related services, if the Contracting Officer has:
- (1) Determined that the authorization will accomplish Bonneville Power Administration (BPA) contractual objectives and effect demonstrable economies;
  - (2) Received evidence that the contractor has obtained motor vehicle liability insurance covering bodily injury and property damage, with limits of liability as required or approved by the agency, protecting the Contractor and the Government against third-party claims arising from the ownership, maintenance, or use of an IFMS;
  - (3) Arranged for periodic checks to ensure that authorized Contractors are using vehicles and related services exclusively under cost-reimbursement contracts;
  - (4) Ensured that Contractors shall establish and enforce suitable penalties for their employees who use or authorize the use of Government vehicles for other than performance of BPA contracts (see 41 CFR 101-38.301-1);
  - (5) Received a written statement that the contractor will assume, without the right of reimbursement from the Government, the cost or expense of any use of IFMS and services not related to the performance of the contract; and
  - (6) Considered any recommendations of the Contractor.
- (b) The authorization shall:
- (1) Be in writing;
  - (2) Cite the contract number;
  - (3) Specify any limitations on the authority, including its duration, and any other pertinent information; and
  - (4) Instruct the contractor to comply with the applicable BPA policies and procedures provided in this subpart.
- (c) Authorizations to subcontractors shall be issued through, and with the approval of, the Contractor; and
- (d) Contracting Officers authorizing contractor use of IFMS vehicles and related services subject their agencies to the responsibilities and liabilities provided in 41 CFR 101-39.4 regarding accidents and claims.

(End of clause)

#### 35.2.135 Clause 11-18 System for Award Management

As prescribed in 11.10 (c) (d), insert the following clause in applicable solicitations and contracts.

**SYSTEM FOR AWARD MANAGEMENT (APR 2024)**

A contractor is required to be registered in SAM as soon as possible. If the contractor is unable to register prior to award, the Contractor shall be registered in SAM within 60 days after award. If the contractor is unable to comply, the contractor shall immediately notify the CO and provide a written explanation.

(End of clause)

35.2.136 Provision 12-1 Debriefing Request

As prescribed in 12.8.3.2, insert the following provision in all solicitations:

**DEBRIEFING REQUEST (JUN 2012)**

Unsuccessful offerors shall request a debriefing within three (3) calendar days of receipt of notice of contract award.

(End of provision)

35.2.137 Clause 12-2 Price Reduction for Inaccurate Cost or Pricing Information

As prescribed in 12.5.4.1, the CO may include the following clause in solicitations and contracts:

**PRICE REDUCTION FOR INACCURATE COST OR PRICING INFORMATION (MAR 2018)**

Bonneville 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)

35.2.138 Clause 12-3 Examination of Records

As prescribed in 12.8.6.1, insert the following clause in all cost reimbursement or time-and-material contracts.

**EXAMINATION OF RECORDS (MAR 2018)**

- (a) The contractor shall keep accurate and complete accounting records in support of all cost-based billings to Bonneville 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 Bonneville.

- (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)

35.2.139 Clause 12-4 [Reserved]

35.2.140 Clause 13-1 [Reserved]

35.2.141 Clause 14-1 Contracting Officer's Representatives – Construction Contracts

As prescribed in 14.1.5, insert a clause in solicitations and contracts substantially the same as follows:

**CONTRACTING OFFICER'S REPRESENTATIVES – CONSTRUCTION (MAR 2018)**

- (a) The Field Inspector is an authorized representative of the Contracting Officer's Representative (COR) for technical oversight of contract performance. This includes the functions of inspection and review of work performed.
- (b) The COR is responsible for all technical oversight of the contract. The functions of the COR include interpretation of specifications and drawings, and processing of payments.
- (c) 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 Bonneville; and (3) final decisions on any matters subject to appeal, as provided in the disputes clause. In addition, the COR may not make final acceptance under the contract.

(End of clause)

35.2.142 Clause 14-2 Contract Administration Representatives

As prescribed in 14.1.5, insert a clause in solicitations and contracts substantially the same as follows:

**CONTRACT ADMINISTRATION REPRESENTATIVES (MAR 2018)**

- (a) In the administration of this contract, the Contracting Officer may be represented by one or more of the following: Contracting Officer's 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; (2) suspension or termination of the Contractor's right to proceed, either for default or for convenience of Bonneville; 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)

35.2.143 Clause 14-3 Order of Precedence

As prescribed in 14.4.3, the CO may insert a clause in solicitations and contracts substantially the same as follows:

**ORDER OF PRECEDENCE (FEB 2020)**

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:

- (a) The Schedule of Items;
- (b) Contract clauses;
- (c) The specifications or statement of work; and
- (d) Other documents, exhibits, and attachments.

(End of clause)

35.2.144 Clause 14-4 Other Rights at Law

As prescribed in 14.4.3, the CO may insert the following clause in all solicitations and contracts:

**OTHER RIGHTS AT LAW (JUL 2013)**

Bonneville, 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)

35.2.145 Clause 14-5 Variation in Quantity – Supply Contracts

As prescribed in 14.6.3, the CO may insert a clause in solicitations and contracts substantially the same as follows:

**VARIATION IN QUANTITY – SUPPLY CONTRACTS (MAR 2018)**

- (a) A variation in the quantity of any contract item will not be accepted unless the variation has been caused by conditions of loading, shipping, packing or allowances in manufacturing processes, and then only to the extent, if any, specified in paragraph (b) of this clause.
- (b) The permissible variation shall be limited to:

\_\_\_\_\_ Percent increase *(CO insert percentage)*

\_\_\_\_\_ Percent decrease *(CO insert percentage)*

This increase or decrease shall apply to \_\_\_\_\_. *(CO shall insert in the blank the designation(s) to which the percentages apply, such as –*

- (a) *The total contract quantity;*
- (b) *Line Item 1 only;*
- (c) *Each quantity specified in the delivery schedule;*
- (d) *The total item quantity for each destination; or*
- (e) *The total quantity of each item without regard to destination.)*

(End of clause)

#### 35.2.146 Clause 14-6 Variation in Estimated Quantity – Service and Construction Contracts

As prescribed in 14.6.3, the CO may insert a clause in solicitations and contracts substantially the same as follows:

#### **VARIATION IN ESTIMATED QUANTITY – SERVICE AND CONSTRUCTION CONTRACTS (MAR 2018)**

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 15 percent above or below the estimated quantity, an equitable adjustment in the contract shall be made at the request of either party. The equitable adjustment shall be based upon any increase or decrease in costs due solely to the variation above 115 percent or below 85 percent of the estimated quantity. If the quantity variation is such as to cause an increase in the time necessary for completion, the Contractor may request, in writing, an extension of time, to be received by the Contracting Officer (CO) within 10 days of the delay, or within such further period as may be granted by the CO before the date of final settlement of the contract. Upon receipt of a written request for an extension, the CO shall ascertain the facts and make an adjustment for extending the completion date as, in the judgement of the CO, is justified.

(End of clause)

#### 35.2.147 Clause 14-7 Subcontracts

As prescribed in 14.9.1, insert the following clause:

#### **SUBCONTRACTS (MAR 2018)**

The Contractor shall not subcontract any work without prior approval of the Contracting Officer, except work specifically agreed upon at the time of award. Bonneville 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 (Mar 2018).* If the contract performance involves the management of handling hazardous waste, number the paragraph in the basic clause to (a) and add the following paragraph (b):

- (b)
  - (1) If the subcontract is for the management or handling of hazardous or toxic wastes, before work may begin, Bonneville must receive:
    - (i) a copy of EPA Notification of Hazardous Waste Activity (EPA form 8700-12) or equivalent); and
    - (ii) acknowledgment of the notification filing (EPA form 8700-12A or equivalent).

- (2) If the subcontract involves management of PCBs, before work may begin, Bonneville must receive:
- (i) a copy of EPA Notification of PCB Activity (EPA form 7710-53 or equivalent), and
  - (ii) acknowledgment of the filing (a letter from EPA). The acknowledgment from EPA will include the EPA identification number assigned.

#### 35.2.148 Clause 14-8 Changes – Fixed-Price

As prescribed in 14.10.5.1.2, the CO may include the following clause in solicitations and contracts. Paragraph (a) may be modified to reflect the specific portion of the contract to be subject to the clause:

#### **CHANGES – FIXED PRICE (MAR 2018)**

- (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 Bonneville 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) Bonneville-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 Bonneville 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)

#### 35.2.149 Clause 14-9 Changes – Cost Reimbursement

As prescribed in 14.10.5.1.2, the CO may include the following clause in solicitations and contracts. Paragraph (a) may be modified to reflect the specific portion of the contract to be subject to the clause:



**CHANGES – COST REIMBURSEMENT (MAR 2018)**

- (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 Bonneville 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) Bonneville-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)

**35.2.150 Clause 14-10 Changes – Time-and-Materials**

As prescribed in 14.10.5.1.2, the CO may include the following clause in solicitations and contracts. Paragraph (a) may be modified to reflect the specific portion of the contract to be subject to the clause:

**CHANGES – TIME-AND-MATERIALS (MAR 2018)**

- (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 Bonneville 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) Bonneville-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)

### 35.2.151 Clause 14-11 Changes and Changed Conditions – Construction Contracts

As prescribed in 14.10.5.1.2, the CO may insert a clause in solicitations and contracts substantially the same as follows:

#### **CHANGES AND CHANGED CONDITIONS – CONSTRUCTION CONTRACTS (JUL 2013)**

- (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)

35.2.152 Clause 14-12 Pricing of Adjustments

As prescribed in 14.10.5.1.2, insert the following clause in solicitations and contracts:

**PRICING OF ADJUSTMENTS (JUL 2013)**

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)

35.2.153 Clause 14-13 Modification Cost Proposal – Price Breakdown

As prescribed in 14.10.5.1.2, the CO may insert the following clause in solicitations and contracts:

**MODIFICATION COST PROPOSAL – PRICE BREAKDOWN (JUL 2013)**

- (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)

35.2.154 Clause 14-14 Stop Work Order

As prescribed in 14.12.7, the CO may insert the following clause in solicitations and contracts:

**STOP WORK ORDER (MAR 2018)**

- (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 Bonneville.
- (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 Bonneville, 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)

#### 35.2.155 Clause 14-15 Delivery of Excess Quantities

As prescribed in 14.6.3, insert the following clause:

##### **DELIVERY OF EXCESS QUANTITIES (APR 2024)**

The Contractor is responsible for the delivery of each item quantity within allowable variations, if any. If the Contractor delivers and the Government receives quantities of any item in excess of the quantity called for (after considering any allowable variation in quantity), such excess quantities will be treated as being delivered for the Convenience of the Contractor. The Government may retain such excess quantities up to \$1000.00 in value without compensating the Contractor therefor, and the Contractor waives all right, title, or interests therein. Quantities in excess of \$1000.00 will, at the option of the Government, either be returned at the Contractor's expense or retained and paid for by the Government at the contract unit price.

(End of clause)

#### 35.2.156 Clause 14-16 Requirement for U.S. Flag Vessels

As prescribed in 14.15.2, insert the following clause in solicitations and contracts:

##### **REQUIREMENTS FOR U.S. FLAG VESSELS (MAR 2018)**

- (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:
- (i) Sponsoring U.S. Government agency.
  - (ii) Name of vessel.
  - (iii) Vessel flag of registry.
  - (iv) Date of loading.
  - (v) Port of loading.
  - (vi) Port of final discharge.
  - (vii) Description of commodity.
  - (viii) Gross weight in kilograms and cubic meters if available.
  - (ix) 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 Bonneville 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, Bonneville 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)

35.2.157 Clause 14-17 [Reserved]

35.2.158 Clause 14-18 Bankruptcy

As prescribed in 14.19.3, insert the following clause in solicitations and contracts exceeding \$100,000:

#### **BANKRUPTCY (OCT 2005)**

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)

#### 35.2.159 Clause 14-19 Post Award Orientation

As prescribed in 14.5.3.3, the CO may insert the following clause in solicitations and contracts:

#### **POST AWARD ORIENTATION (SEP 2007)**

The successful offeror will be required to participate in a post award orientation as designated by the Contracting Officer.

(End of clause)

#### 35.2.160 Clause 14-21 Computer Fraud and Abuse Act

As prescribed in 14.14.1, insert the following clause in solicitations and contracts with electric methods for information exchange:

#### **COMPUTER FRAUD AND ABUSE ACT (MAR 2018)**

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)

#### 35.2.161 Clause 14-22 Definitions

As prescribed in 14.14.1, insert the following clause in solicitations and contracts which electronic transactions will take place:

#### **DEFINITIONS (MAR 2018)**

- (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)

#### 35.2.162 Clause 14-23 E-Commerce Marketplace Ordering

As prescribed in 14.14.1, insert the E-Commerce Marketplace Ordering clause in all solicitations and contracts in which ordering transaction will be executed through electronic means:

**E-COMMERCE MARKETPLACE ORDERING (FEB 2020)**

Contractor agrees to do business with Bonneville electronically through the eCommerce web-based program. Transactions sent via eCommerce are to be considered signed legal documents and Contractor agrees to terms and conditions as transmitted.

(End of clause)

35.2.163 Clause 14-24 Inconsistency Between English Version and Translation of Contract

As prescribed in 14.5.3.3 insert the clause Inconsistency Between English Version and Translation in solicitations and contracts if anticipating translation into another language.

**INCONSISTENCY BETWEEN ENGLISH VERSION AND TRANSLATION OF CONTRACT  
(FEB 2020)**

In the event of inconsistency between any terms of this contract and any translation into another language, the English language meaning shall control.

(End of clause)

35.2.164 Clause 14-25 Factory Representative Services

As prescribed in 14.23.2, insert the clause Factory Representative Services in contracts that require installation assistance of high voltage electrical equipment:

**FACTORY REPRESENTATIVE SERVICES (FEB 2020)**

- (a) Bonneville may require the Contractor to furnish Factory Representatives that are responsible, competent, have a thorough technical knowledge of the equipment involved, and are well versed and can communicate in the English language. The Factory Representative will be responsible for monitoring and providing instructions during the assembly of the equipment. The direct responsibility for supervising and executing the work shall remain with Bonneville.
- (b) The Factory Representative will be paid the amount per day, including Sundays and National holiday's, stated in the Schedule of Items. This payment shall cover up to 10 hours a day.
- (c) Travel: All travel cost will either be;
  - (1) pre-negotiated and included in the Schedule of Items as a firm fixed price or;
  - (2) based on the Federal Travel Regulations Per Diem rates, prescribed by the General Services Administration, for travel in the contiguous 48 United States. For airfare originating outside of the United States, BPA will reimburse based on actual prices paid (in US Dollars at published exchange rate), receipts required. First Class or equivalent seating is excluded.
- (d) The contractor shall make available the agreed upon number of Factory Representatives to Bonneville as soon as reasonably possible following notification by the Contracting Officer or Contracting Officers Representative. Under no circumstances will the arrival of the Factory Representative(s) be delayed longer than 3 weeks from date of such notification.
- (e) Bonneville will designate the headquarters point from which the Factory Representative will work. It will be Bonneville's prerogative to direct the Factory Representative's movements while in the field. Bonneville will either furnish or allow any additional transportation if needed.
- (f) The Factory Representative may be required to remain at the headquarters point until the completion of energization and final acceptance is made.

- (g) The Factory Representative will align his working hours with those of the Bonneville's construction personnel to ensure that he is available for consultation at all times while installation of the equipment is in progress.
- (h) The responsibility of the Factory Representative begins from the time of arrival at the installation job site through installation and energization. The Factory Representative shall be available for consultation, although he need not be actually present at the installation over and above the normal working day if he does not so desire.
- (i) Any cost incurred to Bonneville due to oversight or negligence of the Factory Representative shall be the responsibility of the Contractor up to the time of energization and final acceptance. However, the Contractor shall not be responsible for defects in the installation of the equipment due to refusal or failure of Bonneville to follow reasonable instructions of the Factory Representative.
- (j) The Factory Representative shall furnish to the Bonneville Construction Foreman a written report of the complete installation, all modifications made, and any problems encountered during the installation, as well as any unusual conditions or special instructions.

(End of clause)

#### 35.2.165 Clause 14-26 Emergency Contingency Notice

As prescribed in 14.24.2, insert the clause Emergency Contingency Notice in all contracts/agreements when a contractor may be required to redirect resources due to an emergency.

#### **EMERGENCY CONTINGENCY NOTICE (FEB 2020)**

In the event of a locally declared emergency event, the Contracting Officer retains the authority to redirect the Contractor from services originally contracted to services in support of disaster relief that are within the Contractor's capabilities:

(End of clause)

#### 35.2.166 Clause 15-1 Clean Air and Water

As prescribed in 15.1.3, insert the following clause in solicitations and contracts:

#### **CLEAN AIR AND WATER (JUL 2013)**

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)

#### 35.2.167 Clause 15-2 Drug-Free Workplace

As prescribed in 15.2.3.1, insert the following clause in solicitations and contracts:

#### **DRUG-FREE WORKPLACE (FEB 2016)**



- (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—
    - (i) The dangers of drug abuse in the workplace;
    - (ii) The contractor's policy of maintaining a drug-free workplace;
    - (iii) Any available drug counseling, rehabilitation, and employee assistance programs; and
    - (iv) 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—
    - (i) Abide by the terms of the statement; and
    - (ii) 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)(ii) 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)(ii) 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:
  - (i) Taking appropriate personnel action against such employee, up to and including termination; and/or
  - (ii) 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)

### 35.2.168 Clause 15-3 Property Protection

As prescribed in 15.6.4.1, insert the following clause in solicitations and contracts for construction over \$50,000. The clause may be modified to remove the paragraphs which do not apply to the work performed, and insert additional requirement(s) if conditions warrant:

#### **PROPERTY PROTECTION (FEB 2020)**

- (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 Bonneville 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 Bonneville 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 (FEB 2020).* Unless an environmental plan is already included in the Statement of Work, Alternate I, the following paragraphs (h) and (i) 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 this clause.

- (h) The management and disposal of hazardous wastes and materials exposes the contractor and Bonneville to short- and long-term liabilities. 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 evaluation of the work required under the contract identifying tasks which involve the use, handling or transportation of hazardous materials or wastes.
  - (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 his or her 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. Bonneville's review of the contractor's plan shall in no way relieve the contractor of its liability for environmental law and regulatory compliance.

#### 35.2.169 Clause 15-4 Contractor Compliance with Bonneville Policies

As prescribed in 15.3.1.1, insert the following clause in solicitations and contracts:

#### **CONTRACTOR COMPLIANCE WITH BONNEVILLE POLICIES (FEB 2020)**

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

- (1) Bonneville Smoking Policy (Bonneville Policy 440-1),
- (2) Use of Alcoholic Beverages, Narcotics, or Illegal Drug Substances on Bonneville Property or When in Duty Station (BPAM 400/792C),
- (3) Firearms and Other Weapons (BPAM 1086),
- (4) Standards of conduct regarding transmission information (BPI 3.2),
- (5) Physical Security Program (BPA Policy 432-1),
- (6) Information Protection (Bonneville Policy 433-1),
- (7) Safeguards and Security Program (Bonneville Policy 430-1),
- (8) Managing Access and Access Revocation for NERC CIP Compliance (Bonneville Policy 430-2),
- (9) Cyber Security Program (Bonneville Policy 434-1),
- (10) Business Use of Bonneville Technology Services (BPAM Chapter 1110),
- (11) Prohibition on soliciting or receiving donations for a political campaign while on federal property (18 U.S.C. § 607),
- (12) Guidance on Violence and Threatening Behavior in the Workplace (DOE G 444-1-1),
- (13) Inspection of persons, personal property and vehicles (41 CFR § 102-74.370),
- (14) Preservation of property (41 CFR § 102-74.380),
- (15) Compliance with Signs and Directions (41 CFR § 102-74.385),
- (16) Disturbances (41 CFR § 102-74.390),
- (17) Gambling Prohibited (41 CFR § 102-74.395),
- (18) Soliciting, Vending and Debt Collection Prohibited (41 CFR § 102-74.410),
- (19) Posting and Distributing Materials (41 CFR § 102-74.415),
- (20) Photographs for News, Advertising or Commercial Purposes (41 CFR § 102-74.420),  
and
- (21) 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)

### 35.2.170 Clause 15-5 Protection of Existing Vegetation, Structures, and Improvements

As prescribed in 15.6.4.1, insert the following clause in solicitations and contracts for construction over \$50,000:

**PROTECTION OF EXISTING VEGETATION, STRUCTURES, AND IMPROVEMENTS  
(SEP 1998)**

- (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)

### 35.2.171 Clause 15-6 Hazardous Material Identification and Material Safety Data

As prescribed in 15.4.2, insert the following clause in solicitations and contracts:

#### **HAZARDOUS MATERIAL IDENTIFICATION AND MATERIAL SAFETY DATA (MAR 2018)**

- (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 Bonneville shall relieve the Contractor of any responsibility or liability for the safety of Bonneville, 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)

### 35.2.172 Clause 15-7 Ozone-Depleting Substances

As prescribed in 15.5.2.3, insert the following clause in solicitations and contracts:

#### **OZONE-DEPLETING SUBSTANCES (JUL 2013)**

- (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 the product cannot be acquired—
  - (1) Competitively within a time frame providing for compliance with the contract performance schedule;
  - (2) Meeting contract performance requirements; or
  - (3) 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)

### 35.2.173 Clause 15-8 Refrigeration Equipment

As prescribed in 15.5.2.3, insert the following clause in solicitations and contracts:

#### **REFRIGERATION EQUIPMENT (JUL 2013)**

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), and Section 609 (motor vehicle air conditioning), see <http://www.epa.gov/ozone/title6/index.html>.

(End of clause)

### 35.2.174 Clause 15-9 Energy Efficiency in Energy Consuming Products

As prescribed in 15.5.3.3, insert the following clause in solicitations and contracts:

#### **ENERGY EFFICIENCY IN ENERGY CONSUMING PRODUCTS (MAR 2018)**

- (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 Bonneville use or for performing services at a Bonneville 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://www.energy.gov/eere/femp/energy-efficient-products-and-energy-saving-technologies>

(End of clause)

### 35.2.175 Clause 15-10 Recovered Materials

As prescribed in 15.5.4.2, insert the following clause in solicitations and contracts:

#### **RECOVERED MATERIALS (FEB 2020)**

- (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—
- (b) Competitively within a timeframe providing for compliance with the contract performance schedule;
  - (1) Meeting contract performance requirements; or
  - (2) At a reasonable price.

- (c) Information about this requirement and a list of designated items s available at EPA's Comprehensive Procurement Guidelines web site, <https://www.epa.gov/smm/comprehensive-procurement-guideline-cpg-program>.

(End of clause)

### 35.2.176 Clause 15-11 Bio-Based Products

As prescribed in 15.5.4.2, insert the following clause in solicitations and contracts:

#### **BIO-BASED PRODUCTS (APR 2024)**

- (a) In the performance of this contract, the Contractor shall use bio-based products to the maximum extent possible that are United States Department of Agriculture (USDA)-designated items unless the product cannot be acquired—
- (1) Competitively within a time frame providing for compliance with the contract performance schedule; or
  - (2) Meeting contract performance requirements; or
  - (3) At a reasonable price.
- (b) Information about this requirement and these products is available at <https://biopreferred.gov>
- (c) In performance of this contract, the Contractor shall –
- (1) Report to <http://www.sam.gov>, with a copy of the report to the Contracting Officer, on the product types and dollar value of any USDA-designated biobased products purchased by the Contractor during the previous Government fiscal year, between October 1 and September 30; and
  - (2) Submit this report no later than:
    - (i) October 31 of each year during contract performance; and
    - (ii) At the end of contract performance.

(End of clause)

### 35.2.177 Clause 15-12 Contractor Safety and Health

As prescribed in 15.6.4.1, insert the following clause in solicitations and contracts:

#### **CONTRACTOR SAFETY AND HEALTH (APR 2024)**

- (a) The Contractor shall furnish a place of employment that is free from recognized hazards that cause or have the potential to cause death or serious physical harm to employees; and shall comply with occupational safety and health standards promulgated under the Occupational Safety and Health Act of 1970 (Public Law 91-598). Contractor employees shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to their own actions and conduct.
- (1) All construction contractors working on contracts in excess of \$150,000 shall comply with Department of Labor Contract Work Hours and Safety Standards (40 U.S.C. § 3701 et seq.).
  - (2) The Contractor shall comply with:
    - (i) National Fire Protection Association (NFPA) National Fire Codes for fire prevention and protection applicable to the work or facility being occupied or constructed;

- (ii) NFPA 70E, *Standard for Electrical Safety in the Workplace*;
- (iii) American Conference of Governmental Industrial Hygiene *Threshold Limit Values for Chemical Substances and Physical Agents* and Biological Exposure Indices; and,
- (iv) Any additional safety and health measures identified by the Contracting Officer.

This clause does not relieve the Contractor from complying with any additional specific or corporate safety and health requirements that it determines to be necessary to protect the safety and health of employees.

- (b) The Contractor bears sole responsibility for ensuring that all contractor's workers performing contract work possess the necessary knowledge and skills to perform the work correctly and safely. The Contractor shall make any training and certification records necessary to demonstrate compliance with this requirement available for review upon request by Bonneville.
- (c) The Contractor shall hold Bonneville and any other owners of the site of work 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 under this contract.
- (d) The Contractor shall notify the Contracting Officer (CO) and Contracting Officer's Representative (COR) of any death, injury, occupational disease or near hit arising from or incident to performance of work under this contract.
  - (1) The Contractor shall complete Bonneville Form 6410.15e Contractor's Report of Injury or Illness and submit the form to the CO and COR within five (5) calendar days of such an occurrence. The Contractor shall include photographs and witness statements with the report.
  - (2) In the case of a Near Hit Incident that does not involve injury or illness, the Contractor shall complete Bonneville Form 6410.18e Contractor's Report of Incident/Near Hit/Property Damage and submit the form to the CO and COR within five (5) calendar days of such an occurrence.
- (e) Notification of Imminent Danger and Workers Right to Decline Work
  - (1) All workers, including contractors and Bonneville employees, are responsible for identifying and notifying other workers in the affected area of imminent danger at the site of work. Imminent danger is any condition or practice that poses a danger that could reasonably be expected to cause death or severe physical hardship before the imminence of such danger could be eliminated through normal procedures.
  - (2) A contract worker has the right to ask, without reprisal, their onsite management, and other workers to review safe work procedures and consider other alternatives before proceeding with a work procedure. Reprisal means any action taken against an employee in response to, or in revenge for, the employee having raised, in good faith, reasonable concerns about a safety and health aspect of the work required by the contract.
  - (3) A contract worker has the right to decline to perform tasks, without reprisal, that will endanger the safety and health of themselves or of other workers.
  - (4) The Contractor shall establish procedures that allow workers to cease or decline work that may threaten the safety and health of the worker or other workers.
- (f) Bonneville encourages all contractor workers to raise safety and health concerns as a way to identify and control safety hazards. The Contractor shall develop and communicate a formal procedure for submittal, resolution, and communication of resolution and corrective action to the worker submitting the concern. The procedure shall (1) encourage workers to identify safety and health concerns directly to their supervisor and employer using the



employer's reporting process; and (2) inform workers that they may raise safety concerns to Bonneville or the State OSHA. Workers may notify the Safety Office at (360) 418-2397 if the employer's work process does not resolve the worker's safety and health concern. Bonneville may coordinate the response to a contractor worker's safety and health concerns with the State OSHA when necessary to facilitate resolution.

- (g) Bonneville employees may direct the contractor to stop a work activity due to safety and health concerns. The Bonneville employee shall notify the Contractor orally with written confirmation, and request immediate initiation of corrective action. After receipt of the notice the Contractor shall immediately take corrective action to eliminate or mitigate the safety and health concern. When a Bonneville employee stops a work activity due to a safety and health concern the Contractor shall immediately notify the CO, provide a description of the event, and identify the Bonneville employee that halted the work activity. The Contractor shall not resume the stopped work activity until authorization to resume work is issued by a Bonneville Safety Official. The Contractor shall not be entitled to any equitable adjustment of the contract price or extension of the performance schedule when Bonneville stops a work activity due to safety and health concerns that occurred under the Contractor's control.
- (h) The Contractor shall keep a record of total monthly labor hours worked at the site of work. The Contractor shall include a separate calculation of the monthly total labor hours for each subcontractor in the contractor's monthly data. Upon request by the CO, COR or Bonneville Safety Office, the Contractor shall provide the total labor hours for a completed month to Bonneville no later than the 15<sup>th</sup> calendar day of the following month. The requestor shall identify the required reporting format and procedures.
- (i) The Contractor shall include this clause, including paragraph (i) in subcontracts. The Contractor may make appropriate changes in the designation of the parties to reflect the prime contractor--subcontractor arrangement. The Contractor is responsible for enforcing subcontractor compliance with this clause.

(End of clause)

#### 35.2.178 Clause 15-13 Contractor Safety and Health Requirements

As prescribed in 15.6.4.1, insert the following clause in solicitations and contracts:

#### **CONTRACTOR SAFETY AND HEALTH REQUIREMENTS (APR 2024)**

- (a) The Contractor shall prepare a safety plan (SP) and submit the SP to the Contracting Officer (CO) or the CO's designee. The Contractor shall resolve any concerns with the SP discovered by Bonneville's review prior to any on-site work occurring. The Contractor is prohibited from performing on site work without written authorization from the CO.
- (b) The Contractor shall follow the work procedures provided in the *Contractor Safety and Health Requirements for Prime and Subcontractors*. The full text of the *Contractor Safety and Health Requirements for Prime and Subcontractors* is available at <https://www.bpa.gov/energy-and-services/customers-and-contractors/contractor-safety>.
- (c) Contractor shall comply with revisions to Contractor Safety and Health Requirements for Prime and Subcontractors within 30 calendar days of notification.
- (d) The Contractor shall include this clause in all subcontracts.

(End of clause)

#### 35.2.179 Clause 15-14 Contractor Policy to Ban Text Messaging While Driving

As described in 15.3.1.1, insert the following clause in all solicitations and contracts:

**CONTRACTOR POLICY TO BAN TEXT MESSAGING WHILE DRIVING (FEB 2016)**

(c) 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.

- (a) This clause implements Executive Order 13513, Federal Leadership on Reducing Text Messaging while driving, dated October 1, 2009.
- (b) 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.
- (c) Subcontracts. The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts that exceed \$10,000.

(End of clause)

### 35.2.180 Clause 15-15 Screening Requirements for Personnel Having Access to Bonneville Facilities

As prescribed in 15.7.2.1, insert the following clause in solicitations and contracts:

#### **SCREENING REQUIREMENTS FOR PERSONNEL HAVING ACCESS TO BONNEVILLE FACILITIES (FEB 2022)**

- (a) The following definitions shall apply to this contract:
  - (1) "Access" means the ability to enter Bonneville 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 unclassified 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) Bonneville personnel screening activities are based on the Homeland Security Presidential Directive 12 (HSPD-12), and DOE rules and guidance as implemented at Bonneville. 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 Bonneville with information to determine an individual's initial eligibility or continued

eligibility for access to Bonneville 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 Bonneville 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 Bonneville 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 Bonneville facilities and/or computer systems is an acceptable risk which will not lead to improper use, manipulation, alteration, or destruction of Bonneville 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, Bonneville 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 shall 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 COR 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 Bonneville's information resources must participate annually in a Bonneville-furnished information resources security training course.
- (i) The contractor is responsible for obtaining from its employees any Bonneville-issued identification and/or access cards immediately upon termination of an employee's

employment with the contractor, and for returning it to the COR, 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 Bonneville facilities and/ or computer systems.

(End of clause)

### 35.2.181 Clause 15-16 Access to Bonneville Facilities and Computer Systems

As prescribed in 15.8.3, insert the following clause in solicitations and contracts:

#### **ACCESS TO BONNEVILLE FACILITIES AND COMPUTER SYSTEMS (MAR 2018)**

- (a) Contract workers with unescorted physical access to a Bonneville facility and/ or computer system shall follow the applicable procedures and requirements:
- (1) Bonneville Policy 434-1: Cyber Security Program;
  - (2) Bonneville Policy 430-2: Managing Access and Access Revocation for NERC CIP Compliance;
  - (3) Bonneville Policy 433-1: Information Security;
  - (4) Bonneville Control Center document, Dittmer Control Center Access – Frequently Asked Questions;
  - (5) If unescorted access to energized facilities, Bonneville Substation Operations Rules of Conduct Handbook: Policies and Procedures, Permits, Energized Access, and Clearance Certifications; and
  - (6) Additional requirements and procedures may be included in the statement of work and the technical specifications.
- (b) Notifying Bonneville of Contractor Personnel Changes:
- (1) The Contractor shall notify Bonneville within four (4) hours when a worker with unescorted physical access to a Bonneville facility or computer system is re-assigned to non-Bonneville work, terminates their employment with the contractor, or is removed for cause.
  - (2) The Contractor shall send notification to Bonneville Security Services by email to [Revoke@bpa.gov](mailto:Revoke@bpa.gov) or call (503) 230-3779 to provide notification.
  - (3) The Contractor shall provide written notification to the Contracting Officer, and if assigned the Contracting Officer's Representative, confirming that notification required in the above subsection (2) occurred and surrender the physical badge and computer access assets within 24 hours.
- (c) The provisions of this clause shall be included in all subcontracts where workers have unescorted access to Bonneville facilities or computer system access.

(End of clause)

### 35.2.182 Clause 15-17 Information Assurance

As prescribed in 15.9.4, insert the following clause in solicitations and contracts:

#### **INFORMATION ASSURANCE (FEB 2022)**

- (a) In performance of this contract, the Contractor shall protect all information, 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 Bonneville's missions and programs resulting from a loss or unauthorized disclosure of confidentiality, availability, and integrity of information, data or systems.

- (b) At a minimum, the Contractor shall safeguard Bonneville's information, data, or systems commensurate with the minimum protection requirements set forth by the National Institute of Standards and Technology (NIST) in the Federal Information Processing Standard (FIPS) Publication 199. The contractor shall comply with the protection requirements commensurate with the categorization of "low", "medium" or "high", as identified in the Statement of Work or specifications document.
- (c) The Bonneville Chief Information Officer (CIO), or representative, 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, at its sole expense, shall address and correct any deficiencies and/or noncompliance with the terms of the contract as identified by Bonneville.
- (e) The Contractor shall include the requirements of this clause 15-17 in all subcontracts.

(End of clause)

### 35.2.183 Clause 15-18 Homeland Security

As prescribed in 15.10.3, insert the following clause in solicitations and contracts:

#### **HOMELAND SECURITY (OCT 2023)**

- (a) No portion of the contractor's services, equipment, hardware, software, maintenance, or support shall be performed in a country designated as a State Sponsor of Terrorism or by nationals of a country designated as a State Sponsor of Terrorism by the U.S. Department of State. Additionally, no portion of the contractor's services, equipment, hardware, software, maintenance, or support shall be subcontracted for performance in a country designated as a State Sponsor of Terrorism or by nationals of a country designated as a State Sponsor of Terrorism by the U.S. Department of State.
- (b) No portion of the Contractor's services, software, maintenance, or support shall be performed in a Sensitive Foreign Nation or by Sensitive Foreign Nation National. Additionally, no portion of the Contractors services, software, maintenance, or support shall be subcontracted for performance in a Sensitive Foreign Nation or by Sensitive Foreign Nation Nationals.
- (c) If any portion of the contractor's services, software, maintenance, or support is located in a foreign country, then the contractor shall disclose those foreign Countries to the CO in writing before contract performance. Bonneville will determine if the foreign country is a Sensitive Foreign Nation or a country designated as a State Sponsor of Terrorism by the U.S. Department of State.
- (d) If any portion of the contractor's services, software maintenance or support is located in a foreign country, Bonneville shall notify the contractor in writing whether or not it can allow an intangible export of Bonneville's data, critical energy infrastructure information or critical information and if a deemed export license, export end user agreement or other export documentation is required.
- (e) The contractor shall notify the CO, in advance, of any consultation with a Foreign National that would expose to such parties, Bonneville data, critical energy infrastructure information, critical information, or controlled unclassified information. The notice shall be in writing. Bonneville will approve or reject the consultation with the Foreign National.

- (f) Notification of security incident. The contractor shall immediately notify Bonneville's Office of the Chief Information Officer (OCIO) Chief Information Security Officer (CISO) of any security incident and cooperate with Bonneville in investigating and resolving the security incident. In the event of a security incident, the contractor shall notify the CISO by telephone and ask for a Cyber Security Officer.

(End of clause)

35.2.184 Clause 15-19 Reserved

35.2.185 Provision 15-20 Export Control

As prescribed in 15.11.3 (a), insert in all solicitations:

#### **EXPORT CONTROL (OCT 2023)**

The U.S. Department of Homeland Security designates Bonneville as part of the critical national infrastructure. Offeror shall not export or temporary export any Bonneville proprietary software, critical energy infrastructure information, critical information or controlled unclassified information, or other protected information, data, or technology, contained in this solicitation to a foreign corporation or foreign national without the CO's prior written approval.

(End of Provision)

35.2.186 Provision 15-21 Re-Export Control

As prescribed in 15.11.3 (b), insert in all solicitations:

#### **RE-EXPORT CONTROL (OCT 2023)**

The U.S. Department of Homeland Security designates Bonneville as part of the critical national infrastructure. Offeror shall not re-export any Bonneville proprietary software, critical energy infrastructure information, critical information or controlled unclassified or other protected information, data, or technology, included in this solicitation to another foreign corporation or foreign national for the purposes of preparing and submitting offers, without the CO's prior written approval.

(End of Provision)

35.2.187 Clause 15-22 Export Control

As prescribed in 15.11.4 (a), insert in all contracts:

**EXPORT CONTROL (OCT 2023)**

The U.S. Department of Homeland Security designates Bonneville as part of the critical national infrastructure. Contractor shall not export, or temporary export any Bonneville proprietary software, critical energy infrastructure information, critical information or controlled unclassified or other protected information, data, or technology to a foreign corporation or foreign national without the CO's prior written approval.

(End of clause)

**35.2.188 Clause 15-23 Re-Export Control**

As prescribed in 15.11.4 (b), insert in all contracts:

**RE-EXPORT CONTROL (OCT 2023)**

The U.S. Department of Homeland Security designates Bonneville as part of the critical national infrastructure. Contractor shall not re-export any BPA proprietary software, critical energy infrastructure information, critical information or controlled unclassified or other protected information, data, or technology to a foreign corporation or foreign national without the CO's prior written approval.

(End of clause)

**35.2.189 Clause 16-1 Performance and Payment Bonds**

As prescribed in 16.2.3.3, insert a clause substantially the same as the following:

**PERFORMANCE AND PAYMENT BONDS (APR 2024)**

- (a) Definition. "Original contract price," as used in this clause, means the award price of the contract, or, for indefinite-delivery contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award. Original contract price for Progressive Design-Build contracts shall mean the amount of the CGMP or GMP amount, as applicable.
- (b) Amount of required bonds. Unless the resulting contract price is \$150,000 or less, the successful offeror shall furnish performance and payment bonds to the Contracting Officer as follows:
  - (1) Performance bonds (Standard Form 25, except the seal is not required). The penal amount of performance bonds at the time of contract award shall be 100 percent of the original contract price.
  - (2) Payment bonds (Standard Form 25A, except the seal is not required). The penal amount of payment bonds at the time of contract award shall be 100 percent of the original contract price.

- (3) Additional bond protection.
- (i) The Government may require additional performance and payment bond protection if the contract price is increased. The increase in protection generally will equal 100 percent of the increase in contract price.
  - (ii) The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.
- (c) Furnishing executed bonds. The Contractor shall furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within 10 days, but in any event, before starting work.
- (d) Surety or other security for bonds. The bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or in accordance with Treasury Department regulations, certain bonds, or notes of the United States. Treasury Circular 570 is published in the *Federal Register* or may be obtained from the:

U.S. Department of Treasury  
 Financial Management Service  
 Surety Bond Branch  
 3700 East West Highway, Room 6F0`  
 Hyattsville, MD 20782

Or via the internet at <http://www.fms.treas.gov/c570/>

(End of clause)

### 35.2.190 Clause 16-2 Performance and Payment Bonds – Other Than Construction

As prescribed in 16.2.4.4, insert a clause substantially the same as the following:

#### **PERFORMANCE AND PAYMENT BONDS – OTHER THAN CONSTRUCTION (APR 2024)**

- (a) Definition. "Original contract price," as used in this clause, means the award price of the contract, or, for indefinite-delivery contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.
- (b) The Contractor shall furnish a performance bond (Standard Form 1418, except a seal is not required) for the protection of the Government in an amount equal to 100 percent of the original contract price and a payment bond (Standard Form 1416, except a seal is not required) in an amount equal to 100 percent of the original contract price.
- (c) The Contractor shall furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within 10 days, but in any event, before starting work.
- (d) The Government may require additional performance and payment bond protection if the contract price is increased. The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bonds or to obtain additional bonds.
- (e) The bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or in accordance with Treasury Department regulations, certain



bonds, or notes of the United States. Treasury Circular 570 is published in the *Federal Register* or may be obtained from the:

U.S. Department of Treasury  
 Financial Management Service  
 Surety Bond Branch  
 3700 East West Highway, Room 6F0  
 Hyattsville, MD 20782

Or via the internet at <https://fiscal.treasury.gov/surety-bonds/>

(End of clause)

*Alternate I (Apr 2024)*. As prescribed in 16.2.4.4 substitute the following paragraphs (b) and (d) for paragraphs (b) and (d) of the basic clause:

- (b) The Contractor shall furnish a performance bond (Standard Form 1418, except a seal is not required) for the protection of the Government in an amount equal to 100 percent of the original contract price.
- (d) The Government may require additional performance bond protection if the contract price is increased. The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

#### 35.2.191 Clause 16-3 Additional Bond Security

As prescribed in 16.2.7.4, insert the following clause:

#### **ADDITIONAL BOND SECURITY (MAR 2018)**

The Contractor shall promptly furnish additional security required to protect the Government and persons supplying labor or materials under this contract if –

- (a) Any surety upon any bond, or issuing financial institution for other security, furnished with this contract becomes unacceptable to the Government;
- (b) Any surety fails to furnish reports on its financial conditions as required by the Government;
- (c) The contract price is increased so that the penal amount of any bond becomes inadequate in the opinion of the Contracting Officer; or
- (d) An irrevocable letter of credit (ILC) used as security will expire before the end of the period of required security. If the Contractor does not furnish an acceptable extension or replacement ILC, or other acceptable substitute, at least 30 days before an ILC's scheduled expiration, the Contracting Officer has the right to immediately draw on the ILC.

(End of clause)

#### 35.2.192 Clause 16-4 Prospective Subcontractor Requests for Bonds

As prescribed in 16.2.7.4, insert the following clause:

#### **PROSPECTIVE SUBCONTRACTOR REQUESTS FOR BONDS (MAR 2018)**

In accordance with section 806(a)(3) of Pub L. 102-190, as amended by sections 2091 and 8105 of Pub L. 103-355 (10 U.S.C. § 2302 note), upon the request of a prospective subcontractor or supplier offering to furnish labor or material for the performance of this contract for which a payment bond has been furnished to the Government pursuant to 40 U.S.C. chapter

31, subchapter III, Bonds, the Contractor shall promptly provide a copy of such payment bond to the requester.

(End of clause)

#### 35.2.193 Clause 16-5 Pledge of Assets

As prescribed in 16.3.5.1, insert the following clause:

##### **PLEDGE OF ASSETS (MAR 2018)**

- (a) Offerors shall obtain from each person acting as an individual surety on a performance bond or a payment bond –
  - (1) Pledge of assets; and
  - (2) Standard Form 28, Affidavit of Individual Surety.
- (b) Pledges of assets from each person acting as an individual surety shall be in the form of evidence of an escrow account containing cash, certificates of deposit, commercial or Government securities, or other assets described in BPI 16.3.4.2 (except see 16.3.4.2(b)(2) with respect to Government securities held in book entry form).

(End of clause)

#### 35.2.194 Clause 16-6 Irrevocable Letter of Credit

As prescribed in 16.3.6.4, insert the following clause:

##### **IRREVOCABLE LETTER OF CREDIT (MAR 2018)**

- (a) “Irrevocable letter of credit” (ILC), as used in this clause, means a written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon presentation by the Government (the beneficiary) of a written demand therefor. Neither the financial institution nor the offeror/Contractor can revoke or condition the letter of credit.
- (b) If the offeror intends to use an ILC in lieu of a bid bond, or to secure other types of bonds such as performance and payment bonds, the letter of credit and letter of confirmation formats in paragraphs (e) and (f) of this clause shall be used.
- (c) The letter of credit shall be irrevocable, shall require presentation of no document other than a written demand and the ILC (including confirming letter, if any), shall be issued/confirmed by an acceptable federally insured financial institution as provided in paragraph (d) of this clause, and if used as an alternative to corporate or individual sureties as security for a performance or payment bond,
  - (1) The offeror/Contractor may submit an ILC with an initial expiration date estimated to cover the entire period for which financial security is required or may submit an ILC with an initial expiration date that is a minimum period of one year from the date of issuance; and the ILC shall provide that, unless the issuer provides the beneficiary written notice of non-renewal at least 60 days in advance of the current expiration date, the ILC is automatically extended without amendment for one year from the expiration date, or any future expiration date, until the period of required coverage is completed and the Contracting Officer provides the financial institution with a written statement waiving the right to payment.
  - (2) The period of required coverage shall be:
    - (i) For contracts subject to 40 U.S.C. chapter 31, subchapter III, Bonds, the later of-
      - (A) One year following the expected date of final payment;

- (B) For performance bonds only, until completion of any warranty period; or
- (C) For payment bonds only, until resolution of all claims filed against the payment bond during the one-year period following final payment.
- (ii) For contracts not subject to 40 U.S.C. chapter 31, subchapter III, Bonds, the later of –
  - (A) 90 days following final payment; or
  - (B) For performance bonds only, until completion of any warranty period.
- (d) (1) Only federally insured financial institutions rated investment grade by a commercial rating service shall issue or confirm the ILC.
  - (2) Unless the financial institution issuing the ILC had letter of credit business of at least \$25 million in the past year, ILCs over \$5 million must be confirmed by another acceptable financial institution that had letter of credit business of at least \$25 million in the past year.
  - (3) The Offeror/Contractor shall provide the Contracting Officer a credit rating that indicates the financial institutions have the required credit rating as of the date of issuance of the ILC.
  - (4) The current rating for a financial institution is available through any of the following rating services registered with the U.S. Securities and Exchange Commission (SEC) as a Nationally Recognized Statistical Rating Organization (NRSRO). NRSRO's can be located at the website <http://www.sec.gov/answers/nrsro.htm> maintained by the SEC.
- (e) The following format shall be used by the issuing financial institution to create an ILC:

<p>_____</p> <p><i>[Issuing Financial Institution's Letterhead or Name and Address]</i></p>	
	Issue Date _____
Irrevocable Letter of Credit No. _____	
Account party's name _____	
Account party's address _____	
For Solicitation No. _____ <i>(for reference only)</i>	
To: Bonneville Power Administration <i>[Contracting Office address]</i>	
(l) We hereby establish this irrevocable and transferable Letter of Credit in your favor for one or more drawings up to United States \$_____. This Letter of Credit is payable at <i>[issuing financial institution's and, if any, confirming financial institution's] office at [issuing financial institution's address and, if any, confirming financial institution's address]</i> and expires with our close of business on _____, or any automatically extended expiration date.	
(m) We hereby undertake to honor your or the transferee's sight draft(s) drawn on the issuing or, if any, the confirming financial institution, for all or any part of this credit if presented with this Letter of Credit and confirmation, if any, at the office specified in paragraph 1 of this Letter of Credit on or before the expiration date or any automatically extended expiration date.	
(n) This Letter of Credit is transferable. Transfers and assignments of proceeds are to be effected without charge to either the beneficiary or the transferee/assignee of proceeds. Such transfer or assignment shall be only at the written direction of the	

Government (the beneficiary) in a form satisfactory to the issuing financial institution and the confirming financial institution, if any.

(o) This Letter of Credit is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, International Chamber of Commerce Publication No. \_\_\_\_\_ (Insert version in effect at the time of ILC issuance, e.g., "Publication 600, 2006 edition") and to the extent not inconsistent therewith, to the laws of \_\_\_\_\_ [State of confirming financial institution, if any, otherwise State of issuing financial institution].

(p) If this credit expires during an interruption of business of this financial institution as described in Article 17 of the UCP, the financial institution specifically agrees to effect payment if this credit is drawn against within 30 days after the resumption of our business.

Sincerely,

\_\_\_\_\_

[Issuing financial institution]

(f) The following format shall be used by the financial institution to confirm an ILC:

\_\_\_\_\_  
 [Confirming Financial Institution's Letterhead or Name and Address]

(Date) \_\_\_\_\_

Our Letter of Credit Advice No. \_\_\_\_\_

Beneficiary: Bonneville Power Administration

Issuing Financial Institution: \_\_\_\_\_

Issuing Financial Institution's LC No. \_\_\_\_\_

To \_\_\_\_\_:

(d) We hereby confirm the above indicated Letter of Credit, the original of which is attached, issued by \_\_\_\_\_ [name of issuing financial institution] for drawings of up to United States dollars \_\_\_\_\_ / US. \$ \_\_\_\_\_ and expiring with our close of business on \_\_\_\_\_ [the expiration date], or any automatically extended expiration date.

(e) Draft(s) drawn under the Letter of Credit and this Confirmation are payable at our office located at \_\_\_\_\_.

(f) We hereby undertake to honor sight draft(s) drawn under and presented with the Letter of Credit and this Confirmation at our offices as specified herein.

(g) This confirmation is subject to the Uniform Customs and Practice (UCP) for Documentary Credits, International Chamber of Commerce Publication No. \_\_\_\_\_ (Insert version in effect at the time of ILC issuance, e.g., "Publication 600, 2006 edition") and to the extent not inconsistent therewith, to the laws of \_\_\_\_\_ [State of confirming financial institution, if any, otherwise State of issuing financial institution].

(h) If this confirmation expires during an interruption of business of this financial institution as described in Article 17 of the UCP, the financial institution specifically agrees to effect payment if this credit is drawn against within 30 days after the resumption of our business.

Sincerely,

\_\_\_\_\_  
 [Confirming financial institution]

(g) The following format shall be used by the Contracting Officer for a sight draft to draw on the Letter of Credit:

SIGHT DRAFT	
	_____ [City, State]
(Date) _____	
[Name and address of financial institution]	
Pay to the order of Bonneville Power Administration the sum of United States \$ _____ . This draft is drawn under Irrevocable Letter of Credit No. _____ .	
	_____ [Contracting Officer] Bonneville Power Administration

(End of clause)

35.2.195 Clause 16-7 Work on a Government Installation

As prescribed in 16.4.8.1, insert the following clause:

**WORK ON A GOVERNMENT INSTALLATION (FEB 2022)**

- (a) The Contractor shall, at its own expense, provide and maintain during the entire performance of this contract, at least the kinds and minimum amounts of insurance required in the Schedule or elsewhere in this contract.
- (b) Before commencing work under this contract, the Contractor shall notify the Contracting Officer in writing that the required insurance has been obtained. A copy of the insurance policy is required prior to any on-site work. The policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting the Government's interest shall not be effective –
  - (1) For such period as the laws of the State in which this contract is performed prescribe; or

- (2) Until 30 days after the insurer or the Contractor gives written notice to the Contracting Officer, whichever period is longer.
- (c) Each insurance policy required under this contract, other than workers' compensation and professional liability insurance, shall contain an endorsement naming the United States as an additional insured with respect to operations performed under this contract. The insurance carrier is required to waive all subrogation rights against any of the named insured.
- (d) The Contractor shall insert the substance of this clause, including this paragraph (c), in subcontracts under this contract that require work on a Government installation and shall require subcontractors to provide and maintain the insurance required in the Schedule or elsewhere in the contract. The Contractor shall maintain a copy of all subcontractors' proofs of required insurance, and shall make copies available to the Contracting Officer upon request.

(End of clause)

#### 35.2.196 Clause 16-8 Minimum Insurance Coverage

As prescribed in 16.4.8.2, insert the following clause in solicitations and contracts:

#### **MINIMUM INSURANCE COVERAGE (FEB 2022)**

The Contractor shall obtain and maintain insurance coverage as follows for the performance of this contract. The Contracting Officer shall check all that apply and insert amounts as they pertain to each individual contract.

- (a) Workers' compensation and employer's liability. Worker's compensation and employer's liability insurance as required by applicable Federal and State workers' compensation and occupational disease statutes. If occupational diseases are not compensable under those statutes, they shall be covered under the employer's liability section of the insurance policy, except when contract operations are so commingled with the Contractor's commercial operations that it would not be practical to require this coverage. The employer's liability coverage shall be at least \$1,000,000, except in States with exclusive or monopolistic funds that do not permit workers' compensation to be written by private carriers.
- (b) Commercial general liability. Comprehensive general (bodily injury) liability insurance of at least \$1,000,000 per occurrence.
- (c) *Property damage liability*. Additional property damage liability insurance shall be required when the contractor is engaged in the handling and/or transportation and/or disposal of hazardous wastes.
- (d) \_\_\_ Automobile liability. Motor vehicle liability insurance written on the comprehensive form of policy which provides for bodily injury and property damage liability covering the operation of all motor vehicles used in connection with performing the contract. Policies covering motor vehicles operated in the United States shall provide coverage of at least \$\_\_\_\_\_ per occurrence. The amount of liability coverage on other policies shall be commensurate with any legal requirements of the locality and sufficient to meet normal and customary claims.
- (e) \_\_\_ Watercraft liability. When watercraft is used in connection with performing the work, watercraft liability insurance of at least \$\_\_\_\_\_ per occurrence coverage is required.
- (f) \_\_\_ Pollution liability. The Contractor shall provide environmental impairment liability insurance of at least \$\_\_\_\_\_ 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 Bonneville.

- (g) \_\_\_ Professional liability. The Contractor shall provide professional liability insurance. Coverage shall be at least \$ \_\_\_\_\_ per occurrence for claims arising out of negligent acts, errors, or omissions.
- (h) \_\_\_ Medical malpractice liability. The Contractor shall maintain medical malpractice liability insurance of at least \$ \_\_\_\_\_ per occurrence.
- (i) The Contractor's policy shall be primary and shall not seek any contribution from any insurance or self-insurance programs of Bonneville. The Contractor's insurance certificate shall contain a waiver of subrogation in favor of Bonneville. Where allowable, Contractor's insurance will name Bonneville and its agents, officers, directors, and employees as additional insured's.

(End of clause)

35.2.197 Clause 16-9 Insurance – Liability to Third Persons

As prescribed in 16.4.8.3, insert the following clause:

**INSURANCE – LIABILITY TO THIRD PERSONS (MAR 2018)**

- (a) (1) Except as provided in paragraph (a)(2) of this clause, the Contractor shall provide and maintain workers' compensation, employer's liability, comprehensive general liability (bodily injury), comprehensive automobile liability (bodily injury and property damage) insurance, and such other insurance as the Contracting Officer may require under this contract.
  - (2) 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.
  - (3) All insurance required by this paragraph shall be in a form and amount for those periods as the Contracting Officer may require or approve and with insurers approved by the Contracting Officer.
- (b) The Contractor agrees to submit for the Contracting Officer's approval, to the extent and in the manner required by the Contracting Officer, any other insurance that is maintained by the Contractor in connection with the performance of this contract and for which the Contractor seeks reimbursement.
- (c) The Contractor shall be reimbursed –
  - (1) For that portion –
    - (i) Of the reasonable costs of insurance allocable to this contract; and
    - (ii) 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 limitation of cost or the limitation of funds 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 judgements or settlements approved in writing by the Government. These liabilities are for –
    - (i) Loss of or damage to property (other than property owned, occupied, or used by the Contractor, rented to the Contractor, or the care, custody, or control of the Contractor); or
    - (ii) Death or bodily injury.
- (d) 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 Schedule or elsewhere in this 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 directors, officers, managers, superintendents, or other representatives who have supervision or direction of –
    - (i) All or substantially all of the Contractor's business;
    - (ii) All or substantially all of the Contractor's operations at any one plant or separate location in which this contract is being performed; or
    - (iii) A separate and complete major industrial operation in connection with the performance of this contract.
- (e) The provisions of paragraph (e) of this clause shall not restrict the right of the Contractor to be reimbursed for the cost of insurance maintained by the Contractor in connection with the performance of this contract, other than insurance required in accordance with this clause; provided, that such cost is allowable under the Allowable Cost and Payment clause of this contract.
- (f) 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 Government representatives to collaborate with counsel for the insurance carrier in settling or defending the claim when the amount of the liability claimed exceed the amount of coverage; and
  - (3) Authorize Government representatives to settle or defend the claim and to represent the Contractor in or to take charge of any litigation, if required by the Government, when the liability is not insured or covered by bond. The Contractor may, at its own expense, be associated with the Government representatives in any such claim or litigation.

(End of clause)

### 35.2.198 Clause 16-10 Aircraft Liability Insurance

As prescribed in 16.4.8.4, insert the following clause:

#### **AIRCRAFT LIABILITY INSURANCE (MAR 2018)**

- (a) The Contractor, at the Contractor's expense, agrees to maintain, during the continuance of this contract, aircraft liability and general public liability insurance with limits of liability. Limits shall be at least \$10,000,000 per occurrence, other than for voluntary settlement. The insurance policy shall include coverage for owned, non-owned and hired aircraft and name Bonneville Power Administration, its officials, officers, employers, employees, and agents as additional insureds.
- (b) The Contractor's policy shall be primary and shall not seek any contribution from any insurance or self-insurance programs of Bonneville Power Administration. The Contractor's insurance certificate shall contain a waiver of subrogation in favor of Bonneville Power Administration.
- (c) The Contractor also agrees to maintain worker's compensation and other legally regally required insurance with respect to the Contractor's own employees and agents.

(End of clause)



## 35.2.199 Clause 16-11 Insurance of Leased Motor Vehicles

As prescribed in 16.4.8.5, insert the following clause:

**LIABILITY AND INSURANCE – LEASED MOTOR VEHICLES (MAR 2018)**

- (a) The Government shall be responsible for loss or of damages to –
- (1) Leased vehicles, except for –
    - (i) Normal wear and tear; and
    - (ii) Loss or damage caused by the negligence of the Contractor, its agents, or employees; and
  - (2) Property of third persons, or the injury or death of third persons, if the Government is liable for such loss, damage, injury, or death under the Federal Tort Claims Act (29 U.S.C. § 2671-2680).
- (b) The Contractor shall be liable for, and shall indemnify and hold harmless the Government against, all actions or claims for loss of or damage to property or the injury or death of persons, resulting from the fault, negligence, or wrongful act or omission of the Contractor, its agents, or employees.
- (c) The Contractor shall provide and maintain insurance covering its liabilities under paragraph (b) of this clause, in amounts of at least \$200,000 per person and \$500,000 per occurrence for death or bodily injury and \$20,000 per occurrence for property damage or loss.
- (d) Before commencing work under this contact, the Contractor shall notify the Contracting Officer in writing that the required insurance has been obtained. The policies evidencing required insurance shall contain an endorsement to the effect that any cancellation or any material change adversely affecting the interests of the Government shall not be effective (1) for such period as the laws of the State in which the contract is to be performed prescribe or (2) until 30 days after written notice to the Contracting Officer, whichever period is longer. The policies shall exclude any claim by the insurer for subrogation against the Government by reason of any payment under the policies.
- (e) The contract price shall not include any costs for insurance or contingency to cover losses, damage, injury, or death for the Government is responsible under paragraph (a) of this clause.

(End of clause)

## 35.2.200 Clause 16-12 Self-Insurance

As prescribed in 16.4.8.6, insert the following clause:

**SELF-INSURANCE (MAR 2018)**

- (a) Subject to the Contracting Officer's review and approval, which will not be unreasonably withheld, the Contractor may self-insure the commercial general liability requirements set forth in the clause 16-8, Minimum Insurance Coverage. Bonneville reserves the right, at Bonneville's discretion, to periodically review the Contractor's financial means to meet the Contractor's insurance requirements included herein by self-insurance. If Bonneville reasonably determines that the Contractor cannot meet the insurance obligations included herein by self-insurance, Bonneville may require the Contractor to obtain and maintain insurance coverages for requirements as provided in the clause 16-8 with insurance companies rated not less than A-VII by A.M. Best or otherwise reasonably satisfactory to Bonneville. The self-insurance shall protect the indemnified parties in the same manner and to the same extent as they would have been protected had the policy or policies not been self-insured, contained a self-insured retention or deductible. Notwithstanding the foregoing,

either Party may self-insure in whole or in part the insurance requirements described above provided such Party continues to be investment grade determined by reputable and accepted financial rating agencies.

- (b) If the Contractor maintains a plan(s) of self-insurance to insure any part of the risks otherwise covered by the insurance required herein, the Contractor shall be liable to and hold Bonneville harmless from any claims, demands, losses, costs and expenses, to the same extent that the required insurance would have protected Bonneville; and in any claim or suit it will be presumed that such insurance, if it had been procured and maintained, would have covered the occurrence, loss or damage in question, including extending Additional Insured status to Bonneville through appropriate endorsements.

(End of clause)

#### 35.2.201 Clause 17-1.1 Authorization and Consent – Research, Development and Demonstration Contracts

As prescribed in 17.8.4.2.1.2 and 17.8.4.2.2.3, insert the following clause in solicitations and contracts:

#### **AUTHORIZATION AND CONSENT – RESEARCH, DEVELOPMENT AND DEMONSTRATION CONTRACTS (MAR 2018)**

- (a) Bonneville 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)

#### 35.2.202 Clause 17-1.2 Authorization and Consent – Noncommercial Items or Services

As prescribed in 17.8.4.2.1.2 and 17.8.4.2.2.3, insert the following clause in solicitations and contracts:

#### **AUTHORIZATION AND CONSENT – NONCOMMERCIAL ITEMS OR SERVICES (MAR 2018)**

- (a) Bonneville 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 Bonneville under this contract; or
  - (2) Used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with:
    - (i) specifications or written provisions forming a part of this contract or
    - (ii) specific written instructions given by the CO directing the manner of performance.

The entire liability to Bonneville 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 Bonneville 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)

### 35.2.203 Clause 17-2.1 Patent Rights – Ownership by the Contractor

As prescribed in 17.6.1.2, insert the following clause in solicitations and contracts:

#### **PATENT RIGHTS – OWNERSHIP BY THE CONTRACTOR (OCT 2011)**

- (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—
- (i) 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.
  - (ii) 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.
  - (iii) 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—
- (i) Establish or confirm the rights the Government has throughout the world in those subject inventions in which the Contractor elects to retain ownership; and
  - (ii) 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)

#### 35.2.204 Clause 17-2.2 Patent Rights – Ownership by Bonneville

As prescribed in 17.6.1.2, insert the following clause in solicitations and contracts:

#### **PATENT RIGHTS – OWNERSHIP BY BONNEVILLE (MAR 2018)**

- (a) Ownership.
  - (1) Assignment to Bonneville. The Contractor shall assign to Bonneville 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.
    - (i) 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.
    - (ii) 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.
    - (iii) 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 Bonneville.
  - (1) Regarding each subject invention to which the Contractor retains ownership, the Contractor agrees as follows:
    - (i) Bonneville 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.
    - (ii) 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.
- (iii) 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.
  - (iv) When licensing a subject invention, the Contractor shall—
    - (A) 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;
    - (B) Refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government;
    - (C) Provide for this refund in any instrument transferring rights in the subject invention to any party.
  - (v) 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:
- (i) 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.
  - (ii) 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) 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—
- (i) Any inventions are subject inventions;
  - (ii) The Contractor has established and maintains the procedures required by paragraphs (d)(1) and (d)(4) of this clause; and
  - (iii) 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—
- (i) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to paragraph (d)(1) of this clause;
  - (ii) Disclose any subject invention pursuant to paragraph (d)(2) of this clause;
  - (iii) Deliver acceptable interim reports pursuant to paragraph (d)(3)(A) of this clause; or
  - (iv) Provide the information regarding subcontracts pursuant to paragraph (d)(3)(ii) 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)

### 35.2.205 Clause 17-3 Rights in Data – Noncommercial Software

As prescribed in 17.7.4.3.1, insert the following clause in solicitations and contracts:

#### **RIGHTS IN DATA – NONCOMMERCIAL SOFTWARE (MAR 2018)**

- (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. Bonneville 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 Bonneville 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 Bonneville.
- (c) Unless terminated by Contractor as provided herein, the term of this license shall expire at such time as Bonneville discontinues use of the applicable Software. Contractor agrees to support the Software for whatever time Bonneville pays the annual support fee. Contractor agrees to place the Software source code into escrow for the benefit of Bonneville, as defined in the source code escrow clause herein.
- (d) Contractor shall defend, at its expense, and hold Bonneville harmless from any claim or suit brought against Bonneville 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 Bonneville the right to continue using the Software, replace or modify the Software to be noninfringing, or if such remedies are not reasonably available, grant Bonneville a refund for the Software and accept its return.

(End of clause)

#### 35.2.206 Clause 17-4 Rights in Data – Use of Existing Work

As prescribed in 17.7.4.3.1, insert the following clause in solicitations and contracts:

##### **RIGHTS IN DATA – USE OF EXISTING WORK (MAR 2018)**

- (a) Except as otherwise provided in this contract, the Contractor grants to Bonneville, 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 Bonneville, for all the material or subject matter called for under this contract.
- (b) Contractor shall defend, at its expense, and hold Bonneville harmless from any claim or suit brought against Bonneville 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 Bonneville 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 Bonneville a refund for the work Product and accept its return.

(End of clause)

#### 35.2.207 Clause 17-5.1 Rights in Data – Creation of New Work

As prescribed in 17.7.4.3.1, insert the following clause in solicitations and contracts:

**RIGHTS IN DATA – CREATION OF NEW WORK (MAR 2018)**

- (a) Except as otherwise provided herein, the Contractor grants to Bonneville 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 Bonneville, 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 Bonneville harmless from any claim or suit brought against Bonneville 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 Bonneville 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 Bonneville 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 Bonneville and incorporated in the Work Product to which this clause applies.

(End of clause)

35.2.208 Clause 17-5.2 Rights in Data – Creation of New Work, Restricted

As prescribed in 17.7.4.3.1, insert the following clause in solicitations and contracts:

**RIGHTS IN DATA – CREATION OF NEW WORK, RESTRICTED (MAR 2018)**

- (a) Except as otherwise provided herein, the Contractor grants to Bonneville 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 Bonneville, 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 Bonneville in the statement of work or requirements document. Contractor shall protect the Work Product from disclosure to third parties without Bonneville'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 Bonneville's disclosure without further restrictions.
- (c) Contractor shall defend, at its expense, and hold Bonneville harmless from any claim or suit brought against Bonneville 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 Bonneville 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 Bonneville 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 Bonneville and incorporated in the Work Product to which this clause applies.

(End of clause)

### 35.2.209 Clause 17-6 Commercial Software – No Contractor License

As prescribed in 17.4.1.2, insert a clause in solicitations and contracts similar to the following:

#### **COMMERCIAL SOFTWARE – NO CONTRACTOR LICENSE (MAR 2018)**

- (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 Bonneville, 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—
    - (i) Used or copied for use in or with the computer or computers (or its replacements) for which it was acquired, including use at any Bonneville installation to which such computer or computers may be transferred;
    - (ii) Used or copied for use in or with a backup computer if any computer for which it was acquired is inoperative;
    - (iii) Reproduced for safekeeping (archives) or backup purposes;
    - (iv) 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; and
    - (v) Disclosed to and reproduced for use by Bonneville support service contractors or their subcontractors, subject to the same restrictions set forth in this purchase order/contract.
  - (3) If the proprietary computer software delivered under this purchase order/contract is published and copyrighted, it is licensed to Bonneville, 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, Bonneville 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 Bonneville regarding its use, reproduction and disclosure are as set forth in Bonneville 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 Bonneville 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)

## 35.2.210 Clause 17-7.1 Infringement Indemnification – Noncommercial Software

As prescribed in 17.7.3.3.1 and 17.8.4.2.2.3, insert the following clause in solicitations and contracts:

**INFRINGEMENT IDEMNIFICATION –NONCOMMERCIAL SOFTWARE (MAR 2018)**

- (a) Contractor shall defend and hold Bonneville 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 Bonneville 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:

- (4) not supplied by the Contractor;
  - (5) used in a manner not expressly authorized by this Contract;
  - (6) made in whole or in part in accordance with Bonneville's specifications;
  - (7) modified by Bonneville, if the alleged infringement relates to such modification;
  - (8) combined with other products (hardware or software), processes or materials where the alleged infringement would not exist but for such combination; or
  - (9) where Bonneville 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 Bonneville 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 Bonneville for the infringing Software.

This clause states Contractor's sole liability and Bonneville's exclusive remedy for infringement claims.

(End of clause)

## 35.2.211 Clause 17-7.2 Infringement Indemnification – Patents

As prescribed in 17.8.4.2.2.3, insert the following clause in solicitations and contracts:

**INFRINGEMENT INDEMNIFICATION – PATENTS (MAR 2018)**

- (a) The Contractor shall indemnify Bonneville 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 Bonneville of such supplies or construction work.
- (b) This indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by Bonneville 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)

### 35.2.212 Clause 17-8 Source Code Escrow – Third Party Agent

As prescribed in 17.8.5.3.3, insert the following clause in solicitations and contracts:

#### **SOURCE CODE ESCROW – THIRD PARTY AGENT (APR 2024)**

- (a) The Contractor shall provide reasonable access to its software source code and all relevant software documentation to Bonneville in accordance with the third party escrow agreement as attached to this contract. The intent of this requirement is to provide security to Bonneville 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 Bonneville immediately upon the occurrence of any of the triggering events as identified in section (e) below. If Contractor is unable to provide Bonneville 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 Bonneville a license to use the applicable Source Code(s) for the product(s) as may be reasonably required for the purpose of Bonneville’s continued use and maintenance of the product(s). Bonneville 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 Bonneville. The Contractor shall provide to Bonneville a tripartite escrow agreement to be signed by all parties naming Bonneville 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 Bonneville, or within thirty (30) calendar days from the delivery of changed, updated, or upgraded software to Bonneville, 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 Bonneville 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. Bonneville 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 Bonneville:
- (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 Bonneville issued by either a trustee in bankruptcy appointed for Contractor, or a court having lawful jurisdiction.
- (f) After a Triggering Event, Bonneville shall have provided to the escrow agent:
- (1) Evidence satisfactory to the escrow agent in writing that Bonneville 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 Bonneville;
  - (3) A written commitment that Bonneville will use the source code only as permitted under the terms of the escrow agreement; and
  - (4) Specific delivery instructions.
- (g) The CO shall coordinate with System Owner/CIO and Legal Office to review the Source Code Escrow Agreement.
- (h) After the required review is completed and identified risks have been addressed, the CO may sign the Source Code Escrow Agreement.

(End of clause)

### 35.2.213 Clause 17-9 Source Code Escrow – Bonneville as Agent

As prescribed in 17.8.5.4.3, insert the following clause in solicitations and contracts:

#### **SOURCE CODE ESCROW – BONNEVILLE AS AGENT (MAR 2018)**

- (a) The Contractor shall provide reasonable access to its software source code and all relevant software documentation to Bonneville. The intent of this requirement is to provide security to Bonneville 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 Bonneville immediately upon the occurrence of any of the triggering events as identified in section (d) below. If Contractor is unable to provide Bonneville 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

Bonneville a license to use the applicable source code(s) for the product(s) as may be reasonably required for the purpose of Bonneville's continued use and maintenance of the product(s). Bonneville 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 Bonneville 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 Bonneville 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 Bonneville, 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 Bonneville. Bonneville 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) Bonneville 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)

#### 35.2.214 Clause 17-10 Contractor Software – Contractor License

As prescribed in 17.4.1.2, insert a clause in solicitations and contracts substantially the same as follows:

##### **CONTRACTOR SOFTWARE – CONTRACTOR LICENSE (MAR 2018)**

Contractor grants a license to Bonneville to utilize its commercial software in compliance with the attached software license agreement. Bonneville shall comply with the terms of the software license agreement, or modified software agreement as appropriate.

(End of clause)

#### 35.2.215 Clause 17-11 [Reserved]

#### 35.2.216 Clause 17-12 Modifications to Commercial Software

As prescribed in 17.4.10.2, insert a clause in solicitations and contracts substantially the same as follows:

##### **MODIFICATIONS TO COMMERCIAL SOFTWARE (MAR 2018)**

Contractor shall retain the rights to modifications to its commercial software made at Bonneville's expense; however, Contractor grants to Bonneville a fully paid-up, nonexclusive,

irrevocable, world-wide license to use such modifications, provided Bonneville is licensed for use of the commercial software.

(End of clause)

#### 35.2.217 Clause 17-13 Patent and Copyright Infringement Notice

As prescribed in 17.8.4.2.1.2, insert the following clause in solicitations and contracts:

##### **PATENT AND COPYRIGHT INFRINGEMENT NOTICE (MAR 2018)**

- (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 Bonneville 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 Bonneville, 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 Bonneville except where the Contractor has agreed to indemnify Bonneville.
- (c) The terms of this clause shall apply to subcontracts at any tier whether or not incorporated into such subcontracts.

(End of clause)

#### 35.2.218 Clause 17-14 Noncommercial Software Warranty

As prescribed in 17.7.3.4.2, insert the following clause in solicitations and contracts:

##### **NONCOMMERCIAL SOFTWARE WARRANTY (MAR 2018)**

- (a) Contractor warrants that its product shall perform substantially in accordance with applicable technical documentation as published and provided to Bonneville. Contractor warrants that its products, as delivered to Bonneville, 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 Bonneville 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 Bonneville, if any, will be free of defects in materials and workmanship under normal use. Contractor agrees to replace defective media.
- (b) 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 Bonneville, Bonneville 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 Bonneville's use of the product contrary to applicable technical documentation.

(End of clause)

#### 35.2.219 Clause 17-15 Noncommercial Hardware and Equipment Warranty



As prescribed in 17.7.2.1.1, insert a clause in solicitations and contracts substantially the same as follows:

**NONCOMMERCIAL HARDWARE AND EQUIPMENT WARRANTY (MAR 2018)**

- (a) Contractor warrants that its products, as delivered to Bonneville, contain 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 Bonneville 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.
- (b) 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 Bonneville, Bonneville 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 Bonneville's use of the product contrary to applicable technical documentation.

(End of clause)

35.2.220 Provision 17-16 Royalty Payment or Fees

As prescribed in 17.8.2.2, insert the following provision in all solicitations and contracts for Information Technology or Operational Technology contracts and Information Technology or Operational Technology service, support, or maintenance contracts:

**ROYALTY PAYMENT OR FEES (APR 2024)**

Offeror shall not submit quotes or proposals for any IT/OT hardware, software or services contracts or licenses requiring a royalty payment or payments. In the event Offeror submits a proposal requiring royalty payments, Offeror agrees that it will pay all due royalty payments itself and such costs shall not be charged to Bonneville as a part of the price, as additional fees or in any other form of payment by Bonneville.

35.2.221 Clause 17-17 Royalty Payment or Fees

As prescribed in 17.4.1.2, insert the following clause in all contracts for Information Technology or Operational Technology contracts and Information Technology or Operational Technology service, support or maintenance, agreements, contracts, or PO's:

**ROYALTY PAYMENT OR FEES (APR 2024)**

Contractor affirms that this contract or license excludes any form of royalty payment. If after contract execution, it is determined that royalty payments are due to a third party, contractor agrees that it will pay all royalty payments and such costs shall not be a part of the price paid by Bonneville or be required to be paid by Bonneville as additional cost either paid to the contractor or a third party.

## 35.2.222 Clause 17-19 Survival of Perpetual License

As prescribed in 17.7.3.4.2; insert the following clause in solicitations and contracts:

**SURVIVAL OF PERPETUAL LICENSE (MAR 2018)**

Notwithstanding any expiration of the Bonneville contract, any perpetual use licenses granted to Bonneville by Contractor shall survive the expiration of the contract.

(End of clause)

## 35.2.223 Provision 17-21 Nondisclosure for RFP/RFQ

As prescribed in 17.8.2.2.2, insert the following provision in solicitations:

**NONDISCLOSURE FOR RFP/RFQ (MAR 2018)**

- (a) During the term of this Request for Proposal (RFP) or Request for Quote (RFQ), Contractor may disclose sensitive or confidential ("Information"), to Bonneville. 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 Bonneville.
- (b) Bonneville 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. Bonneville shall give such Information at least such protection as Bonneville gives its own information and data of the same general type, but in no event less than reasonable protection. Bonneville shall not use or make copies of the Contractor's Information for any purpose other than for the purposes of this RFP/RFQ. Bonneville shall not disclose the Contractor's Information to any person other than those of Bonneville'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). Bonneville 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 Bonneville itself is required to give such Information under provision. Bonneville'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 Bonneville;
  - (2) has been made known to Bonneville by a third party in accordance with such third party's legal rights without any restriction on disclosure;
  - (3) was in the possession of Bonneville 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) Bonneville is required by law to disclose, or is subject to FOIA;
  - (5) has been independently developed by Bonneville from information not defined as "Information" in this contract; or
  - (6) is subject to disclosure pursuant to the Freedom of Information Act (FOIA).
- (c) Bonneville 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 RFP/RFQ or the Contractor's written request.

(End of clause)

#### 35.2.224 Clause 17-22 Nondisclosure during Contract Performance

As prescribed in 17.8.2.2.2, insert the following clause in solicitations and contracts:

#### **NONDISCLOSURE DURING CONTRACT PERFORMANCE (MAR 2018)**

- (a) During the term of this contract, Contractor may disclose sensitive, confidential or for official use only information ("Information"), to Bonneville. 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 Bonneville.
- (b) Bonneville 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. Bonneville shall give such Information at least such protection as Bonneville gives its own information and data of the same general type, but in no event less than reasonable protection. Bonneville shall not use or make copies of the Contractor's Information for any purpose other than as contemplated by the terms of this contract. Bonneville shall not disclose the Contractor's Information to any person other than those of Bonneville'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). Bonneville 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 Bonneville itself is required to give such Information under this contract. Bonneville'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 Bonneville;
  - (2) has been made known to Bonneville by a third party in accordance with such third party's legal rights without any restriction on disclosure;

- (3) was in the possession of Bonneville 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) Bonneville is required by law to disclose, or is subject to FOIA;
  - (5) has been independently developed by Bonneville from information not defined as "Information" in this contract; or
  - (6) is subject to disclosure pursuant to the Freedom of Information Act (FOIA).
- (c) Bonneville 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)

35.2.225 Clause 18-1 [Reserved]

35.2.226 Clause 18-2 Inspection – Supplies

As prescribed in 18.3.1, insert a clause in solicitations and contracts substantially the same as follows:

#### **INSPECTION – SUPPLIES (FEB 2020)**

- (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 this contract.
- (b) Bonneville 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 Bonneville reasonable facilities and assistance. Except as otherwise provided in the contract, Bonneville shall bear the expense of Bonneville inspections or tests made at other than the Contractor's or subcontractor's premises; provided that, in case of rejection, Bonneville shall not be liable for any reduction in the value of inspection or test samples. Bonneville is not obligated to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in this contract. Bonneville will perform inspections and tests in a manner that will not unduly delay the work.
- (c) The Contractor may be charged for Bonneville'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, Bonneville may perform the tests and charge the Contractor for the costs of such.
- (d) Bonneville 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 Bonneville's Contracting Officer's Representative (COR), unless waived in writing by the Contracting Officer or an authorized representative.
  - (1) If the Bonneville COR exercises Bonneville'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 Bonneville.

- (f) Inspections and tests by Bonneville do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Lack of inspection by Bonneville shall not relieve the Contractor of any obligations under this contract.

(End of clause)

*Alternate I (Mar 2018).* The CO may substitute paragraph (d) below based on need:

- (d) Bonneville 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, Bonneville 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 Bonneville. Such contract price reduction shall be based on Bonneville'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.

35.2.227 Clause 18-3 Acceptance – Supplies

As prescribed in 18.3.1, insert a clause in solicitations and contracts substantially the same as follows:

**ACCEPTANCE – SUPPLIES (JUL 2013)**

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)

35.2.228 Clause 18-4 [Reserved]

35.2.229 Clause 18-5 Inspection and Acceptance – Construction

As prescribed in 18.3.1, insert a clause in solicitations and contracts substantially the same as follows:

**INSPECTION AND ACCEPTANCE – CONSTRUCTION (MAR 2018)**

- (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 Bonneville. All work shall be conducted under the general direction of the Contracting Officer and is subject to Bonneville inspection and test at all places and at all reasonable times before acceptance to ensure strict compliance with the terms of the contract.
- (c) Bonneville inspections and tests are for the sole benefit of Bonneville 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 Bonneville after acceptance of the completed work under paragraph (i) below.
- (d) The presence or absence of a Bonneville 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. Bonneville 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. Bonneville 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 Bonneville not to conform to contract requirements, unless in the public interest Bonneville consents to accept the work with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from Bonneville property.
- (g) If the Contractor does not promptly replace or correct rejected work, Bonneville 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, Bonneville 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 Bonneville 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 Bonneville's rights under any warranty or guarantee.

(End of clause)

### 35.2.230 Clause 18-6 Responsibility for Damage or Loss of Supplies

As prescribed in 18.4.2, insert a clause in solicitations and contracts substantially the same as follows:

#### **RESPONSIBILITY FOR DAMAGE OR LOSS OF SUPPLIES (MAR 2018)**

- (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, Bonneville 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 Bonneville acting within the scope of their employment.

- (c) The Contractor shall bear all risks as to rejected supplies after notice of rejection, except that Bonneville 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 Bonneville acting within the scope of their employment.

(End of clause)

#### 35.2.231 Clause 18-8 Warranty – Supplies

As prescribed in 18.5.1, insert a clause in solicitations and contracts substantially the same as follows:

##### **WARRANTY – SUPPLIES (MAR 2018)**

- (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 Bonneville-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. Bonneville will install replacements at no expense to the Contractor.
- (c) Supplies replaced under the provisions of this warranty shall remain the property of Bonneville unless the Contractor wishes to obtain ownership. In this case, the Contractor shall notify Bonneville of such in writing not later than the date of receipt by Bonneville of the replacement supplies. The Contractor is responsible for packaging and shipping costs.
- (d) The rights and remedies of Bonneville provided in this clause are in addition to and do not limit any rights afforded to Bonneville by any other clause of this contract or under applicable Federal or State law, including the Uniform Commercial Code.

(End of clause)

#### 35.2.232 Clause 18-9 Warranty – Heavy Electrical Equipment

As prescribed in 18.5.1, insert a clause in solicitations and contracts substantially the same as follows:

##### **WARRANTY – HEAVY ELECTRICAL EQUIPMENT (MAR 2018)**

- (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 Bonneville 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 Bonneville, 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, Bonneville 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 Bonneville or the Contractor. The cost of removal of any appurtenant equipment shall be the responsibility of the Contractor. If Bonneville performs the corrective work, the Contractor shall reimburse Bonneville 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 Bonneville provided in this clause are in addition to and do not limit any rights afforded to Bonneville by any other clause of this contract or under applicable Federal or State law, including the Uniform Commercial Code.

(End of clause)

35.2.234 Clause 18-10 Warranty – Tower Steel

As prescribed in 18.5.1, insert a clause in solicitations and contracts substantially the same as follows:

**WARRANTY – TOWER STEEL (MAR 2018)**

- (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, Bonneville 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.
    - (i) Minor Correction:  $1.0 \times \text{Weight of piece mark (lbs.)} \times \text{Supply Contract price/lb.}$
    - (ii) Replace:  $2.5 \times \text{Weight of piece mark (lbs.)} \times \text{Supply Contract price/lb.}$
  - (2) Deficiencies found during assembly:
    - (i) Minor Correction:  $1.25 \times \text{Cost per each minor correction (see Note 1)}$
    - (ii) Replace:  $5.0 \times \text{Weight of piece mark (lbs.)} \times \text{Supply Contract price/lb.}$
  - (3) Deficiencies found during or after erection:
    - (i) Minor Correction:  $1.25 \times \text{Cost per each minor correction (see Note 1)}$
    - (ii) Replace:  $10.0 \times \text{Weight of piece mark (lbs.)} \times \text{Supply Contract price/lb.}$

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. Bonneville 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 Bonneville unless the Contractor wishes to obtain ownership. In this case, the Contractor shall notify Bonneville of such in writing not later than the date of receipt by Bonneville of the replacement supplies. The Contractor is responsible for packaging and shipping costs.
- (e) The rights and remedies of Bonneville provided in this clause are in addition to and do not limit any rights afforded to Bonneville by any other clause of this contract or under applicable Federal or State law, including the Uniform Commercial Code.

(End of clause)

35.2.235 Clause 18-11 Warranty – Services

As prescribed in 18.5.1, insert a clause in solicitations and contracts substantially the same as follows:

**WARRANTY – SERVICES (MAR 2018)**

- (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 Bonneville. 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 Bonneville, and any services or materials corrected or reperfomed by the Contractor shall be subject to this clause to the same extent as work initially performed.

(End of clause)

35.2.236 Clause 18-12 Warranty – Construction

As prescribed in 18.5.1, insert a clause in solicitations and contracts substantially the same as follows:

**WARRANTY – CONSTRUCTION (MAR 2018)**

- (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 Bonneville takes possession of any part of the work before final acceptance, this warranty shall continue for a period of 1 year from the date Bonneville 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, Bonneville 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 Bonneville, if directed by the Contracting Officer; and
  - (3) Enforce all warranties for the benefit of Bonneville, 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 Bonneville nor for the repair of any damage that results from any defect in Government-furnished material or design.
- (i) This warranty shall not limit Bonneville's rights under the Inspection and Acceptance clause of this contract with respect to latent defects, gross mistakes, or fraud.

(End of clause)

#### 35.2.237 Clause 18-13 Warranty – Small Construction Contracts

As prescribed in 18.5.1, insert a clause in solicitations and contracts substantially the same as follows:

##### **WARRANTY – SMALL CONSTRUCTION CONTRACTS (MAR 2018)**

- (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, Bonneville shall have the right to replace, repair, or otherwise remedy the failure, defect, or damage at the Contractor's expense.

(End of clause)

#### 35.2.238 Clause 18-14 Limitation of Liability for Latent Defects

As prescribed in 18.6.4, insert a clause in solicitations and contracts substantially the same as follows:

##### **LIMITATION OF LIABILITY FOR LATENT DEFECTS (MAR 2018)**

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.

Bonneville will notify the Contractor of any latent defects within a reasonable period after discovery.

(End of clause)

### 35.2.239 Clause 18-15 Limitation of Liability for Consequential Damages

As prescribed in 18.6.4, insert a clause in solicitations and contracts substantially the same as follows:

#### **LIMITATION OF LIABILITY FOR CONSEQUENTIAL DAMAGES (JUL 2013)**

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)

### 35.2.240 Clause 19-1 Bonneville-Furnished/Contractor-Acquired Property

As prescribed in 19.4, insert a clause in solicitations and contracts substantially the same as follows:

#### **BONNEVILLE-FURNISHED/CONTRACTOR-ACQUIRED PROPERTY (MAR 2018)**

- (a) The Contractor shall manage Bonneville-furnished, contractor-acquired property in accordance with BPI Appendix 19 if that appendix is made a part of this contract. If Appendix 19 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) Bonneville shall deliver to the Contractor, at the time and locations stated in this contract, Bonneville-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 Bonneville-furnished property shall remain with Bonneville, unless specifically identified elsewhere in this contract. The Contractor shall use Bonneville-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 Bonneville inspection at all reasonable times.
- (d) Upon delivery of Bonneville-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 Bonneville upon the supplier's delivery of such property to the contractor.

- (f) Title to Bonneville property shall not be affected by its incorporation into or attachment to any property not owned by Bonneville, nor shall Bonneville 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 Bonneville, which was not consumed in the performance of this contract or previously delivered to Bonneville. 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 Bonneville 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 Bonneville as directed by the Contracting Officer.

(End of clause)

#### 35.2.241 Clause 19-2 Bonneville Property Furnished "As Is"

As prescribed in 19.7.1, insert a clause in solicitations and contracts substantially the same as follows:

#### **BONNEVILLE PROPERTY FURNISHED "AS IS" (MAR 2018)**

- (a) Bonneville makes no warranty whatsoever with respect to Bonneville 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 Bonneville.
- (c) If there is any change in the condition of Bonneville 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 Bonneville'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 Bonneville shall not be otherwise liable for any delivery of Bonneville property furnished "as is" in a condition other than that in which it was originally offered.

(End of clause)

#### 35.2.242 Clause 19-3 Contractor Use of Government-Owned Vehicles

As prescribed in 19.8.1, insert the following clause in solicitations and contracts:

**CONTRACTOR USE OF GOVERNMENT-OWNED VEHICLES (MAR 2018)**

In those instances where Bonneville provides access to sources of Government-owned vehicles for the Contractor's use, the Contractor agrees to indemnify and save and hold harmless Bonneville from any and all claims and damages or other costs where Bonneville was not at fault.

(End of clause)

35.2.243 Clause 19-4 Bonneville Property to be Transferred to the Contractor

As prescribed in 19.9.2, insert the following clause in solicitations and contracts:

**BONNEVILLE PROPERTY TO BE TRANSFERRED TO THE CONTRACTOR (MAR 2018)**

Bonneville transfers title to the Bonneville furnished, or contractor-acquired property listed below to the contractor at the time specified. At the time of disposal, Bonneville 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)

35.2.244 Clause 20-1 Reserved

35.2.245 Clause 20-2 Termination for the Convenience of Bonneville

As prescribed in 20.4.1, insert the following clause in solicitations and contracts:

**TERMINATION FOR THE CONVENIENCE OF BONNEVILLE (MAR 2018)**

- (a) Bonneville 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)

35.2.246 Clause 20-3 Termination for Default

As prescribed in 20.5.1, insert the following clause in solicitations and contracts:

**TERMINATION FOR DEFAULT (MAR 2018)**

- (a) Bonneville 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 Bonneville 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)

*Alternate I (Mar 2018).* For fixed-price contracts, the CO shall add the following paragraph (c) to the basic clause:

- (c) Bonneville 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 Bonneville for any excess costs for those supplies or services, including administrative costs.

35.2.247 Clause 20-4 Excusable Delays

As prescribed in 20.5.1, insert the following clause:

**EXCUSABLE DELAYS (MAR 2018)**

- (a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. "Default" includes failure to make progress in the work so as to endanger performance.
- (b) If the failure to perform is caused by the failure of a subcontractor at any tier to perform or make progress, and if the cause of the failure was beyond the control of both the Contractor and subcontractor, and without the fault or negligence of either, the Contractor shall not be deemed to be in default, unless –
- (1) The subcontracted supplies or services were obtainable from other sources;
  - (2) The Contracting Officer ordered the Contractor in writing to purchase these supplies or services from other sources; and
  - (3) The Contractor failed to comply reasonably with this order.
- (c) Upon request of the Contractor, the Contracting Officer shall ascertain the facts and extent of the failure. If the Contracting Officer determines that any failure to perform results from

one or more of the causes above, the delivery schedule shall be revised, subject to the rights of the Government under the termination clause of this contract.

(End of clause)

#### 35.2.248 Provision 21-1 Protests Against Award

As prescribed in 21.2.10.1, insert the following provision in solicitations:

##### **PROTESTS AGAINST AWARD (MAR 2018)**

- (a) Interested parties agree that any protest against award will be filed with the Bonneville 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 Bonneville. 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 Bonneville by obtaining written and dated acknowledgement of receipt. The copies of the protest and all other materials filed shall be received in the Bonneville CO's office and in the HCA's office, respectively, within one day of filing a protest with the GAO.

(End of provision)

#### 35.2.249 Clause 21-2 Disputes

As prescribed in 21.3.15.1, insert the following clause in solicitations and contracts:

##### **DISPUTES (MAR 2018)**

- (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 Bonneville 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 Bonneville is liable; and that I am duly authorized to certify the claim on behalf of the Contractor.”*
  - (iv) 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 Bonneville 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) Bonneville 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)

35.2.250 Clause 21-3 [Reserved]

35.2.251 Clause 21-4 Release of Claims



As prescribed in 21.3.10.1, insert the following clause in solicitations and contracts:

**RELEASE OF CLAIMS (MAR 2018)**

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 Bonneville arising out of the contract, other than claims specifically excepted from the operation of the release.

(End of clause)

35.2.252 Clause 21-5 Applicable Law

As prescribed in 21.1.3, insert the following clause in solicitations and contracts:

**APPLICABLE LAW (JUL 2013)**

United States law will apply to resolve any claim of breach of this contract.

(End of clause)

35.2.253 Clause 22-1 [Reserved]

35.2.254 Clause 22-2 Basis of Payment –Construction

As prescribed in 22.1.3, insert the following clause in solicitations and contracts. The CO may modify the percentage in paragraph (a) as needed.

**BASIS OF PAYMENT – PROGRESS PAYMENTS CONSTRUCTION (MAR 2018)**

- (a) Progress payments. Bonneville shall make progress payments as the work proceeds based on its assessment of the stage or percentage of work accomplished. Bonneville 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 the provision 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 Bonneville 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 Bonneville 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 Bonneville 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 Bonneville 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. Bonneville 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 Bonneville 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 Bonneville.

(End of clause)

### 35.2.255 Clause 22-3 Progress Payments

As prescribed in 22.1.3, insert the following clause in solicitations and contracts:

#### **PROGRESS PAYMENTS (MAR 2018)**

Bonneville shall make progress payments as the work proceeds based on the stage or percentage of work accomplished, but not more frequently than monthly, in amounts of \$2,500 or more approved by the Contracting Officer, under the following conditions:

- (a) Computation of amounts.
- (1) Unless the Contractor requests a smaller amount, Bonneville will compute each progress payment as 80 percent of the Contractor's total costs incurred under this contract whether or not actually paid, plus financing payments to subcontractors (see paragraph (j) of this clause), less the sum of all previous progress payments made by Bonneville under this contract. The Contracting Officer will consider cost of money that would be allowable under Appendix 13 of the BPI as an incurred cost for progress payment purposes.
  - (2) The amount of financing and other payments for supplies and services purchased directly for the contract are limited to the amounts that have been paid by cash, check, or other forms of payment, or that are determined due and will be paid to subcontractors
    - (i) In accordance with the terms and conditions of a subcontract or invoice; and
    - (ii) Ordinarily within 30 days of the submission of the Contractor's payment request to Bonneville.
  - (3) Bonneville will exclude accrued costs of Contractor contributions under employee pension plans until actually paid unless –
    - (i) The Contractor's practice is to make contributions to the retirement fund quarterly or more frequently; and
    - (ii) The contribution does not remain unpaid 30 days after the end of the applicable quarter or shorter payment period (any contribution remaining unpaid shall be excluded from the Contractor's total costs for progress payments until paid).
  - (4) The Contractor shall not include the following in total costs for progress payment purposes in paragraph (a)(1) of this clause:
    - (i) Costs that are not reasonable, allocable to this contract, and consistent with sound and generally accepted accounting principles and practices.
    - (ii) Costs incurred by subcontractors or suppliers.
    - (iii) Costs ordinarily capitalized and subject to depreciation or amortization except for the properly depreciated or amortized portion of such costs.
    - (iv) Payments made or amounts payable to subcontracts or suppliers, except for –
      - (A) Completed work, including partial deliveries, to which the Contractor has acquired title; and
      - (B) Work under cost-reimbursement or time-and-material subcontracts to which the Contractor has acquired title.

- (5) The amount of unliquidated progress payments may exceed neither (i) the progress payments made against incomplete work (including allowable unliquidated progress payments to subcontractors) nor (ii) the value, for progress payment purposes, of the incomplete work. Incomplete work shall be considered to be the supplies and services required by this contract, for which delivery and invoicing by the Contractor and acceptance by Bonneville are incomplete.
  - (6) The total amount of progress payments shall not exceed 80 percent of the total contract price.
  - (7) If a progress payment or the unliquidated progress payments exceed the amounts permitted by paragraphs (a)(4) or (a)(5) of this clause, the Contractor shall repay the amount of such excess to Bonneville on demand.
  - (8) Notwithstanding any other terms of the contract, the Contractor agrees not to request progress payments in dollar amounts of less than \$2,500. The Contracting Officer may make exceptions.
  - (9) The costs applicable to items delivered, invoiced, and accepted shall not include costs in excess of the contract price of the items.
- (b) *Liquidation*. Except as provided in the Termination for Convenience for Bonneville clause, all progress payments shall be liquidated by deducting from any payment under this contract, other than advance or progress payments, the unliquidated progress payments, or 80 percent of the amount invoiced, whichever is less. The Contractor shall repay to Bonneville any amounts required by a retroactive price reduction, after computing liquidations and payments on past invoices at the reduced prices and adjusting the unliquidated progress payments accordingly. Bonneville reserves the right to unilaterally change from the ordinary liquidation rate to an alternate rate when deemed appropriate for proper contract financing.
- (c) *Reduction or suspension*. The Contracting Officer may reduce or suspend progress payments, include the rate of liquidation, or take a combination of these actions, after finding on substantial evidence any of the following conditions:
- (1) The Contractor failed to comply with any material requirement of this contract (which includes paragraphs (f) and (g) of this clause).
  - (2) Performance of this contract is endangered by the Contractor's –
    - (i) Failure to make progress; or
    - (ii) Unsatisfactory financial condition.
  - (3) Inventory allocated to this contract substantially exceeds reasonable requirements.
  - (4) The Contractor is delinquent in payment of the costs of performing this contract in the ordinary course of business.
  - (5) The fair value of the undelivered work is less than the amount of unliquidated progress payments for that work.
  - (6) The Contractor is realizing less profit than that reflected in the establishment of any alternate liquidation rate in paragraph (b) of this clause, and that rate is less than the progress payment rate started in paragraph (a)(1) of this clause.
- (d) *Title*.
- (1) Title to the property described in this paragraph (d) shall vest in Bonneville. Vestiture shall be immediately upon the date of this contract, for property acquired or produced before that date. Otherwise, vestiture shall occur when the property is or should have been allocable or properly chargeable to this contract.
  - (2) "Property," as used in this clause, includes all of the below-described items acquired or produced by the Contractor that are or should be allocable or properly chargeable to this contract under sound and generally accepted accounting principles and practices.
    - (i) Parts, materials, inventories, and work in progress;
    - (ii) Special tooling and special test equipment to which Bonneville is to acquire title;

- (iii) Nondurable (i.e., noncapital) tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment, and other similar manufacturing aids, title to which would not be obtained as special tooling under paragraph (d)(2)(ii) of this clause; and
  - (iv) Drawings and technical data, to the extent the Contractor or subcontractors are required to deliver them to Bonneville by other clauses of this contract.
- (3) Although title to property is in Bonneville under this clause, other applicable clauses of this contract; e.g., the termination clauses, shall determine the handling and disposition of the property.
- (4) The Contractor may sell any scrap resulting from production under this contract without requesting the Contracting Officer's approval, but the proceeds shall be credited against the costs of performance.
- (5) To acquire for its own use or dispose of property to which title is vested in Bonneville under this clause, the Contractor must obtain the Contracting Officer's advance approval of the action and the terms. The Contractor shall (i) exclude the allocable costs of the property from the costs of contract performance, and (ii) repay to Bonneville any amount of unliquidated progress payments allocable to the property. Repayment may be by cash or credit memorandum.
- (6) When the Contractor completes all of the obligations under this contract, including liquidation of all progress payments, title shall vest in the Contractor for all property (or the proceeds thereof) that –
- (i) Delivered to, and accepted by, Bonneville under this contract; or
  - (ii) Incorporated in supplies delivered to, and accepted by, Bonneville under this contract and to which title is vested in Bonneville under this clause.
- (7) The terms of this contract concerning liability for Bonneville-furnished property shall not apply to property to which Bonneville acquired title solely under this clause.
- (e) *Risk of loss.* Before delivery to and acceptance by Bonneville, the Contractor shall bear the risk of loss for property, the title to which vests in Bonneville under this clause, except to the extent Bonneville expressly assumes the risk. The Contractor shall repay Bonneville an amount equal to the unliquidated progress payments that are based on costs allocable to property that is lost.
- (f) *Control of costs and property.* The Contractor shall maintain an accounting system and controls adequate for proper administration of this clause.
- (g) Reports, forms, and access to records.
- (1) The Contractor shall promptly furnish reports, certificates, financial statements, and other pertinent information (including estimates to complete) reasonably requested by the Contracting Officer for the administration of this clause. Also, the Contractor shall give Bonneville reasonable opportunity to examine and verify the Contractor's books, records, and accounts.
  - (2) The Contractor shall furnish estimates to complete that have been developed or updated within six month of the date of the progress payment request. The estimates to complete shall represent the Contractor's best estimate of total costs to complete all remaining contract work required under the contract. The estimates shall include sufficient detail to permit Bonneville verification.
  - (3) Each Contractor request for progress payment shall:
    - (i) Be submitted on Standard Form 1443, Contractor's Request for Progress Payment, or an electronic equivalent approved by the Contracting Officer, in accordance with the from instructions and the contract terms; and
    - (ii) Include any additional supporting documentation requested by the Contracting Officer.

- (h) *Special terms regarding default.* If this contract is terminated under the Default clause, (i) the Contractor shall, on demand, repay to Bonneville, on full liquidation of progress payments and (ii) title shall vest in the Contractor, on full liquidation of progress payments, for all property for which Bonneville elects not to require delivery under the Default clause. Bonneville shall be liable for no payment except as provided by the Default clause.
- (i) Reservations of rights.
- (1) No payment or vesting of title under this clause shall –
- (i) Excuse the Contractor from performance of obligations under this contract; or
  - (ii) Constitute a waiver of any of the rights or remedies of the parties under the contract.
- (2) Bonneville’s rights and remedies under this clause –
- (i) Shall not be exclusive but rather shall be in addition to any other rights and remedies provided by law or this contract; and
  - (ii) Shall not be affected by delayed, partial, or omitted exercise of any right, remedy, power, or privilege, nor shall such exercise or any single exercise preclude or impair any further exercise under this clause or exercise of any other right, power, or privilege of the Government.
- (j) *Financing payments to subcontractors.* The financing payments to subcontractors mentioned in paragraphs (a)(1) and (a)(2) of this clause shall be financing payments to subcontractors or divisions, if the following conditions are met:
- (1) The amount included are limited to –
- (i) The unliquidated remainder of financing payments made; plus
  - (ii) Any unpaid subcontractor requests for financing payments.
- (2) The subcontract or interdivisional order is expected to involve a minimum of approximately 6 months between the beginning of work and the first delivery; or, if the subcontractor is a small business concern, 4 months.
- (3) If the financing payments are in the form of progress payments, the terms of the subcontract or interdivisional order concerning progress payments –
- (i) Are substantially similar to the terms of this clause for any subcontractor that is a large business concern, or this clause with its Alternate I for any subcontractor that is a small business concern;
  - (ii) Are at least as favorable to Bonneville as the terms of this clause;
  - (iii) Are not more favorable to the subcontractor or division than the terms of this clause are to the Contractor; and
  - (iv) Subordinate all subcontractor rights concerning property to which Bonneville has title under the subcontractor to the Government’s right to require delivery of the property to Bonneville if –
    - (A) The Contractor defaults; or
    - (B) The subcontractor becomes bankrupt or insolvent.
- (4) If financing is in the form of progress payments, the progress payment rate in the subcontract is the customary rate used by Bonneville, depending on whether the subcontractor is or is not a small business concern.
- (5) Concerning any proceeds received by Bonneville for property to which title has vest in Bonneville under the subcontract terms, the parties agree that the proceeds shall be applied to reducing any unliquidated financing payments by Bonneville to the Contractor under this contract.
- (6) If no unliquidated financing payments to the Contractor remain, but there are unliquidated financing payments that the Contractor has made to any subcontractor, the Contractor shall be subrogated to all the rights Bonneville obtained through the terms required by this clause to be in any subcontract, as if all such rights have been assigned and transferred to the Contractor.

- (k) *Limitation on undefinitized contract actions.* Notwithstanding any other progress payment provisions in this contract, progress payments may not exceed 80 percent of costs incurred on work accomplished under undefinitized contract actions. A “contract action” is any action resulting in a contract, as defined in subpart 2.2, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes. This limitation shall apply to the costs incurred, as computed in accordance with paragraph (a) of this clause, and shall remain in effect until the contract action is definitized. Costs incurred which are subject to this limitation shall be segregated on Contractor progress payment requests and invoices from those costs eligible for higher progress payment rates. For purposes of progress payment liquidation, as described in paragraph (b) of this clause, progress payments for undefinitized contract actions shall be liquidated at 80 percent of the amount invoiced for work performed under the undefinitized contract action as long as the contract action remains undefinitized. The amount of unliquidated progress payments for undefinitized contract actions shall not exceed 80 percent of the maximum liability of Bonneville under the undefinitized contract action or such lower limit specified elsewhere in the contract. Separate limits may be specified for separate actions.
- (l) *Due date.* The payment office will make progress payments on the 30th day after the billing office receives a proper progress payment request. In the event that Bonneville requires an audit or other review of a specific progress payment request to ensure compliance with the terms and conditions of the contract, the payment office is not compelled to make payment by the specified due date. Progress payments are considered contract financing and are not subject to the interest penalty provisions of the Prompt Payment Act.
- (m) *Progress payments under indefinite-delivery contracts.* The Contractor shall account for and submit progress payment requests under individual orders as if the order constituted a separate contract, unless otherwise specified in this contract.

(End of clause)

*Alternate I (Mar 2018).* If the contract is with a small business concern, change each mention of the progress payment and liquidation rates excepting paragraph (k) to the customary rate of 85 percent for small business concerns.

#### 35.2.256 Clause 22-4 Basis of Payment – Time-and-Materials/Labor-Hour Contracts

As prescribed in 22.1.3, insert the following clause in solicitations and contracts:

##### **BASIS OF PAYMENT – TIME-AND-MATERIALS/LABOR-HOUR CONTRACTS (APR 2024)**

Bonneville 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 and Appendix 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 and Appendix 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 and Appendix 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 and Appendix 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 Bonneville 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 Bonneville; 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, Bonneville 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 Bonneville. The Contractor and each assignee shall assign to Bonneville all such refunds, rebates, or credits (including any interest) in form and substance satisfactory to the CO.

(End of clause)

35.2.257 Clause 22-5 [Reserved]

35.2.258 Clause 22-6 [Reserved]

35.2.259 Clause 22-7 Contract Ceiling Limitation

As prescribed in 22.1.3, insert the following clause in solicitations and contracts:

**CONTRACT CEILING LIMITATION (MAR 2018)**

- (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 Bonneville'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) Bonneville 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 Bonneville 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, Bonneville 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)

35.2.260 Clause 22-8 Advance Payments

As prescribed in 22.1.4.5, insert the following clause in solicitations and contracts:

**ADVANCE PAYMENTS (FEB 2020)**

- (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 Bonneville 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 Bonneville. Whenever requested by the CO, the Contractor shall repay to Bonneville 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 15 percent of the contract price, Bonneville shall withhold further payments to the Contractor. On completion or termination of the contract, Bonneville 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 Bonneville.
  - (e) Lien on property under contract.
    - (1) The Contractor will file a security interest in favor of Bonneville, 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 Bonneville. If, for any reason, the supplies, materials, or other property are not identified by marking or segregating, Bonneville shall be considered to have a lien to the extent of Bonneville'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 Bonneville 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 Bonneville 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 Bonneville 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 Bonneville 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 Bonneville. 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 (Mar 2018).* The CO may substitute paragraph (a) of the basic clause with paragraph (a) below as prescribed in 22.1.4.5(b):

- (a) Requirements for payment. Advance payments will be made under this contract by electronic funds transfer within 5 working days after Bonneville receipt of a request. The contractor is authorized to request Bonneville 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 Bonneville billing office. The Contractor shall apply terms similar to this clause to any advance payments to subcontractors.

*Alternate II (Mar 2018).* The CO may substitute paragraphs (a) and (l) of the basic clause with paragraph (a) and (l) below as prescribed in 22.1.4.5(c):

- (a) Requirements for payment. Advance payments will be made under this contract by electronic funds transfer within 5 working days after Bonneville receipt of a request. The contractor is authorized to request Bonneville 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 Bonneville billing office. The Contractor shall apply terms similar to this clause to any advance payments to subcontractors.
- (l) No interest shall be charged to the Contractor for advance payments except for interest charged during a period of default.

*Alternate III (Oct 1993).* The CO may substitute paragraph (l) of the basic clause with paragraph (l) below as prescribed in 22.1.4.5(d):

- (l) No interest shall be charged to the Contractor for advance payments except for interest charged during a period of default.

#### 35.2.261 Clause 22-9 Withholding

As prescribed in 22.1.5.1, the CO may insert the following clause in solicitations and contracts:

#### **WITHHOLDING (FEB 2020)**

- (a) The CO reserves the right to withhold an amount not to exceed 20 percent of the contract price if determined necessary to protect Bonneville'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 (FEB 2020).* The CO may add paragraph (c) below to the basic clause:

- (a) In the event this contract requires a specific written warranty, equipment operating instructions, owner's manual, or other documentation the CO may process an interim payment for completed work, retaining a maximum of 20 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.

#### 35.2.262 Clause 22-10 Discounts for Prompt Payment

As prescribed in 22.2.7, insert the following clause in solicitations and contracts:

##### **DISCOUNTS FOR PROMPT PAYMENT (MAR 2018)**

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 Bonneville 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)

#### 35.2.263 Clause 22-11 Prompt Payment for Construction Contracts

As prescribed in 22.2.7, insert the following clause in solicitations and contracts:

##### **PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (MAR 2018)**

- (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 Bonneville designated billing office. Bonneville 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 Bonneville actually receives a proper invoice or the date of Bonneville 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 Bonneville). 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 Bonneville.
- (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:
- (i) 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 Bonneville under this contract.
  - (ii) 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.
  - (iii) 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 Bonneville, 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—
- (i) 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;
  - (ii) Give the CO a copy of the notice furnished to the subcontractor;
  - (iii) Notify the CO of the beginning and end dates of any withholding of subcontractor payments;
  - (iv) Pay the subcontractor as soon as practicable after the correction of the identified subcontract performance deficiency; and
  - (v) Pay interest to Bonneville 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 Bonneville.
- (3) The Contractor may not request payment from Bonneville 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)

### 35.2.264 Clause 22-12 Payment

As prescribed in 22.2.7, insert the following clause in solicitations and contracts:

#### **PAYMENT (MAR 2018)**

- (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 Bonneville actually receives a proper invoice in the designated billing office or the date when the items delivered or completed services are accepted by Bonneville. 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 Bonneville). 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 Bonneville.
- (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)

#### 35.2.265 Clause 22-13 Interest on Amounts Due Bonneville

As prescribed in 22.3.1, insert the following clause in solicitations and contracts:

#### **INTEREST ON AMOUNTS DUE BONNEVILLE (MAR 2018)**

- (a) Notwithstanding any other clause of this contract, all amounts that become payable by the Contractor to Bonneville under this contract (net of any applicable tax credit under the Internal Revenue Code (26 U.S.C. 1481)) 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 12 of the Contract Disputes Act of 1978 (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 Bonneville 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)

#### 35.2.266 Clause 22-14 Taxes – Indefinite Delivery Contracts

As prescribed in 22.5.6, insert the following clause in solicitations and contracts:

##### **TAXES – INDEFINITE DELIVERY CONTRACTS (MAR 2018)**

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 Bonneville agrees either to pay the amount of the taxes to the Contractor or provide evidence necessary to sustain an exemption.

(End of clause)

#### 35.2.267 Clause 22-15 Federal, State and Local Taxes

As prescribed in 22.5.6, insert the following clause in solicitations and contracts, except when clause 22-14 Taxes - Indefinite Delivery Contracts is utilized:

##### **FEDERAL, STATE AND LOCAL TAXES (JUL 2013)**

- (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)

#### 35.2.268 Clause 22-16 [Reserved]

#### 35.2.269 Clause 22-17 Washington State Sales and Use Taxes

As prescribed in 22.5.6, insert the following clause in solicitations and contracts:

**WASHINGTON STATE SALES AND USE TAXES (MAR 2018)**

- (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 Bonneville 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 Bonneville 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)

35.2.270 Clause 22-18 State of Idaho Use Tax

As prescribed in 22.5.6, insert the following clause in solicitations and contracts:

**STATE OF IDAHO USE TAX (APR 2024)**

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 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 Bonneville 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)

35.2.271 Clause 22-19 Oregon Corporate Activity Tax

As prescribed in 22.5.6, insert the following clause in solicitations and contracts:

**OREGON CORPORATE ACTIVITY TAX (APR 2024)**

The Oregon Corporate Activity Tax (CAT) is an annual tax imposed on taxpayers for the privilege of doing business in Oregon. Oregon's CAT is measured on a business's commercial activity, the total amount a business realizes from transactions and activity in the normal course of business in Oregon. In the event the State of Oregon assesses or levies such a tax, the Contractor shall immediately submit copies of any documents reflecting such assessment or levy to the CO. The Contractor shall not make any payments to the State of Oregon on account of such taxes under the contract, unless authorized by the CO. Offerors should not take into account or include a factor for the Oregon CAT Tax in their proposal response. The contractor shall be reimbursed by Bonneville 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 Oregon.

## 35.2.272 Clause 22-20 Electronic Funds Transfer Payment

As prescribed in 22.6.2, insert the following clause in solicitations and contracts:

**ELECTRONIC FUNDS TRANSFER PAYMENT (FEB 2020)**

- (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 Bonneville, 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 Bonneville contracts, unless the Bonneville 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 Bonneville. The Contractor shall submit EFT enrollment banking information directly to Bonneville 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 61409  
Vancouver, WA 98666-1409  
ATTN: NSTS – 4400-LL  
Vendor Maintenance

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 Bonneville 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. Bonneville 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. Bonneville shall pay no penalty on delay of payment resulting from defective EFT information. Bonneville 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)

## 35.2.273 Clause 22-21 Acceleration of Payments to Small Business Subcontractors



As prescribed in 22.7.2, insert the following clause in solicitations and contracts:

**ACCELERATION OF PAYMENTS TO SMALL BUSINESS SUBCONTRACTORS (MAR 2018)**

- (a) Upon receipt of accelerated payments from Bonneville, the Contractor shall make accelerated payments to its small business subcontractors under this contract, to the maximum extent practicable and prior to when such payment is otherwise required under the applicable contract or subcontract, after receipt of a proper invoice and all other required documentation from the small business subcontractor.
- (b) The acceleration of payments under this clause does not provide any new rights under the Prompt Payment Act.
- (c) Include the substance of this clause, including this paragraph (c), in all subcontracts with small business concerns, including subcontracts with small business concerns for the acquisition of commercial items.

(End of clause)

35.2.274 Clause 22-22 Contracts for Services with Individuals

As prescribed in 22.5.6, insert the following clause in solicitations and contracts:

**CONTRACTS FOR SERVICES WITH INDIVIDUALS (MAR 2018)**

- (a) Contractor is associated with Bonneville 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 Bonneville 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 Bonneville.

(End of clause)

35.2.275 Clause 22-23 Contracts for Supplemental Labor

As prescribed in 22.5.6, insert the following clause in solicitations and contracts:

**CONTRACTS FOR SUPPLEMENTAL LABOR (MAR 2018)**

- (a) Contractor is associated with Bonneville 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 Bonneville 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 the contractor, its employees, agents, or representatives shall be considered employees, agents, or representatives of the Bonneville.

(End of clause)

### 35.2.276 Clause 22-24 Tribal Employment Rights Ordinance Fee

As prescribed in 22.5.6, insert the following clause in all solicitations and contracts

#### **TRIBAL EMPLOYMENT RIGHTS ORDINANCE FEE (FEB 2020)**

- (a) Either a portion, or all, of the work required under this contract (or task order) is located on land governed by a Tribal Employment Rights Ordinance (TERO).
- (b) Below are additional requirements that may apply to work awarded under this contract (or task order):
- (1) The TERO office(s) may require an administrative fee based upon the contract amount which is payable to the TERO office(s). If required, this fee shall be included as a separate line item on the Contractor's price proposal and any subsequent invoice;
  - (2) The Contractor shall meet with the TERO office(s) prior to commencement of the work under this contract and submit an acceptable plan for implementation of its obligations under TERO regulations;
  - (3) The Contractor shall provide to the Contracting Officer evidence of any TERO fees paid as a result of these requirements.
- (c) This requirement shall be included in all subcontracts at any tier.
- (d) The contractor may be required to submit all appropriate documentation related to the TERO fee to the CO, including any tribal compliance agreement required by the tribe.
- (e) Clauses 10-1, Equal Opportunity, and 10-15 Pre-award On-Site Equal Opportunity Compliance Review, do not apply to work on or within 40 miles of an Indian reservation where a TERO is known to be in effect.

(End of clause)

### 35.2.277 Clause 23-1 Continuity of Services

As prescribed by 23.1.7, the CO may insert the following clause, or one substantially similar to, in solicitations and contracts:

#### **CONTINUITY OF SERVICES (MAR 2018)**

- (a) The Contractor recognizes that the services under this contract are vital to Bonneville and must be continued without interruption and that, upon contract expiration, a successor, either Bonneville 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)

#### 35.2.278 Clause 23-2 Key Personnel

As prescribed by 23.1.7, insert the following clause, or one substantially similar to, in solicitations and contracts:

##### **KEY PERSONNEL (SEP 1998)**

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)*

(End of clause)

#### 35.2.279 Clause 23-3 Unauthorized Reproduction or Use of Computer Software

As prescribed in 23.2.1, insert the following clause, or one substantially similar to, in solicitations and contracts:

##### **UNAUTHORIZED REPRODUCTION OR USE OF COMPUTER SOFTWARE (MAR 2018)**

The contractor shall hold Bonneville 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)

#### 35.2.280 Clause 23-4 [Reserved]

#### 35.2.281 Clause 23-5 Nondisplacement of Qualified Workers

As prescribed in 23.1.8.2, insert the following clause in solicitations and contracts:

##### **NONDISPLACEMENT OF QUALIFIED WORKERS (OCT 2014)**

- (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 Labor Standards statute, 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](mailto: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 \$150,000 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)

35.2.282 Clause 23-6 [Reserved]

35.2.283 Clause 24-1 Dismantling and Demolition of Property

As prescribed in 24.5.1, insert the following clause in solicitations and contracts:

**DISMANTLING AND DEMOLITION OF PROPERTY (MAR 2018)**

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 Bonneville. The title shall vest in the Contractor immediately upon Bonneville's issuing the notice of award, or if a performance bond is to be furnished after award, upon Bonneville's issuance of a notice to proceed with the work. Bonneville shall not be responsible for the condition of, or any loss or damage to, the property.

(End of clause)

35.2.284 Clause 24-2 Liquidated Damages - Construction

As prescribed in 24.5.2, insert the following clause in solicitations and contracts:

**LIQUIDATED DAMAGES - CONSTRUCTION (MAR 2018)**

- (a) If the Contractor fails to complete the work within the time specified in the contract the Contractor shall pay to Bonneville in the amount of \$\_\_\_\_\_ [CO fill in] for each calendar day of delay until the work is completed or accepted.
- (b) If Bonneville terminates the Contractor's right to proceed, liquidated damages will continue to accrue until the work is completed. These liquidated damages are in addition to excess costs of repurchase under the Termination clause.

(End of clause)

35.2.285 Clause 24-3 Site Investigation and Conditions Affecting the Work

As prescribed in 24.5.3, insert the following clause in solicitations and contracts:

**SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 2024)**

- (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 (1) 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. For Progressive Design-Build delivery (PDB) contracts, this task shall occur during Phases 1 and 2. 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 Bonneville, 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 Bonneville. For Progressive Design-Build (PDB) contracts, submission of the CGMP Proposal/GMP Proposal to Bonneville constitutes a representation by the Contractor that the investigation required in this subsection has been made.

- (b) Bonneville assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by Bonneville. Nor does Bonneville 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)

#### 35.2.286 Clause 24-4 Physical Data

As prescribed in 24.5.4, insert the following clause in solicitations and contracts:

##### **PHYSICAL DATA (FEB 2020)**

Data and information furnished or referred to is for the Contractor's information. Bonneville shall not be responsible for any interpretation of or conclusion drawn from the data or information made available to the Contractor. Further, Bonneville specifically does not warrant construction methodology which may be included in such documents.

(End of clause)

#### 35.2.287 Clause 24-5 Preconstruction Conference

As prescribed in 24.5.5, insert the following clause in solicitations and contracts:

##### **PRECONSTRUCTION CONFERENCE (MAR 2018)**

The successful offeror will be required to attend a pre-construction conference at a site. If the Contracting Officer decides to conduct a preconstruction conference, the successful offeror will be notified and will be required to attend. The Contracting Officer's notification will include specific details regarding the date, time, and location of the conference, any need for attendance by subcontractors, and information regarding the items to be discussed.

(End of clause)

#### 35.2.288 Clause 24-6 Schedules for Construction Contracts

As prescribed in 24.5.6, insert the following clause in solicitations and contracts:

##### **SCHEDULES FOR CONSTRUCTION CONTRACTS (SEP 1998)**

- (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, Bonneville may withhold approval of progress payments until the Contractor submits the required schedule.

- (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 approved schedule, the Contractor shall take the steps necessary to improve its progress, including those that may be required by the CO, without additional cost to Bonneville. In this circumstance, the CO may require the Contractor to implement such things as increasing the number of shifts, overtime, days of work, and/or the amount of construction plant and to submit for approval any supplementary schedule or schedules in chart form as the CO deems necessary to demonstrate how the rate of progress 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 CO 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)

#### 35.2.289 Clause 24-7 Differing Site Conditions

As prescribed in 24.5.7, insert the following clause in solicitations and contracts:

#### **DIFFERING SITE CONDITIONS (APR 2024)**

- (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer (CO) 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) Bonneville shall investigate the site conditions promptly after receiving the notice. If the CO 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 paragraph (a) of this clause for giving written notice may be extended by the CO.
- (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.
- (e) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if the differing site conditions could have been discovered with reasonable diligence (during Phases 1 and 2 for Progressive Design-Build contracts), and

notification of the Differing Site Condition was not included with the Site Conditions Report (required with the CGMP Proposal/GMP Proposal).

(End of clause)

#### 35.2.290 Clause 24-8 Layout of Work

As prescribed in 24.5.8, insert the following clause in solicitations and contracts:

#### **LAYOUT OF WORK (MAR 2018)**

The Contractor shall lay out its work from Bonneville-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 (CO). The Contractor shall also be responsible for maintaining and preserving all stakes and other marks established by the CO until authorized to remove them. If such marks are destroyed by the Contractor or through its negligence before their removal is authorized, the CO may replace them and deduct the expense of the replacement from any amounts due or to become due to the Contractor.

(End of clause)

#### 35.2.291 Clause 24-9 Specifications, Drawings, and Material Submittals for Construction

As prescribed in 24.5.9, insert the following clause, or one substantially similar to, in solicitations and contracts:

#### **SPECIFICATIONS, DRAWINGS AND MATERIAL SUBMITTALS FOR CONSTRUCTION (MAR 2018)**

- (a) The Contractor shall keep on the work site a copy of the drawings and specifications and shall at all times give the Contracting Officer (CO) access thereto. 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 CO, 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 CO 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) Standard Details or Specification Drawings are applicable when listed, bound with the specifications, noted on the drawings, or referenced elsewhere in the specification. Where the notes on the drawings indicate modifications, such modifications shall govern. In the case of difference between Standard Details or Specification Drawings and the specifications, the specifications will govern. In case of difference between the Standard Details or Specification Drawings and the drawings prepared specifically for this contract, the later shall govern.
- (e) 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.
- (f) The Contractor shall check all drawings furnished by Bonneville prior to starting work and shall promptly notify the CO 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. Schedules on any contract drawing shall take precedence over conflicting information on that or any other contract drawing. On any of the drawings where a portion of the work is detailed or drawn out and the remainder is shown in outline, the parts detailed or drawn out shall apply also to other like portions of the work. 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.
- (g) Shop drawings means drawings submitted to Bonneville 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. Bonneville may duplicate, use, and disclose in any manner and for any purpose shop drawings delivered under this contract.
- (h) 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 the CO without evidence of the Contractor's approval may be returned for resubmission. The Contracting Officer's Representative will indicate an approval or disapproval of the submittal, and if not approved as submitted, shall indicate Bonneville's reasons therefor. Any work done before such approval shall be at the Contractor's risk. Approval by the CO, or by 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 paragraph (i) below.
- (i) 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. If the CO approves any such variation, the CO 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.
- (j) Unless otherwise provided in this contract, or otherwise directed by the CO, shop drawings, coordination drawings and schedules shall be submitted to the CO, with a transmittal letter, sufficiently in advance of construction requirements to permit no less than 10 working days for checking and appropriate action.

- (k) The Contractor shall submit to the CO for approval four (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 CO and one set will be returned to the Contractor.
- (l) This clause shall be included in all subcontracts at any tier.

(End of clause)

*Alternate I (Mar 2018).* When record shop drawings are required and reproducible shop drawings are needed, the CO may add the following sentence to paragraph (i) of the basic clause:

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.

*Alternate II (Mar 2018).* When record shop drawings are required and reproducible shop drawings are not needed, the CO may add the following sentences to paragraph (h) of the basic clause:

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.

#### 35.2.292 Provision 24-10 Price Data Sheet

As prescribed in 24.5.10, insert the following provision in solicitations:

#### **PRICE DATA SHEET (MAR 2018)**

If offer is accepted, this data provided on the Price Data Sheet may be used to compute progress payments. The quantities shown are estimated and may not represent the actual quantities required to accomplish the contract work. Since this is a fixed-price type contract, a price adjustment will not be made if actual quantities differ from estimated quantities.

(End of clause)

#### 35.2.293 Clause 24-11 Working Hours – Construction

As prescribed in 24.5.11, insert a clause in solicitations and contracts substantially the same as follows:

#### **WORKING HOURS – CONSTRUCTION (FEB 2020)**

- (a) All site work (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 (CO).
- (b) Application for varying working hours shall be submitted sufficiently in advance to enable the CO to determine the desirability of allowing such performance, to determine if equitable adjustment to the contract must be made (to reimburse Bonneville for additional inspection or other costs) and to enable arrangements to be made for inspecting the work during those times.

- (c) If the contractor works outside the hours shown in paragraph (a) above, and the Government incurs additional inspection costs as a result, the contractor shall reimburse the Government as follows:
- (1) Outside normal hours, during the normal work week, \$177 per hour, per inspector.
  - (2) Outside normal work week (except Federal Holidays), \$177 per hour, plus per diem rate (if applicable) of \$257 for each additional day, per inspector.
  - (3) Federal Holidays \$177 per hour, plus per diem (if applicable), per inspector.

(End of clause)

#### 35.2.294 Clause 24-12 Radio Information

As prescribed in 24.5.12, insert a clause in solicitations and contracts:

#### **RADIO INFORMATION (FEB 2020)**

- (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:
- (1) Bonneville 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 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)

#### 35.2.295 Clause 24-13 Material and Workmanship

As prescribed in 24.5.13, insert the following clause in solicitations and contracts:

#### **MATERIAL AND WORKMANSHIP (MAR 2018)**

- (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. Reference in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgement of the Contracting Officer (CO), is equal to that named in the specifications, unless otherwise specifically provided in this contract.

- (b) The Contractor shall obtain the CO's approval of the machinery and mechanical and other equipment to be incorporated into the work. When requesting approval, the Contractor shall furnish to the CO the name of the manufacturer, the model number, and other information concerning the performance, capacity, nature, and rating of the machinery and mechanical and other equipment. When required by this contract or by the CO, the Contractor shall also obtain the CO's approval of the material or articles which the Contractor contemplates incorporating into the work. When requesting approval, the Contractor shall provide full information concerning the material or articles. When directed to do so, the Contractor shall submit samples for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles that do not have the required approval shall be installed or used at the risk of subsequent rejection.
- (c) All work under this contract shall be performed in a skillful and workmanlike manner. The CO may require, in writing, that the Contractor remove from the work any employee the CO deems incompetent, unsafe, or otherwise objectionable.

(End of clause)

*Alternate 1 (Mar 2018).* When equivalent materials are not allowable, the CO may substitute the following paragraph (a) for paragraph (a) of the basic clause:

- (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.

#### 35.2.296 Clause 24-14 Superintendence by the Contractor

As prescribed in 24.5.14, insert the following clause in solicitations and contracts:

#### **SUPERINTENDENCE BY THE CONTRACTOR (MAR 2018)**

- (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)

#### 35.2.297 Clause 24-15 Permits and Responsibilities

As prescribed in 24.5.15, insert the following clause in solicitations and contracts:

#### **PERMITS AND RESPONSIBILITIES (MAR 2018)**

The Contractor shall, without additional expense to Bonneville, 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. The Contractor is responsible for 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)

#### 35.2.298 Clause 24-16 Other Contracts

As prescribed in 24.5.16, insert the following clause in solicitations and contracts:

##### **OTHER CONTRACTS (MAR 2018)**

Bonneville may undertake or award other contracts for additional work, or may utilize in-house construction forces, at or near the site of the work under this contract. The Contractor shall fully cooperate with the other contractors and with Bonneville employees, and shall 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 Bonneville employees.

(End of clause)

#### 35.2.299 Clause 24-17 Operations and Storage Areas

As prescribed in 24.5.17, insert a clause in solicitations and contracts substantially the same as follows:

##### **OPERATIONS AND STORAGE AREAS (MAR2018)**

- (a) The Contractor shall confine all operations (including storage of materials) on Bonneville premises to areas authorized or approved by the Contracting Officer (CO) or his or her representative. The Contractor shall hold and save the Government, its officers, and agents, free and harmless from liability of any nature occasioned by the Contractor's performance.
- (b) Temporary buildings (e.g., storage sheds, shops, offices) and utilities may be erected by the Contractor only with the approval of the CO, and shall be built with labor and materials furnished by the Contractor without expense to Bonneville. 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 CO, the buildings and utilities may be abandoned and need not be removed.
- (c) The Contractor shall use only established roadways, or use temporary roadways constructed by the Contractor when and as authorized by the CO. When materials are transported in prosecuting the work, vehicles shall not be loaded beyond the loading capacity recommended by the manufacturer of the vehicle or prescribed by any Federal, State, or local law or regulation. When it is necessary to cross curbs or sidewalks, the Contractor shall protect them from damage. The Contractor shall repair or pay for the repair of any damaged curbs, sidewalks, or roads.

(End of clause)

#### 35.2.300 Clause 24-18 Use and Possession Prior to Completion

As prescribed in 24.5.18, insert the following clause in solicitations and contracts:

**USE AND POSSESSION PRIOR TO COMPLETION (MAR 2018)**

- (a) Bonneville 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 (CO) shall furnish the Contractor a list of items of work remaining to be performed or corrected on those portions of the work that Bonneville intends to take possession of or use. However, failure of the CO to list any item of work shall not relieve the Contractor of responsibility for complying with the terms of the contract. Bonneville's possession or use shall not be deemed an acceptance of any work under the contract.
- (b) While Bonneville has such possession or use, the Contractor shall be relieved of the responsibility for the loss or damage to the work resulting from Bonneville's possession or use, notwithstanding the terms of the clause in this contract entitled "Permits and Responsibilities". If prior possession or use by Bonneville 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)

35.2.301 Clause 24-19 Cleaning Up

As prescribed in 24.5.19, insert a clause in solicitations and contracts:

**CLEANING UP (MAR 2018)**

- (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 Bonneville. 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 recycler or disposal site.

(End of clause)

35.2.302 Clause 24-20 Availability and Use of Utility Services

As prescribed in 24.5.20, insert a clause in solicitations and contracts substantially the same as follows:

**AVAILABILITY AND USE OF UTILITY SERVICES (SEP 1998)**

- (a) Bonneville 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 Contracting Officer, 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 Bonneville, the Contractor shall remove all the temporary connections, distribution lines, meters, and associated paraphernalia.



(End of clause)

### 35.2.303 Clause 24-21 Road Maintenance

As prescribed in 24.5.21, insert the following clause in solicitations and contracts:

#### **ROAD MAINTENANCE (SEP 1998)**

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)

### 35.2.304 Clause 24-22 Use of Land for Storage and Offices

As prescribed in 24.5.22, insert a clause in solicitations and contracts substantially the same as follows:

#### **USE OF LAND FOR STORAGE AND OFFICES (SEP 1998)**

(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:
- (2) Name of landowner.
- (3) Location of land.
- (4) Purpose, terms, and duration of agreement.
- (5) Signatures of landowners and Contractor and dates signed.
- (6) A signed copy of the agreement shall be furnished to the Contracting Officer prior to use of such land.
- (7) The Contractor shall assume all liability for damages and interference with any part of the contract or other Bonneville work due to such use of private land.

(End of clause)

### 35.2.305 Clause 24-23 Use of Explosives

As prescribed in 24.5.23, insert the following clause in solicitations and contracts:

#### **USE OF EXPLOSIVES (SEP 1998)**

(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)

### 35.2.306 Clause 24-24 Contractor's Daily Report

As prescribed in 24.5.24, insert a clause in solicitations and contracts substantially the same as follows:

#### **CONTRACTOR'S DAILY REPORT (MAR 2018)**

The Contractor is required to submit a "Daily Report to Inspector," Bonneville Form 6410.11. The form shall be completed daily and delivered to the designated Bonneville Contracting Officer's Representative or Field Inspector. Information to be reported on the form 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)

### 35.2.307 Clause 24-25 Field Contract Modification

As prescribed in 24.5.25, the CO may insert the following clause in solicitations and contracts:

#### **FIELD CONTRACT MODIFICATION (FEB 2022)**

- (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 individual changes that do not exceed \$10,000. Additionally, when multiple changes are issued under this authority they are limited to no more than 5% of the original award or no more than \$50,000. Any priced changes above \$10,000 and/or aggregate changes exceeding 5% of original contract award of \$50,000, shall be submitted to the contracting officer for further action. No additional field modifications may be issued under this authority until all previous field modifications have been officially incorporated into the contract by the contracting officer.
- (b) Prior to authorizing a field modification, the COR shall confirm that sufficient funds are available to support any priced changes.

- (c) All field modifications must be submitted to the contracting officer within ten (10) days of its execution for final incorporation into the contract.
- (d) 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 Bonneville individuals, besides the Contracting Officer, authorized to execute such modifications is the Contracting Officer's Representative.
- (e) 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)

#### 35.2.308 Clause 24-26 Oral Modification

As prescribed in 24.5.26, the CO may insert the following clause in solicitations and contracts:

#### **ORAL MODIFICATION (SEP 1998)**

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)

#### 35.2.309 Clause 24-27 Equipment Cost Allowances

As prescribed in 24.5.27, the CO may insert the following clause in solicitations and contracts:

#### **EQUIPMENT COST ALLOWANCES (APR 2024)**

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:
    - (i) 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 EquipmentWatch 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.
    - (ii) 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.
    - (iii) 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.

- (iv) 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:
- (i) 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 EquipmentWatch 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.
  - (ii) 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.
  - (iii) 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.
  - (iv) Payment for equipment placed on standby will be limited to forty (40) hours per week (combined operated and standby hours).
- (b) Rented Equipment:
- (1) Operated Equipment:
- (i) 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.
  - (ii) 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.
  - (iii) 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:
- (i) 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.
  - (ii) 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)(ii) 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.

<b>Chart No. 1 – Summary of Allowable Costs</b>			
	Normal Working Hours	Excess Working Hours	Standby Hours
Owned Equipment	Ownership Cost plus Overhaul Cost plus Operating Costs	½ Ownership Cost plus ½ Overhaul Cost plus Operating Costs	½ Ownership Cost plus ½ Overhaul Cost, but No Operating Costs
Rented Equipment	Hourly Rental Cost* plus Operating Costs	Operating Costs Only	Hourly Rental Cost* Only
*Hourly Rental Cost = Invoice Cost divided by Normal Contractor Working Hours** in the Period			
**Normal Contractor Working Hours			
	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)

35.2.310 Clause 24-28 Quantity Surveys

As prescribed in 24.5.28, the CO may insert the following clause in solicitations and contracts:

**QUANTITY SURVEYS (MAR 2018)**

- (a) Quantity surveys shall be conducted, and the data derived from these surveys shall be used in computing the quantities of work performed and the actual construction completed and in place.

- (b) The Government shall conduct the original and final surveys and make the computations based on them. The Contractor shall conduct the surveys for any periods for which progress payments are requested and shall make the computations based on these surveys. All surveys conducted by the Contractor shall be conducted under the direction of a representative of the Contracting Officer (CO), unless the CO waives this requirement in a specific instance.
- (c) Promptly upon completing a survey, the Contractor shall furnish the originals of all field notes and all other records relating to the survey or to the layout of the work to the CO, who shall use them as necessary to determine the amount of progress payments. The Contractor shall retain copies of all such material furnished to the CO.

(End of clause)

*Alternate 1 (Mar 2018).* If it is determined at a level above that of the CO that it is impracticable for Government personnel to perform the original and final surveys, and Bonneville wishes the Contractor to perform these surveys, substitute the following paragraph (b) for paragraph (b) of the basic clause:

- (b) The Contractor shall conduct the original and final surveys and surveys for any periods for which progress payments are requested. All these surveys shall be conducted under the direction of a representative of the Contracting Officer (CO), unless the CO waives this requirement in a specific instance. The Government shall make such computations as are necessary to determine the quantities of work performed or finally in place. The Contractor shall make the computations based on the surveys for any periods for which progress payments are requested.

#### 35.2.311 Clause 24-29 Work Oversight in Cost-Reimbursement Construction

As prescribed in 24.5.29, insert the following clause in solicitations and contracts when cost-reimbursement construction contracts are contemplated.

#### **WORK OVERSIGHT IN COST-REIMBURSEMENT CONSTRUCTION CONTRACTS (MAR 2018)**

The extent and character of the work to be done by the Contractor shall be subject to the general supervision, direction, control, and approval of the Contracting Officer.

(End of clause)

#### 35.2.312 Clause 24-30 Organization and Direction of the Work

As prescribed in 24.5.30, insert the following clause in solicitations and contracts, when a cost-reimbursement construction contract is contemplated.

#### **ORGANIZATION AND DIRECTION OF THE WORK (MAR 2018)**

- (a) When this contract is executed, the Contractor shall submit to the Contracting Officer (CO) a chart showing the general executive and administrative organization, the personnel to be employed in connection with the work under this contract, and their respective duties. The Contractor shall keep the data furnished current by supplementing it as additional information becomes available.
- (b) Work performance under this contract shall be under the full-time resident direction of (1) the Contractor, if the Contractor is an individual; (2) one or more principal partners, if the

Contractor is a partnership; or (3) one or more senior officers, if Contractor is a corporation, association, or similar legal entity. However, if the CO approves, the Contractor may be represented in the direction of the work by a specific person or persons holding positions other than those identified in this paragraph.

(End of clause)

### 35.2.313 Provision 24-31 Preparation of Proposals – Construction

As prescribed in 24.5.31, insert the following provision in solicitations for construction:

#### **PREPARATION OF PROPOSALS - CONSTRUCTION (MAR 2018)**

- (a) Proposals must be (1) submitted on the forms furnished by Bonneville or on copies of those forms, and (2) electronically or manually signed. The person signing a proposal must initial each erasure or change appearing on any proposal form.
- (b) The proposal form may require offerors to submit proposed prices for one or more items on various bases, including –
  - (1) Lump sum prices;
  - (2) Alternate prices;
  - (3) Units of construction; or
  - (4) Any combination of paragraphs (b)(1) through (b)(3) of this provision.
- (c) If the solicitation requires submission of a proposal on all items, failure to do so may result in the proposal being rejected without further consideration. If a proposal on all items is not required, offerors should insert the words “no proposal” in the space provided for any item on which no price is submitted.
- (d) Alternate proposals will not be considered unless this solicitation authorizes their submission.

(End of provision)

### 35.2.314 Provision 24-32 Magnitude of Requirement

As prescribed in 24.5.32, insert the following provision in solicitations for construction:

#### **MAGNITUDE OF REQUIREMENT (FEB 2020)**

Bonneville Power Administration’s estimated price range of this project is stated in form 4220.52e.

(End of provision)

### 35.2.315 Clause 24-33 Use of Equipment by the Government

As prescribed in 24.5.33, insert the following clause in solicitation and contracts for construction:

#### **USE OF EQUIPMENT BY THE GOVERNMENT (MAR 2018)**

- (a) Bonneville may take over and operate, with Government employees, such equipment as is necessary for heating or cooling such areas of the building as require the service as soon as the installation is sufficiently complete.
- (b) The Contracting Officer will advise the Contractor by letter, prior to the use of equipment, which items of equipment will be operated, and the date and time such operation will begin.

- (c) Government operation of equipment will not relieve the Contractor of the one-year guarantee on materials and workmanship elsewhere provided for in this contract.
- (d) The guarantee period, elsewhere provided for in this contract, for each piece of equipment shall be in accordance with the “Guarantees” clause of this contract.

(End of clause)

#### 35.2.316 Clause 24-34 Subcontracts – Construction

As prescribed in 24.5.34, insert the following clause in solicitation and contracts for construction:

#### **SUBCONTRACTS – CONSTRUCTION (MAR 2018)**

- (a) Nothing contained in the contract shall be construed as creating any contractual relationship between any subcontractor and Bonneville. The divisions or sections of the specifications are not intended to control the Contractor in dividing the work among subcontractors, or to limit the work performed by any trade.
- (b) The Contractor shall be responsible to Bonneville for acts and omissions of his own employees and of subcontractors and their employees. He shall also be responsible for the coordination of the work of the trades, subcontractors, and suppliers.
- (c) Bonneville will not undertake to settle any differences between or among the Contractor, subcontractors, or suppliers.

(End of clause)

*Alternate I (Mar 2018).* If the contract performance involves the management of handling hazardous waste, add the following paragraph (d):

- (d) If the subcontract is for the management or handling or management of –
  - (1) Hazardous or toxic wastes, before work may begin, Bonneville must receive:
    - (i) A copy of EPA Notification of Hazardous Waste Activity (EPA form 8700-12) or equivalent); and
    - (ii) An acknowledgment of the notification filing (EPA form 8700-12A or equivalent).
  - (2) PCBs, before work may begin, Bonneville must receive:
    - (i) A copy of EPA Notification of PCB Activity (EPA form 7710-53 or equivalent), and
    - (ii) An acknowledgment of the filing (a letter from EPA). The acknowledgment from EPA will include the EPA identification number assigned.

#### 35.2.317 Clause 24-35 Time Extensions

As prescribed in 24.5.2(b), insert the following clause in solicitations and contracts for construction which include the clause 24-2.

#### **TIME EXTENSIONS (MAR 2018)**

Time extensions for contract changes will depend upon the extent, if any, by which the changes cause delay in the completion of the various elements of construction. The change order granting the time extension may provide that the contract completion date will be extended only for those specific elements related to the changed work and that the remaining contract completion dates for all other portions of the work will not be altered. The change order also may provide an equitable readjustment of liquidated damages under the new completion schedule.

(End of clause)



35.2.318 Clause 24-36 Site Visit – Construction

As prescribed in 24.5.35, insert the provision substantially the same as the following:

**SITE VISIT - CONSTRUCTION (FEB 2020)**

- (a) The clauses 24-3, Site Investigations and Conditions Affecting the Work, and 24-7, Differing Site Conditions, will be included in any contract awarded as a result of this solicitation. Accordingly, offerors are urged and expected to inspect the site where the work will be performed.
- (b) Site visits may be arranged during normal duty hours by contacting the Contracting Officer.

(End of provision)

*Alternate I (Mar 2018).* If an organized site visit will be conducted, substitute a paragraph substantially the same as the following for paragraph (b) of the basic provision, and add paragraph (c):

- (b) An organized site visit has been scheduled for—

---

[CO insert date and time]

- (c) Participants will meet at—

---

[CO insert location]

35.2.319 Clause 24-37 Responsibility of the Architect-Engineer Contractor

As prescribed in 24.6.8.1, insert the following clause:

**RESPONSIBILITY OF THE ARCHITECT-ENGINEER CONTRACTOR (MAR 2018)**

- (a) The Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the Contractor under this contract. The Contractor shall, without additional compensation, correct or revise any errors or deficiencies in its designs, drawings, specifications, and other services.
- (b) Neither Bonneville’s review, approval or acceptance of, nor payment for, the services required under this contract shall be construed to operate as a waiver of any rights under this contract or of any cause of action arising out of the performance of this contract, and the Contractor shall be and remain liable to Bonneville in accordance with applicable law for all damages to Bonneville caused by the Contractor’s negligent performance of any of the services furnished under this contract.
- (c) The rights and remedies of Bonneville provided for under this contract are in addition to any other rights and remedies provided by law.
- (d) If the Contractor is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

(End of clause)

35.2.320 Clause 24-38 Work Oversight in Architect-Engineer Contracts

As prescribed in 24.6.8.2, insert the following clause:

**WORK OVERSIGHT IN ARCHITECT-ENGINEER CONTRACTS (MAR 2018)**

The extent and character of the work to be done by the Contractor shall be subject to the general oversight, supervision, direction, control, and approval of the Contracting Officer.

(End of clause)

35.2.321 Clause 24-39 Requirements for Registration of Designers

As prescribed in 24.6.8.3, insert the following clause:

**REQUIREMENTS FOR REGISTRATION OF DESIGNERS (MAR 2018)**

Architects or engineers registered to practice in the particular professional field involved in a State, the District of Columbia, or an outlying area of the United States shall prepare or review and approve the design of architectural, structural, mechanical, electrical, civil, or other engineering features of the work.

(End of clause)

35.2.322 Clause 24-40 Option for Supervision and Inspection Services

As prescribed in 24.6.8.4, insert the following clause:

**OPTION FOR SUPERVISION AND INSPECTION SERVICES (FEB 2020)**

- (a) Bonneville may –
- (1) At its option, direct the Contractor to perform any part or all of the supervision and inspection services as provided in this contract; and
  - (2) Exercise its option, by written order, at any time prior to six months after satisfactory completion and acceptance of the work under this contract.
- (b) Upon receipt of the Contracting Officer's written order, the Contractor shall proceed with the supervision and inspection services.

(End of clause)

35.2.323 Clause 24-41 Subcontractor – Architect-Engineer Services

As prescribed in 24.6.8.5, insert the following clause:

**SUBCONTRACTORS – ARCHITECT-ENGINEER SERVICES (MAR 2018)**

Any subcontractors and outside associates or consultants required by the Contractor in connection with the services covered by the contract will be limited to individuals or firms that were specifically identified and agreed to during negotiations. The Contractor shall obtain the Contracting Officer's written consent before making any substitution for these subcontractors, associates, or consultants.

(End of clause)

35.2.324 Clause 24-42 Authorized Purchaser – Construction

As prescribed in 24.6.8.6, insert the following clause Authorized Purchaser in BPA contracts/agreements if a contractor (including EPC contractors) may order materials using a Bonneville contract (s) or agreement (s):

**AUTHORIZED PURCHASER – CONSTRUCTION (FEB 2020)**

- (a) The following definitions apply to this contract:
  - (1) Authorized Purchaser: An independent individual or company authorized in writing by the Bonneville Contracting Officer to make purchases on behalf of Bonneville under the terms and conditions of a Bonneville contract.
  - (2) Supplier: A Bonneville contractor providing materials and equipment for Bonneville projects.
- (b) The Contractor is an Authorized Purchaser.
- (c) The materials and equipment Supplier will honor and accept orders from the Contractor as if ordered directly by the Bonneville Contracting Officer.
  - (1) The terms and conditions of the Supply contract flow down to the Contractor.
  - (2) The Contractor will transfer all remaining warranties to Bonneville after the Construction Warranty (Clause 18-12) or Warranty (28-11) period ends.
- (d) The Supplier will only honor orders placed by the Contractor for work identified as Bonneville project materials that reference the specific Supply contract by number and title.
- (e) The Contractor is responsible for all logistics related activities such as ordering, receiving, transportation, and payment.
- (f) If the Supplier and the Contractor have a conflict they cannot resolve, the Contractor must immediately notify the Contracting Officer for resolution. If a conflict cannot be readily resolved, the Contracting Officer may direct the Contractor to continue performance pending resolution.
- (g) The Contractor will provide a record of all purchases made from the Supplier at the close of the contract.

(End of clause)

35.2.325 Clause 24-43 Progressive Design Build

As prescribed in 24.7.5 insert the following clause:

**PROGRESSIVE DESIGN BUILD (APR 2024)**

(a) PHASE 1 SERVICES

- (1) Task Order. The Owner will issue a Task Order that will include a preliminary list of Task Order Projects, a preliminary budget for the Task Order, and a Task Order Schedule of Items. The Task Order Schedule of Items shall be adjusted with the Initial Phase 1 Deliverables. Each Task Order Project shall be assigned a Work Order against which Design-Builder may charge for the costs associated with the Task Order Project, consistent with the Contract Documents.
- (2) Initial Phase 1 Deliverables. At the time set forth in the Task Order Schedule of Items, the parties shall provide the Initial Phase 1 Deliverables, which shall include the deliverables set forth in the Statement of Work and, at a minimum, shall include the scope and budget for each Task Order Project.

- (3) Scope of Work for Phase 1. Phase 1 shall commence upon a written Notice to Proceed from the Owner and shall end on Phase 1 Completion Date set forth in the Task Order Schedule of Items. The services to be provided by the Design Builder during Phase 1 are set forth in the Statement of Work.
- (4) Phase 1 Component Guaranteed Maximum Price (CGMP). Design Builder guarantees that during Phase 1, Design Builder's Compensation shall not exceed Phase 1 CGMP set forth in the Task Order Schedule of Items. Design Builder agrees that it will be responsible for paying all costs of completing Phase 1 Work which exceed Phase 1 CGMP and shall not seek reimbursement from the Owner for any costs that exceed Phase 1 CGMP, as adjusted in accordance with the Contract Documents including by written Change Order. Any unused amount of the Phase 1 CGMP may be reallocated to subsequent phases of the same Work Order.
- (5) Design Builder's Phase 1 Compensation. Design Builder's compensation for Work performed in Phase 1 shall consist of the following:
  - (i) The Cost of the Work set forth in Clause 7-104 for Work performed in Phase 1;
  - (ii) The Design-Builder's Fee; and
  - (iii) Insurance, Taxes, and Bonding Costs as applicable.
- (6) Phase 1 Deliverables. At the conclusion of Phase 1 for each Task Order, Bonneville and the Design-Builder will collaboratively develop the deliverables set forth in the Statement of Work. The deliverables will include the following information, unless the parties agree in writing otherwise:
  - (i) The Phase 2 CGMP;
  - (ii) The Phase 2 Schedule;
  - (iii) The Task Order Project Phase Sequencing Plan;
  - (iv) The revised Owner Project Requirements;
  - (v) A description of each Task Order Project included within the Task Order;
  - (vi) The Phase 1 deliverables set forth in the Statement of Work.
  - (vii) Draft Schedule of Items
- (7) Multiple Task Order and Project Phases. Multiple Task Orders may be issued under this Agreement. Task Orders will authorize work that may be performed under four distinct Phases. For each approved Task Order for which the Owner issues a Task Order Modification authorizing Phase 2 services, the parties will follow the process for Phase 2 as set forth below. Task Orders may authorize Work on one or more projects.

(b) PHASE 2 SERVICES

- (1) Scope of Work for Phase 2. Phase 2 shall commence when the Owner at its sole discretion, modifies the Task Order to enter into Phase 2 services. Phase 2 shall end on the Phase 2 Completion Date or Dates as determined by the parties in the applicable Task Order Project Phase Sequencing Plan. The services to be provided by the Design Builder during Phase 2 are set forth in the Statement of Work. Design-Builder shall not proceed with any Phase 2 Work without a fully executed Phase 2 Contract Modification or verbal authorization from the CO.

- (2) Phase 2 Component Guaranteed Maximum Price (CGMP). Design Builder guarantees that during Phase 2, Design Builder's Compensation shall not exceed the Phase 2 CGMP. Design Builder agrees that it will be responsible for paying all costs of completing Phase 2 Work which exceed the Phase 2 CGMP and shall not seek reimbursement from the Owner for any costs that exceed the Phase 2 CGMP, as adjusted in accordance with the Contract Documents including by written Change Order.
- (3) Design Builder's Phase 2 Compensation. Design Builder's compensation for Work performed in Phase 2 shall consist of the following:
- (i) The Cost of the Work set forth in Clause 7-104 for Work performed in Phase 2;
  - (ii) The Design-Builder's Fee; and
  - (iii) Insurance, Taxes, and bonding costs, as applicable.
- (4) Guaranteed Maximum Price (GMP) Proposal. At the conclusion of Phase 2, the Design Builder will submit a Phase 3 GMP Proposal pursuant to the requirements set forth in the Statement of Work. The GMP Proposal will either be for the Task Order as a whole, for Task Order Projects in specified bundles, or for each Task Order Project separately, as determined in the Task Order Project Phase Sequencing Plan, as modified. Unless the Parties agree otherwise, the GMP Proposal shall include the cost of completing all remaining Work in the Task Order or in the Task Order Projects, as applicable, up to and including Construction Completion and Final Completion of the Task Order or the Task Order Projects, as applicable, which shall include all compensation to the Design-Builder for Phases 3 and 4 of the Task Order or Task Order Projects, as applicable. The GMP shall be developed in collaboration with Bonneville with full transparency and consistent with the requirements in the Statement of Work. At a minimum, the GMP shall be comprised of the following, as applicable for each Task Order/Project:
- (i) The Cost of the Work;
  - (ii) The Design-Builder's Fee;
  - (iii) The Design-Builder's Contingency broken down by:
    - (A) Design Development
    - (B) Escalation
    - (C) Design-Builder's Contingency
  - (iv) Insurance and Bonding; and
  - (v) The Basis of Design Documents;
  - (vi) A list of the assumptions and clarifications made by Design Builder in the preparation of the GMP Proposal, such assumptions and clarifications must be consistent with the Initial Basis of Design Documents, unless specifically noted otherwise;
  - (vii) The Final Schedule, including but not limited to the scheduled Substantial Completion Date and Milestone Dates upon which the proposed GMP are based
  - (viii) Updated Schedule of Values;
  - (ix) Draft conformed Schedule of Items
  - (x) Percentage of Self-Performed and subcontracted work;
  - (xi) If applicable, a description of Allowances and the estimated value of the Allowance;
  - (xii) If applicable, a schedule of Unit Prices;
  - (xiii) The scope of work and operations and maintenance requirements for Phase 4;
  - (xiv) The deliverables set forth in the Statement of Work; and
  - (xv) The time limit for the Owner to exercise its option to enter into Phase 3, such time limit shall not be less than 90 days.

(5) Owner's Decision to Enter into Phase 3

- (i) Owner Review and Comment. After submission of the GMP Proposal, Design Builder and Owner shall meet to discuss and review the GMP Proposal. The Owner shall make its best efforts to provide such comments within thirty (30) days of the Owner's receipt of the GMP Proposal, unless the Owner provides notification that it requires additional time for review. If Owner has any comments regarding the GMP Proposal or finds any inconsistencies or inaccuracies in the information presented, it shall give written notice to Design Builder of such comments or findings in a reasonably prompt manner. Design Builder shall, upon receipt of Owner's notice, make appropriate adjustments to the GMP Proposal. To assist in the Owner's review of the GMP Proposal, the Design Builder shall, upon the Owner's Request, provide all information, including but not limited to all data, reports, cost analysis, pricing, designs, and specifications on which the Design Builder relied or used as a basis for the GMP Proposal. The Owner shall make its best efforts to review any revised Task Order/Project Price Proposal within thirty (30) days of receipt of the revised GMP Proposal.
- (ii) Owner Issues Phases 3 & 4 Modification. The Owner, at its sole discretion, may modify the Task Order to enter into Phase 3 & 4 services for the Task Order or Task Order Project(s), as applicable.
- (A) If the Owner accepts the GMP Proposal, the parties shall enter into a Phase 3 Contract Modification. The total compensation paid to Design Builder for the applicable Task Order or Task Order Project(s) shall not exceed the GMP, as modified pursuant to this Contract.
- (B) The Owner may suggest changes to the GMP Proposal, whereupon, if such changes are accepted in writing by Design Builder, the GMP Proposal shall be deemed accepted and the Parties shall proceed in accordance with subsection (i) above.
- (C) The Design Builder shall not perform any Work after the submission of the GMP Proposal unless the Owner has fully executed the modification for Phase 3 & 4 services, or the Owner directs the Design Builder in writing to perform such Work and only to the extent that such Work is expressly described in the written consent.
- (iii) Owner Does Not Issue Phase 3 & 4 Modification. If Owner decides not to modify the Task Order to enter into Phase 3 & 4 and/or rejects the GMP Proposal, the GMP Proposal shall be deemed withdrawn and of no effect. In such event, Owner and Design Builder shall meet and confer as to how to proceed, with Owner having the following options:
- (A) Owner may authorize Design Builder to continue to proceed with the Work on the basis of reimbursement as provided in subsection (b)(3). above; however, Design Builder may not exceed any NTE or Lump Sum that may be established between the Parties associated with the applicable Task Order and/or Project, as applicable; or
- (B) Owner may elect not to issue the Phase 3 & 4 modification. In such case, the Design-Builder shall be compensated for the amount incurred pursuant to subsection (c) above for the applicable Task Order or Task Order Project, as applicable, as supported by Design-Builder's Invoices and subject to the applicable Phase 2 CGMP or FFP. The compensation set forth herein shall be the Design-Builder's sole compensation for the applicable Task Order/Project if the Owner elects not to issue the Phase 3 & 4 modification, and the Design Builder hereby agrees that it will not seek any other compensation, remedy or

damages of any kind whatsoever if the Owner elects not to issue the Phase 3 & 4 modification, for any Task Order and/or Task Order Project.

(c) PHASE 3 SERVICES

- (1) Commencement and Scope of Work. Phase 3 shall commence upon Design-Builder's receipt of a fully executed Phase 3 & 4 Contract Modification from the Owner and Design-Builder's delivery to Bonneville of a Performance and Payment Bonds for the amount of the GMP, as applicable, as required pursuant to this Contract. Phase 3 shall end on the Substantial Completion Date or Dates as determined by the parties in the applicable Phase 3 & 4 Contract Modification. The scope of Work for Phase 3 & 4 will be developed during Phase 2 and set forth in the Phase 3 & 4 Contract Modification, but it will, at a minimum, include the services set forth in the Statement of Work, including but not limited to the following:
  - (i) Completion of the design services and the development of Construction Documents for the Task Order/Project,
  - (ii) Performance and completion of construction Work of the Task Order/Project in accordance with the requirements of the Contract Documents; and
  - (iii) Any ongoing contractual obligations after Construction Completion, such as guarantees, warranty services, and/or obligations to provide insurance and indemnity to the Owner.
  
- (2) Task Order GMP. The Phase 3 & 4 Contract Modification shall establish a binding GMP between the Parties for the costs of completing the Phase 3 and 4 Work for the Task Order and/or Task Order Project, as applicable. Design Builder agrees that it will be responsible for paying all costs of completing the Phase 3 and 4 Work which exceed the GMP, as adjusted in accordance with the Contract Documents. Execution of the applicable Contract Modification constitutes Design Builder's representation and agreement to the following:
  - (i) The Task Order and/or Task Order Project is adequately defined, that the Basis of Design Documents are sufficiently defined to provide an accurate GMP;
  - (ii) The Task Order and/or Task Order Project is sufficiently clear and understandable for the Design Builder to perform the Work in accordance with the Contract Documents for an amount that will not exceed the applicable GMP and within the Task Order/Project Schedule; and
  - (iii) If the Work cannot be completed for the agreed GMP, any additional costs shall be the responsibility of the Design Builder, and Design Builder hereby assumes liability for such costs without reimbursement by the Owner.
  
- (3) Task Order/Project Schedule. The Substantial Completion, Construction Completion, and Final Completion Dates for Phase 3 and 4 for each Task Order and Task Order Project will be set forth in the applicable Phase 3 Contract Modification. By entering into the applicable Phase 3 Contract Modification, the Design-Builder makes the following representations:
  - (i) The time frame for completion of the Work presented in the Task Order/Project Schedule is sufficient time to complete the applicable Task Order or Task Order Project in accordance with the Phase 3 Contract Modification and the Contract Documents.

(ii) If the Design-Builder fails to achieve Substantial Completion by the date or dates set forth in the Phase 3 Contract Modification, the Design-Builder will pay liquidated damages in the amount set forth in the Contract and the Contract Modification as agreed compensation to the Owner for the cost of delay and not as a penalty.

(4) Design Builder’s Compensation. The Phase 3 & 4 Contract Modification shall establish whether the Task Order will be based on the GMP or converted to a Firm Fixed Price (FFP).

(i) If the Task Order Price is based on a GMP, the Design-Builder will be compensated for the following cost up to the GMP:

- (A) The Cost of the Work;
- (B) The Design-Builder’s Fee; and
- (C) Insurance, Taxes, and bonding costs, as applicable.
- (D) Payments will be made in accordance with Clause 22-3 Basis of Payment - Progress Payment.

(ii) If the GMP is converted into a Firm Fixed Price (FFP), the Design-Builder shall be compensated at a FFP as applicable. Payments will be made in accordance with Clause 22-2 Basis of Payment - Progress Payment (Construction Contracts).

(iii) The Design-Builder shall not be compensated in excess of a GMP, as modified pursuant to this Agreement. Any costs incurred in excess of a GMP shall be the responsibility of the Design Builder.

(d) PHASE 4 SERVICES

Commencement and Scope of Work. Phase 4 shall commence upon Substantial Completion of Phase 3 of each applicable Task Order and/or Task Order Project. The Phase 3 & 4 Modification shall consist of tasks required to achieve Construction Completion as set forth in the Statement of Work. Phase 3 & 4 shall end when the requirements set forth in the applicable Phase 3 Contract Modification are met. Phase 4 shall also include post construction services and shall begin no later than 10 months after Substantial Completion. The scope of the Phase 4 Services shall be set forth in the applicable Phase 3 & 4 Contract Modification for a specific Task Order/Project.

(e) DEFINITIONS AND GENERAL TERMS

(1) Definitions

Term	Definition
Allowances	A budget amount for those items for which there are unidentifiable risks, incomplete designs, or unknown conditions that have been estimated by the Design-Builder and are included in a GMP. If the final cost of an allowance item is more or less than the



	estimated amount, the Allowance may be increased or decreased by a commensurate amount with Bonneville’s approval.
Basis of Design Documents	The Basis of Design Documents are those documents that are set forth in a Contract Modification that establish the Scope of Work for Phase 3 of the Project for a Task Order and/or Task Order Project.
Bidding or Bids	As used in this contract to mean either RFQ (Quote), RFP (Proposal), and is NOT an Invitation For Bid (IFB) or Sealed Bids.
Buyout	Buyout is defined as the point in the project where the Design-Builder has executed all trade partner subcontracts.
Ceiling Price/Guaranteed Maximum Price	Shall mean the maximum cost for which the Design-Builder may be compensated for a specific Task Order or Project. Any costs that exceed an agreed on Ceiling Price shall be the responsibility of the Design-Builder. The Ceiling Price may also be referred to as the Guaranteed Maximum Price, “GMP”, or contract ceiling.
Component Guaranteed Maximum Price (CGMP) Proposal	A CGMP Proposal represents the scope and total costs for a discrete component of Work required to implement a Project. The CGMP Proposal may authorize performance of a complete Phase of a Project, or a discrete activity within a Phase. A CGMP Proposal may also be used to authorize the implementation of early construction work during Phase 2 of the Project. Examples of Work performed under a CGMP Proposal include the ordering or long-lead items or starting a particular phase of construction for which the risks are adequately identified and the scope of work is defined sufficiently for Bonneville and the Design-Builder to reasonably determine price. The CGMP Proposal shall include all the information required in the Contract Documents and represents the Design-Builder’s total compensation for the Scope of Work included in the CGMP Proposal. All CGMP Proposals will be conformed into the final Project GMP Proposal.
Construction Completion	Is the date when all of the construction Work for a Task Order/Project is completed and accepted by Bonneville and the deliverables required in the Scope of Work for the applicable Task Order/Project have been delivered and accepted by Bonneville. Construction Completion includes, but is not limited to final clean-up of the premises, completion of punch lists, delivery of warranty and all record documents, completion of inspections and acceptance pursuant to Sections 18-2, 18-3, and 18-5, and completion of all tasks set forth in the applicable Contract Modification for Construction Completion
Construction Documents	Construction Documents are the documents, consisting of Drawings and Specifications, to be prepared or assembled by the Design-Builder consistent with the Basis of Design Documents unless a deviation from the Basis of Design Documents (as applicable) is specifically set forth in a Change Order executed by both the Owner and Design-Builder, as part of the design review process contemplated by this Contract

Construction Packages	Is a portion of the construction Work, which will be performed after a Task Order GMP or Component GMP has been established. These Construction Packages generally occur in Phase 3 though can take place before that; see “Early Work Construction Packages”.
Contingency	An amount agreed upon by the Design-Builder and Bonneville and included within a Task Order/Project Price and consistent with Clause 7-104. In developing the Task Order/Project Price, the Design-Builder and Bonneville shall develop the Design-Builder’s Contingency collaboratively and in a transparent manner.
Contract	The Contract, including all Contract Documents and provisions incorporated in the Contract Documents or by reference, contain the entire agreement between the parties related to the specifications and terms of the project(s).
Contract Documents	Include the executed Contract and is inclusive of the Statement of Work, all Attachments, Task Orders and Amendments, GMP and CGMPs Proposals, and all reference documents.
Contract Price	Shall mean the cumulative value of all GMPs that are developed and agreed by the parties. The Contract Price is the total maximum cost of the work to design and construct the entire project. Design-Builder shall be responsible for all costs in excess of the Contract Price.
Contract Modification	A Contract Modification is a modification to the Contract entered into by the parties which may be at the conclusion of a Phase that establishes terms and conditions for the next phase, including but not limited to a Not to Exceed amount, the Basis of Design Documents, the GMP, the Project Schedule, and other terms agreed to by the parties. The Design-Builder may not proceed to the next phase of a Task Order or Task Order Project without a written Contract Modification signed by Bonneville.
Contract Terms	Contract Terms are any terms that establish the GMP or otherwise establish Design-Builder’s compensation. The Contract Terms also include any terms that establish a Completion Date.
Cost of the Work	The Cost of the Work are set forth in the PDB Cost Principles Clause 7-104. Notwithstanding anything to the contrary in 7-104. The Cost of the Work shall not include the Insurance, Bonding Costs or Taxes.
Design-Builder	A Contractor Bonneville has selected to provide design and construction services. All references in this contract to the Contractor shall mean the Design-Builder.
Design-Builder’s Contingency	An amount agreed upon by the Design-Builder and Bonneville and included within a Task Order GMP and consistent with Clause 7-103 and 7-104. In developing the GMP, the Design-Builder and Bonneville shall develop the Design-Builder’s Contingency collaboratively and in a transparent manner. Use of the Design-Builder’s Contingency requires approval by the Owner.

<p>Design-Builder's Fee</p>	<p>The Design-Builder's Fee is a percentage amount set forth in the Design-Builder's Business/Pricing Proposal and in the IDIQ Schedule of Items. During each Phase, the Design-Builder's compensation shall charge the Design-Builder's Fee on the Cost of the Work as set forth below. Notwithstanding anything to the contrary in Clause 7-104, the Design-Builder's Fee includes the following items, which shall not be charged as a Cost of the Work: 1) all profit and overhead of the Design-Builder for this Project; 2) all regional and home office overhead expenses, including labor and materials, phone, facsimile, postage, internet service, and other incidental office expenses attributed to Work on this project, and 3) all other direct and indirect costs incurred by the Design-Builder that are not otherwise specifically identified in the Cost of the Work.</p>
<p>Design Contingency</p>	<p>Design Contingency is an amount carried in the Design-Builder's GMP or CGMP during design development to cover costs which are not reasonably inferable except for material changes in scope. The costs attributable to clarifications, assumptions, and further development and completion of the drawings and specifications.</p>
<p>Design Evolution Log</p>	<p>A Design Evolution Log is a document intended to record design decisions during the design development phase of the project that are consistent with the OPR and Contract Terms and identify those decisions that cause a change to the OPR or contract terms. The DEL includes documentation related to design decisions and consequences made during design development.</p>
<p>Design Materials</p>	<p>Design Materials means any and all documents, shop drawings, electronic information, including computer programs and computer generated materials, data, plans, drawings, sketches, illustrations, specifications, descriptions, models and other information developed, prepared, furnished, delivered or required to be delivered by, or for, the Design-Builder: (1) to the Owner under the Contract Documents; or (2) developed or prepared by or for the Design-Builder specifically to discharge its duties under the Contract Documents.</p>
<p>Final Completion</p>	<p>Is the date when all tasks set forth for Phase 4 of a Task Order/Project have been completed and accepted by Bonneville, including but not limited to the completion of the Work.</p>
<p>Firm Fixed Price</p>	<p>Shall mean the fixed price for which the Design-Builder may be compensated for a specific Task Order or Project. A firm-fixed-price Task Order provides a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract, thus by definition is not a Cost Reimbursement GMP Contract.</p>
<p>Guaranteed Maximum Price (GMP)</p>	<p>GMP is the maximum compensation Owner agrees to pay Design-Builder for the scope of work included in a Guaranteed Maximum Price or Component Guaranteed Maximum Price Proposal. The Design-Builder agrees that it will be responsible for paying all costs of completing the work described in the GMP or CGMP Proposal and shall not seek reimbursement from the Owner for any costs that exceed the GMP, as adjusted in accordance with the Contract Documents including those authorized by written Change Order. The GMP shall be prepared by the Design-Builder in consultation with Bonneville.</p>

<p>Guaranteed Maximum Price Proposal</p>	<p>A Guaranteed Maximum Price Proposal represents the scope and total costs for completion of all Phases of Work for a Project. The Guaranteed Maximum Price Proposal shall include the costs for all Component Guaranteed Maximum Price Proposals, if any, previously approved by the Owner. The Guaranteed Maximum Price Proposal shall include all information required in the Contract Documents and represents the Design-Builder's total compensation for the Scope of Work included in the GMP Proposal and all incorporated CGMP Proposals.</p>
<p>Guaranteed Maximum Price (GMP) Savings</p>	<p>GMP Savings means the difference as of the date of final completion of the Work, between the Guaranteed Maximum Price (as it may be adjusted in accordance with the Contract terms, including any unspent contingency and allowance amounts), and the total aggregate sum of the Cost of Work plus the Fee</p>
<p>Insurance, Taxes, and Bonding Costs</p>	<p>Means the costs to provide the insurance and bonds required under this contract. Notwithstanding anything to the contrary in 7-104, Insurance, Taxes and Bonding Costs shall not be considered a Cost of the Work. Design-Builder shall be reimbursed Insurance, Taxes and Bonding Costs without applying the Design-Builder's Fee.</p>
<p>Owner's Project Criteria</p>	<p>Owner's Project Criteria are developed by or for Owner to describe Owner's program requirements and objectives for the Project, including use, space, price, time, site, and expandability requirements, as well as submittal requirements and other requirements governing Design-Builder's performance of the Work. Owner's Project Criteria may include conceptual documents, design criteria, design performance specifications, design specifications, and LEED® or other sustainable design criteria and other Project-specific technical materials and requirements.</p>
<p>Phase</p>	<p>Phases are defined as discrete elements of work for which the Design-Builder will receive a Notice to Proceed. The end of each Phase represents a decision point or stage gate at which the Owner will determine whether to advance the Project into the next Phase.</p>
<p>Reliable Design Decision</p>	<p>Reliable Design Decision is a decision, development, or election that refines the Basis of Design Documents, that is approved by the Owner and that is set forth in the Design Evolution Log. A Reliable Design Decision cannot change the Owner's Program or the Basis of Design Documents but shall instead constitute a further development or refinement of the design for the Task Order Project with which all subsequent Design Materials, design submissions and Construction Documents shall be consistent.</p>
<p>Schedule of Items (SOI)</p>	<p>The Schedule of Items (SOI) is set forth at Part B to this Contract and sets forth Contract Terms. The IDIQ SOI is applicable to all Work under this Contract. A Task Order SOI is applicable only to an identified Task Order.</p>
<p>Schedule of Values</p>	<p>The Schedule of Values (SOV) is a Tab in the CGMP or GMP proposal that contains a comprehensive breakdown of the value and cost of the project. The SOV is a list of every work item on a project using the CSI format organized according to anticipated bid packages and including quantities, unit prices, and cost extension. All costs will be organized by Work Order as applicable.</p>

Substantial Completion	Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so that the Owner can occupy or utilize the Work for its intended use. The parties may include more specific requirements for Substantial Completion in Change Orders, Task Orders, and/or Contract Modifications.
Task Order	The Work shall be authorized by Task Order. Each Task Order will be developed collaboratively as set forth in this Contract. Each Task Order will describe the Task Order Projects within the Task Order. Provided the parties enter into a Contract Modification, the parties will enter into the subsequent phases of the outlined in the Contract Documents for each Task Order/Project.
Task Order Project	The Parties will develop within each Task Order "Task Order Projects", which shall be a separate scope of work within the Task Order. Each Task Order Project shall have a separate GMP
Task Order/Project Phase Sequencing Plan	The Task Order/Project Phase Sequencing Plan is the plan developed by the Design-Builder in collaboration with the Owner in Phase 1 that sets forth the phases for each Task Order and Task Order Project and whether each Task Order Project proceeds through Phases 2-4 1) separately; 2) in bundles; or 3) together with other Task Order Projects in a single Task Order.
Trend	Trend is an issue that has been identified by the Design-Builder or the Owner that may cause a change to the Owner's Project Criteria or the Basis of Design Documents, as applicable, and/or any Contract Term and is further described in subsection (d) 7 below.
Trend Log	Trend Log is a log of Trends as further described in Subsection (d) 7.
Work	Work is the services, design, and construction to be completed by the Design-Builder under the terms of this Contract. Work specifically includes the furnishing of all services, labor, materials, equipment, and all incidentals necessary to the successful completion of the services, design, and construction, whether expressly required by or reasonably inferable from the Contract Documents, whether they are temporary or permanent, and whether they are incorporated into the finished Work or not. Work also includes all other obligations imposed on the Design-Builder by the Contract. The Work is sometimes generally referred to as the "Project."
Work Order	A Work Order will be issued for each Task Order Project prior to Phase 1 for each Task Order. Design-Builder must have a Work Order in order to be compensated under this Contract. Design-Builder must identify the applicable Work Order(s) for each invoice.

(2) Competition of Subcontracts

- (i) Selection of sources of labor, material, and equipment necessary to accomplish the work is governed by this section. For the purpose of this section, "subcontractor" also includes suppliers.

- (ii) Unless exempted pursuant to subsection (3) below, the Design-Builder shall solicit subcontractor bidding for all construction work except work which is specifically exempted by Bonneville.
- (iii) The Design-Builder shall seek to develop subcontractor interest in the work and shall furnish to Bonneville a list of potential qualified subcontractors from whom bids may be requested. Bonneville may identify additional potential qualified subcontractors from whom the Design-Builder shall request bids.
- (iv) The Design-Builder shall develop the criteria (qualifications and price) that will be used to analyze bids for each element of the work. If requested by Bonneville, bid solicitation documents shall be provided to Bonneville for review not less than five (5) business days prior to issuance of bid solicitation.
- (v) If the Design-Builder or an affiliate or subsidiary of the Design-Builder will be included in the subcontract selection process to perform particular services or construction work on the project, the Design-Builder shall disclose that fact in the selection process documents and announcements. All affiliations and subsidiary relationships shall be made known to Bonneville 30 days prior to initiating the selection process.
- (vi) Design-Builder shall obtain a minimum of three subcontractor bids for each element of the design and construction work, unless Bonneville waives the three-bid-minimum requirement after reviewing the Design-Builder's good faith efforts to obtain bids or the estimate for the work is less than \$25,000.00.
- (vii) All bids shall be submitted electronically to Bonneville's Contracting Officer via email using a bid tabulation summary document.
- (viii) After evaluation, the Design-Builder shall share the results of the evaluation with Bonneville. Upon completion of Bonneville's review and subject to Bonneville approval, which shall not be unreasonably withheld, the Design-Builder shall then award the contract to the selected bidder and announce the results to all subcontractors who submitted bids for that element of the work. Design-Builder shall award the subcontracts on the basis of the best value to the Project. If the Design-Builder determines that the best value is not the lowest bid, the Design-Builder shall obtain approval from Bonneville, and such approval shall not be unreasonably withheld.
- (ix) The announcement of award shall be communicated to the subcontractors by email transmittal and specify those subcontractors who were not selected for an element of the work.
- (x) Bonneville will not resolve or be involved in the resolution of protests of the Design-Builder's selection of subcontractors and suppliers.
- (xi) Bonneville retains the right to monitor the subcontracting process, including contract review(s), in order to protect Bonneville's interests and to confirm the Design-Builder's compliance with the contract, applicable statutes, administrative rules, and other legal requirements.
- (xii) Upon execution of any subcontract, the Design-Builder shall, at Bonneville's request, provide Bonneville with a copy or copies of the contract(s) for work and services covered by the subcontract(s).

(3) Self-performance and exemption from the competitive selection process

- (i) Unless already exempted by Bonneville, the Design-Builder shall submit for Bonneville approval each element of the design and construction Work the Design-Builder proposes to self-perform or exempt from the Competition of Subcontracts

- selection process set forth in Section (e)(2) above. The term “self-perform” shall apply to construction Work by the Design-Builder or to any affiliated entity wholly or substantially owned or controlled by Design-Builder.
- (ii) The Design-Builder shall fully respond to any questions or comments submitted to the Design-Builder by Bonneville in regard to the non-competitive process.
  - (iii) Each element of the Work the Design-Builder proposes to subcontract without the competitive selection process must include an explanation as to why self-performance or exemption from the competitive selection process is in Bonneville’s best interest. The proposal shall also describe the process the Design-Builder will use to qualify and select prospective subcontractors for any Work an exemption from the competitive process is requested.
  - (iv) To determine whether self-performance or exemption from the competitive selection process is in Bonneville’s best interest, Bonneville will consider some or all of the following factors including, but not limited to:
    - (A) emergency circumstances,
    - (B) the Design-Builder’s need to utilize a key subcontractor member of the Design-Builder’s project team consistent with the Design-Builder’s project proposal,
    - (C) the need to meet other specified contract requirements,
    - (D) the continuation or expansion of an existing subcontractor agreement that was awarded though a “competitive process” along with facts supporting the continuation or expansion of the subcontract agreement,
    - (E) special requirements for the work,
    - (F) special advantages or capabilities of the Design-Builder or subcontractor to perform the work,
    - (G) the significance of the work as a critical path item,
    - (H) market availability of the requested series or products, and
    - (I) Demonstration that the costs are fair and reasonable.
  - (v) Except for emergencies, a formal written request shall be provided 30 days before bid documents are released for bids to the community.
  - (vi) Bonneville will retain third party consultants to review the Design-Builder’s detailed cost breakdown for market realism.
  - (vii) Neither Design-Builder controlled GMP Contingency nor shall allowances be used for costs incurred in the performance of self-performed scopes.
  - (viii) The Design-Builder may charge overhead and profit normally charged for similar work in a similar location for self-performed work. Acceptance of the overhead and profit is subject to Bonneville review and approval. The Design-Builder’s Fee may not be added to the cost of self-performed work.
- (4) Design Services. Design-Builder and Owner shall, consistent with any applicable provision of the Contract Documents, agree upon any interim and final design materials and submissions that Owner may wish to review. Design Materials shall be provided for each Phase of the Project as required in Contract Documents.
- (i) Design Materials shall be consistent with the Owner Project Requirements as well as the Basis of Design Documents, as the Basis of Design Documents may have been changed or supplemented through the design process set forth in this Section, including but not limited to changes recorded in the Design Evolution Log and through Change Orders. By submitting Design Materials, the Design Builder represents to the Owner that the Work depicted and otherwise shown, contained, or reflected in Design Materials may be constructed in compliance with the then current Contract Terms for the applicable Task Order or Task Order Project.

- Notwithstanding the above, Design Builder may propose Design Materials that may alter either the Basis of Design Documents or the Contract Terms; however, Design Builder must provide notice thereof in accordance with the contract and obtain a Change Order before such proposed Design Materials are incorporated into the Construction Documents. Alternatively, if the Owner agrees in writing, the proposed Design Material may be included in the Trend Log pursuant to subsection (vi) below.
- (ii) Unless the parties agree in writing otherwise, the Design-Builder shall provide the Design Materials set forth in Contract Documents. On or before the time of the scheduled submission of the Design Materials set forth in the Contract Documents, Design Builder and Owner shall meet and confer about the Design Materials, with Design Builder identifying during such meetings, among other things, the evolution of the design and any changes to the Owner's Project Criteria, the Basis of Design Documents, or, if applicable, previously submitted Design Materials.
  - (iii) The Owner shall review and comment on Design Materials, providing any comments and/or concerns about the Design Materials. The Owner shall provide all comments on the Design Materials within the time provided by the Contract Documents. The Design Builder shall revise the Design Materials (and any other deliverables) in response to the Owner's comments and incorporate said responses into the next submission of Design Materials.
  - (iv) If incorporation of the Owner's comments result in a design that is inconsistent with or otherwise give rise to a change in the Owner's Project Criteria, the Basis of Design Documents, or the applicable Contract Terms, the Design Builder shall provide notice thereof in accordance with the Contract. Changes to the Basis of Design Documents or the Contract Terms, including those that are deemed minor changes, shall be processed in accordance with the Contract Documents. Alternatively, if the Owner agrees in writing, the proposed Design Material may be included in the Trend Log pursuant to Section (vii) below.
  - (v) The Design Builder shall provide an updated cost model for each Task Order Project periodically as set forth the Statement of Work. The cost model will be based on a detailed labor and material cost estimate for the Task Order/Project Price and the other Contract Terms as required in Contract Documents. The cost model will be supplemented pursuant to Contract Documents.
  - (vi) Design Evolution Log. A Design Evolution Log, including a full listing of Reliable Design Decisions and all changes to the Basis of Design Documents, will be maintained by the Design Builder, and provided to the Owner for review.
    - (A) The Design Evolution Log shall be updated after every Design Review Meeting, and in any case, on a weekly basis.
    - (B) The purpose of the Design Evolution Log is to record design decisions that are consistent with the Owner's Project Criteria, the Contract Terms, and the Basis of Design Documents, as applicable. Both parties must agree to include a Reliable Design Decision in the Design Evolution Log. If a Reliable Design Decision will cause a change in the Basis of Design Decisions, or any of the other Contract Terms, such changes must be processed pursuant to the Contract.
    - (C) Once a Reliable Design Decision is incorporated into the Design Evolution Log, it shall be binding on the Design Builder as if set forth in the Owner's Project Criteria and/or the Basis of Design Documents, as applicable.
  - (vii) Trend Log. Either party may request in writing for the other party to agree to identify a Trend in the Trend Log.



- (A) The request to include a Trend in the Trend Log must include the following information:
    - (1) Identification of the issue for which the costs are uncertain and may cause any Contract Term to be exceeded;
    - (2) The estimated change in the applicable Contract Term; and
    - (3) Potential impacts or changes to the Owner's Project Criteria or Basis of Design Documents as a result of the Trend.
  - (B) Either party must obtain the other's consent to include the Trend in the Trend Log. The Design-Builder will track the Trend on the Trend Log, and the Trend Log shall be updated with the most recent information on a weekly basis.
  - (C) The Parties will work collaboratively to resolve Trends in the Trend Log as quickly as possible. When a Trend in the Log is resolved, and the resolution changes the Basis of Design Documents and/or any other Contract Term, the resolution shall be memorialized in a Change Order.
- (viii) Construction Documents. Design-Builder shall submit to Owner Construction Documents setting forth in detail drawings and specifications describing the requirements for construction of the Work for each Task Order Project. The Construction Documents shall be consistent with the latest set of interim design submissions, as such submissions may have been modified in a design review meeting and recorded as set forth above. The parties shall have a design review meeting to discuss, and Owner shall review and approve, the Construction Documents in accordance with the procedures set forth herein. Design-Builder shall proceed with construction in accordance with the approved Construction Documents and shall submit one set of approved Construction Documents to Owner prior to commencement of construction.
- (A) The Construction Documents shall provide information customarily necessary in documents for projects of similar size, complexity, and quality, including its phasing and subcontracting mode. The Construction Documents shall include all information required by the building trades to complete the construction of the Project, other than such details customarily developed by others during construction. To the extent not prohibited by the Contract Documents or Applicable Code Requirements, and subject to written approval by the Owner, Design Builder may prepare Construction Documents for approved Construction Packages for a portion of the Work to permit construction to proceed on that portion of the Work prior to completion of the Construction Documents for the entire Work.
  - (B) It is acknowledged by the parties hereto that inherent in a design build project, the production and review of Construction Documents may be a continuing process with portions thereof completed at different times. The Design Builder will limit the Construction Packages for Owner's review to a reasonable number, not more than that stipulated in the Supplementary Conditions, unless approved in writing by the Owner. Contract Schedule shall indicate the times for the Owner to review the completion of each such portion of the Construction Documents and a reasonable time for review of same.
- (ix) Owner's Review. Owner's review and approval of Design Submissions, meeting minutes, the Design Evolution Log, the Trend Log, and the Construction Documents is for the purpose of mutually establishing a conformed set of Contract Documents compatible with the requirements of the Work. Neither Owner's review nor approval

of any interim or final Design Submissions, Design Materials, meeting minutes, the Design Evolution Log, the Trend Log and Construction Documents shall be deemed to transfer any design liability from Design-Builder to Owner, and Owner's review shall not be deemed an approval or waiver by the Owner of any deviation from, or of the Design Builder's failure to comply with, any provision or requirement of the Contract Documents, unless such deviation or failure has been expressly identified as such in writing in the documents submitted by the Design Builder and approved by the Owner. Design-Builder shall provide Owner with sufficient time in the Project Schedule to review and approve the design submissions, such time period shall not be less than one (1) week.

(5) Construction Packages.

All construction work under this contract will be performed as either a Component Guaranteed Maximum Price (CGMP) or a Guaranteed Maximum Price (GMP).

(i) CGMP

- (A) If Bonneville and Design-Builder agree on a CGMP, the Work may proceed during Phase 2 and prior to the execution of the applicable Contract Modification. However, such CGMP shall not be considered a waiver of Bonneville's right to reject the Design-Builder's proposed GMP or otherwise limit Bonneville's rights and remedies under this contract in anyway.
- (B) Except as permitted pursuant to CGMP(s), construction shall not commence prior to execution of the applicable Contract Modification authorized by the Contracting Officer and receipt of a Performance and Payment Bond for the amount of the CGMP.
- (C) CGMP(s) shall follow the format of a change order request and be executed via formal Contract Modification. Design-Builder shall be responsible for all costs in excess of the CGMP. The basis of payment shall be set forth in the Contract Modification.
- (D) Any work issued in a CGMP may include, without limitation, early purchase of long-lead materials, equipment, or physical construction work.
- (E) If one or more CGMP are executed, the Design-Builder shall diligently continue to provide preconstruction services as work toward development of a GMP.
- (F) The CGMP includes costs for all applicable warranties, as-built, etc. as required by the contract.
- (G) Unless otherwise agreed in writing, the Contract Modification authorizing the CGMP shall include a Substantial Completion date, and the parties will follow the process for determining Substantial Completion as set forth in Subsection (6) below.

(ii) GMP

- (A) All construction work that is not specifically allowed as a CGMP shall be performed during Phase 3 as part of the GMP.
- (B) The parties shall determine the GMP during Phase 2.
- (C) GMP documentation shall include the information set forth in the Statement of Work and shall, at a minimum, include the following:
  - (1) A detailed list of applicable drawings and specifications.
  - (2) Any clarifications and assumptions made by the Design-Builder.

- (3) A breakdown of the cost of the work organized by trade categories or systems, allowances, alternates, unit price, contingency and Design-Builder's Fee.
    - (4) The current Task Order/Project schedule and anticipated date of substantial completion as the basis upon which any proposed adjustment to the GMP is based.
  - (6) Substantial Completion
    - (i) Design-Builder shall notify Bonneville when it believes a Task Order or Task Order Project has achieved Substantial Completion. Within five (5) days of Bonneville's receipt of Design-Builder's written notice of Substantial Completion on Design-Builder's letterhead, Bonneville and Design-Builder will jointly inspect such Work to verify that either the Design-Builder has achieved Substantial Completion in accordance with the requirements of the Contract Documents. If the Design-Builder has achieved Substantial Completion, Bonneville shall prepare and issue a Certificate of Substantial Completion that will set forth (i) the date of Substantial Completion of the Task Order Project, or Task Order, as applicable, (ii) the remaining items that have to be completed before Construction and Final Completion, (iii) provisions (to the extent not already provided in the Contract Documents) establishing Bonneville's and Design-Builder's responsibility for the Project's security, maintenance, utilities and insurance, and (iv) an acknowledgment that warranties for the Task Order Project or Task Order commence to run on the date of Substantial Completion, except as may otherwise be noted in the Certificate of Substantial Completion.
    - (ii) Bonneville, at its option, may use a portion of the Work which has been determined to be Substantially Complete, provided, however, that (i) a Certificate of Substantial Completion has been issued for the portion of Work addressing the items set forth above, (ii) Design-Builder and Bonneville have obtained the consent of their sureties and insurers, and (iii) Bonneville and Design-Builder agree that Bonneville's use or occupancy will not interfere with Design-Builder's completion of the remaining Work.
- (7) Records and Audits
  - (i) The Design-Builder shall retain all records, including but not limited to financial records, that pertain to this contract for at least three years after Bonneville has made final payment and all other matters related to this contract are concluded.
  - (ii) Bonneville or its designee may, at any time with reasonable notice, inspect, audit, and copy any of the records, including financial records, pertaining to the contract.
  - (iii) Bonneville may evaluate and verify the Cost of the Work completed by the Design-Builder in performing the Work under this contract including the accuracy of any invoice, change order, change directive, payment, or claim submitted - by the Design-Builder or the Design-Builder's payees;
  - (iv) The Design-Builder shall provide Bonneville such assistance as may be required to allow complete-access to such records within 10 business days from the original request. The Design-Builder shall make the records available any time during regular business hours after reasonable advance notice. If records are located outside the SW Washington and Portland metro area, the Design-Builder agrees to reimburse Bonneville for expenses incurred in sending representatives to wherever such records are maintained. Such expense reimbursement shall include transportation, lodging, food, and other out of pocket expenses resulting from the necessity of leaving SW Washington and the Portland metro area. The Design-

- Builder agrees to provide free access to copiers, fax machines, and other office equipment reasonably necessary to perform a review of the records.
- (v) The Design-Builder shall provide all records kept electronically in the normal course of business to Bonneville in the same electronic format the documents were originally kept.
  - (vi) The Design-Builder shall allow Bonneville to interview the Design-Builder's employees, and shall cooperate with Bonneville in arranging interviews with the Design-Builder's employees and former employees, for the purposes of identifying, evaluating, verifying, or auditing the records described in these requirements.
  - (vii) The Design-Builder shall require all, material suppliers, and subcontractors at any tier to comply with these requirements. The Design-Builder shall be entitled to no extra compensation for complying with these.
- (8) **Assignment of Subcontracts.** Design Builder hereby assigns to Owner all its interest in first-tier subcontracts now or hereafter entered into by Design Builder for performance of any part of the Work. The assignment will be effective upon acceptance by Owner in writing and only as to those subcontracts which the Owner designates in writing. The Owner may accept said assignment at any time during the course of the Work and prior to completion of a Task Order and/or Task Order Project, as applicable in the event of a suspension or termination of Design Builder's rights under the Contract Documents or any Task Order or Task Order Project. Such assignment is part of the consideration to the Owner for entering into the Contract with Design Builder and may not be withdrawn prior to completion of the Project.
- (9) **Buyout Monitoring**
- (i) The following process assumes that a GMP or CGMP value has been agreed to between the Design-Builder and the Owner prior to the buyout of trade packages.
  - (ii) The Design-Builder is required to monitor the buyout of trade packages allowing for comparison of estimated trade package costs to actual contracted costs.
  - (iii) The Contract SOW establishes requirements for submittal of a Pre-Construction Evaluation Report during development of either a CGMP or GMP Proposal. This report is required to include a budget cost estimate for the CGMP or GMP, and each Trade Package projected to be subcontracted in either a CGMP or GMP. The intent of these requirements is to provide Bonneville the ability to monitor actual trade costs contracted by the Design-Builder as the trade buyout progresses.
  - (iv) The Pre-Construction Evaluation Report must include the following information for each prospective trade package:
    - (A) The individual number of the trade package
    - (B) A description of the work included in the trade package.
    - (C) The Design-Builder's estimate of the work included in the trade package.
    - (D) Design-Development Contingency, Escalation Contingency, and Design-Builder's Contingency values shall each be listed as individual line items within the Report.
  - (v) As the buyout progresses the Design-Builder shall monitor the awarded value of each trade package against the estimated trade package costs. If the awarded cost of a trade package exceeds the estimated value, the Design-Builder may utilize the Design Development or Escalation Contingencies to cover the additional costs. If the awarded cost of a trade package is less than the estimated cost, the difference between the two is defined as buyout savings. As trade packages are bought out, the buyout savings, if any, shall remain available to the Design-Builder for use if the awarded value of additional trade packages exceed the estimated costs.

Once all trade packages have been awarded to subcontractors, all remaining Buyout Savings, Design Development Contingency, and Escalation Contingency revert to the Owner's control. The Design-Builder's Contingency will remain in the CGMP or GMP to be used as authorized under the Contract Terms. Under no condition, regardless of actual awarded costs versus estimated costs, will the CGMP or GMP costs exceed the CGMP or GMP price proposal inclusive of contingencies.

(End of clause)

### 35.2.326 Clause 24-44 Guaranteed Maximum Price Cost Principles for Progressive Design Build

As prescribed in 7.4.3 insert the following clause:

#### **GUARANTEED MAXIMUM PRICE COST PRINCIPLES FOR PROGRESSIVE DESIGN BUILD (APR 2024)**

- (a) The cost principles and procedures in this clause shall be used in pricing contracts and contract modifications with the Design-Builder whenever cost analysis is performed. Contracts with Design-Builder includes all contracts and contract modifications for supplies, services, and construction. The clause is specifically tailored to the GMP contract type. Definitions of terminology used in this clause can be found in the Progressive Design-Build clause 24-43.
- (b) Section 1 – Principles and Procedures
- (1) Application of Principles and Procedures
- (i) The total cost of the contract is contained in the Guaranteed Maximum Price (GMP).
  - (ii) Costs shall be allowed to the extent they are reasonable, allocable, and determined to be allowable under this Clause.
  - (iii) Costs incurred as reimbursements or payments to a subcontractor under a GMP or Firm Fixed Price type subcontract are allowable to the extent consistent with this Clause.
  - (iv) Costs incurred as payments under firm fixed price subcontracts with economic price adjustment provisions, when cost analysis was performed, shall be allowable only to the extent that the price was negotiated and approved in advance by the Owner.
  - (v) This Clause does not cover every element of cost. Failure to include any item of cost does not imply that it is either allowable or unallowable. The determination of allowability shall be based on the principles and standards in this Clause. When more than one subsection in this Clause is relevant to a contractor cost, the cost shall be apportioned among the applicable subsections, and the determination of allowability of each portion shall be based on the guidance contained in the applicable subsection. When a cost to which more than one subsection in this Clause is relevant cannot be apportioned, the determination of allowability shall be based on the guidance contained in the subsection that most specifically deals with, or best captures the essential nature of, the cost at issue.
- (2) Reimbursing Costs
- (i) For the purpose of reimbursing allowable costs the term "costs" includes –

- (ii) 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.
- (iii) The amount of progress and other payments to the Contractor's subcontractors that either have been paid, or that the Contractor is required to pay pursuant to the payment clause(s) in the contract. Payments shall be made by cash, check, or other form of payment to the Contractor's subcontractors under similar cost standards.

(3) Invoicing

- (i) Bonneville will make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more often than once every 2 weeks, in amounts determined to be allowable by the Contracting Officer in accordance with this clause. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice for the claimed allowable costs for performing this contract.
- (ii) Contract financing payments are not subject to the interest penalty provisions of the Prompt Payment Act. Interim payments made prior to the final payment under the contract are contract financing payments.
- (iii) Interim payments will be made for contract financing on the 30th day after receipt of a proper payment request. In the event that Bonneville requires an audit or other review of a specific payment request to ensure compliance with the terms and conditions of the contract, Bonneville is not compelled to make payment by the specified due date.

(4) Determination of Allowability

The following factors shall be considered in determining whether a cost is allowable:

- (i) Reasonableness.
- (ii) Allocability.
- (iii) Generally accepted accounting principles and practices appropriate to the particular circumstances.
- (iv) Terms of the contract.
- (v) Any limitation set forth in this Clause.

(5) Determining Reasonableness

- (i) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the CO or the CO's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.
- (ii) What is reasonable depends upon a variety of considerations and circumstances, including:
  - (A) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or contract performance;
  - (B) Generally accepted sound business practices, arm's-length bargaining, and Federal and State laws and regulations.

- (C) The contractor's responsibilities to Bonneville, other customers, the owners of the business, employees, and the public at large; and
- (D) Any significant deviations from the contractor's established practices.

(6) Determination of Allocability

A cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to the contract if it –

- (i) Is incurred specifically for the contract;
- (ii) Benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or
- (iii) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

(7) Credits

The applicable portion of any income, rebate, allowance, or other credit relating to any allowable cost and received by or accruing to the contractor shall be credited to Bonneville either as a cost reduction or by cash refund.

(8) Direct Costs

A direct cost is any cost that can be identified specifically with a specific final cost objective. No cost shall be allocated as a direct cost to a final cost objective, if the same cost is allocated as an indirect cost and has been included in any indirect final cost objective. Costs identified specifically with the contract are direct costs of the contract and are to be charged directly to the contract. All direct costs are reflected in the Cost of the Work.

(9) Indirect Costs

- (i) Indirect costs are expenses that cannot be directly linked to a project specific activity or service. Typical indirect costs include, but are not limited to –
  - (A) Administrative and office staff
  - (B) Mortgage, rent and utilities
  - (C) Marketing and promotional activities
  - (D) Miscellaneous costs (e.g. office supplies, technology, and computer equipment (not project specific), company vehicles, etc.)
- (ii) All indirect costs will be covered by the Design-Builder's Fee unless specified in the contract which indirect costs will be factored into the Cost of the Work.

(10) Final Payment

- (i) Upon approval of a completion invoice or voucher submitted by the Contractor and upon the Contractor's compliance with all terms of this contract, Bonneville shall promptly pay any balance of allowable costs and Design-Builder's Fee.
- (ii) The Contractor shall pay to Bonneville 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 Bonneville. Reasonable expenses incurred by the Contractor for securing refunds, rebates, credits, or other amounts shall be allowable costs if approved by the Contracting Officer. 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:

- (A) An assignment to Bonneville, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including interest, if any) properly allocable to costs for which the Contractor has been reimbursed by Bonneville under this contract; and
- (B) A release discharging Bonneville its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, except –
  - (1) Specified claims stated in exact amounts, or in estimated amounts when the exact amounts are not known;
  - (2) Claims (including reasonable incidental expenses) based upon liabilities of the Contractor to third parties arising out of the performance of this contract; provided, that the claims are not known to the Contractor on the date of the execution of the release, and that the Contractor gives notice of the claims in writing to the Contracting Officer within 6 years following the release date or notice of final payment date, whichever is earlier; and
  - (3) Claims for reimbursement of costs, including reasonable incidental expenses, incurred by the Contractor under the patent clauses of this contract, excluding, however, any expenses arising from the Contractor’s indemnification of Bonneville against patent liability.

(11) Audit.

At any time or times before final payment, the Contracting Officer may have the Contractor’s invoices or vouchers and statements of cost audited. Any payment may be reduced by amounts found by the Contracting Officer not to constitute allowable costs or adjusted for prior overpayments or underpayments.

(12) Contingency

“Contingency” means a possible future event or condition arising from presently known or unknown causes, the outcome of which is indeterminable at the present time. In connection with estimates of future costs, contingencies fall into the following categories:

- (i) Design-Builder Contingency is a contingency amount that may be included as a specified amount in a GMP or CGMP. Such Contingency funds are to be used for costs to complete Work considered to be within the original scope of Work, including issued change orders, but which exceed the established estimated costs. Use of Design-Builder Contingency funds is for Work which could have been reasonably anticipated based upon the information available at the time the cost estimate was established. Use of Design-Builder Contingency funds is for the following:
  - (A) Those items that were included in the proposal drawings and specifications that were missed in proposing the GMP or CGMP.
  - (B) Those items that were included in the proposal drawings and specifications that the Design-Builder underpriced in proposing the GMP.
  - (C) Schedule acceleration or schedule mitigation as required to meet contract milestones, or as deemed necessary by the Design-Builder to improve the project schedule when required.
  - (D) Increased general conditions or general requirements costs. This may include, but is not limited to items such as additional temporary fence moves, increased costs for temporary protection of installed work, and increased costs for weather protection,
  - (E) To cover higher costs for replacing a subcontractor which are not covered by subcontractor default insurance or surety.



- (F) Other items not outlined above, if approved in advance in writing by Owner.
  - (G) All Design-Builder Contingency fund charges must have Owner's advance approval before being transferred to a line item. All remaining funds in the Design-Builder's Contingency upon project completion shall revert back to the Owner.
  - (ii) Design Development Contingency
    - (A) Design Development Contingency is a value included in the initial cost estimates to cover costs that cannot be accurately identified based on the incompleteness of the plans and specifications during the initial design phases of the project.
    - (B) The Design Development Contingency value should be identified as a specific line item in the GMP or CGMP Proposal
    - (C) When a project is completely bought out, all remaining Design Development Contingency funds will revert back to the Owner.
  - (iii) Escalation Contingency
    - (A) Escalation Contingency is a value included in the initial cost estimates to cover potential future price escalation. The escalation value shall be based on an agreed upon annual escalation factor (expressed as a percentage) applied to the estimated cost of Work escalated to the mid-point of construction.
    - (B) The Escalation Contingency value shall be identified as a specific line item in the GMP or CGMP Proposal.
    - (C) When a project is completely bought out, all remaining Escalation Contingency funds will revert back to the Owner.
  - (iv) Owner's Contingency
    - (A) Owner's Contingency is a fund to cover cost growth during the project used at the discretion of the Owner usually for costs that result from Owner directed changes or unforeseen Site conditions.
    - (B) The amount and use of the Owner's contingency shall be at the Owner's sole discretion.
    - (C) The Owner's contingency is not part of the GMP or CGMP. Owner's contingency is separate from the PDBs contingency, is controlled by the owner, and is transmitted to the PDB in the form of a task order modification, which typically increases the GMP or CGMP.
- (c) Section 2: Design-Builder's Fee and Fee Percentage

(1) Design-Builder's Fee

The Design-Builder's Fee is established in the Design-Builder's Component GMP or GMP. The Design-Builder's Fee is calculated as the Cost of Work included in the CGMP or GMP multiplied by the Design-Builder's Fee Percentage. The Design-Builder's Fee in the CGMP or GMP shall not be based on Contingency or Allowance costs included within the CGMP or GMP. The Design-Builder's Fee will be applied to Contingency and/or Allowance values when the Contingency or Allowance use is approved by the Owner.

(2) Design-Builder's Fee Percentage

The Design-Builder's Fee Percentage is the value expressed as a percentage that was set forth in the Design-Builder's Business/Pricing Proposal and in the IDIQ Schedule of Items. Notwithstanding anything to the contrary in this Clause (7-104), the Design-Builder's Fee Percentage includes the following items, which shall not be charged as a

Cost of the Work: 1) all profit and overhead of the Design-Builder for this Project; 2) all regional and home office overhead expenses, including labor and materials, phone, facsimile, postage, internet service, and other incidental office expenses attributed to Work on this project, and 3) all other direct and indirect costs incurred by the Design-Builder that are not otherwise specifically identified in the Cost of the Work.

(d) Section 3 – Cost of the Work

The term Cost of the Work shall mean costs set forth in this Section that are reasonably and actually incurred by Design Builder in the proper performance of the Work and during a specified Phase. The following costs are determined to be allowable and may be included in the Cost of the Work:

- (1) Direct labor costs of employees of Design Builder performing construction or design Work at the Site or, with Owner's agreement, at locations off the Site.
  - (i) The costs for those employees of Design Builder performing design or other services shall be calculated on the basis of prevailing market rates for design professionals performing such services or, if applicable, the Hourly Rates set in the Schedule of Items.
  - (ii) The costs for those employees of Design-Builder performing Work shall be calculated on the basis of the Hourly Rates set forth in the Design-Builder's CGMP Proposal and/or GMP Proposal.
- (2) Employee benefits, premiums, taxes, insurance, contributions, and assessments required by law, collective bargaining agreements, or which are customarily paid by Design Builder, to the extent such costs are based on wages and salaries paid to employees of the Design Builder.
- (3) Payments properly made by Design Builder to Subcontractors and Design Consultants for performance of portions of the Work, including any insurance and bond premiums incurred by Subcontractors and Design Consultants. The costs for those employees performing design services shall be calculated on the basis of prevailing market rates for design professionals performing such services or, if applicable, those Hourly Rates set forth in the IDIQ Schedule of Items and/or in the IDIQ Task Orders. Contracts to Subcontractors and Design-Consultants that are paid on the basis of a Firm Fixed Price must be approved in advance by the Owner, such approval shall not be unreasonably withheld.
- (4) Costs, including transportation, inspection, testing, storage, and handling, of materials, equipment and supplies incorporated or reasonably used in completing the Work. The material costs shall be based upon the net cost after all discounts or rebates, freight costs, express charges, or special delivery costs, when applicable. No Firm Fixed Price costs will be allowed except when approved in writing in advance by the Owner. Discounts and rebates based on prompt payment need not be included, however, if the Design Builder offered but the Owner declined the opportunity to take advantage of such discount or rebate.
- (5) Transportation costs include freight, express, cartage, and postage charges relating to goods purchased, in process, or delivered. When these costs can be identified with the

items involved, they may be directly costed as transportation costs or added to the cost of such items.

- (6) Costs (less salvage value) of materials, supplies, temporary facilities, machinery, equipment, and hand tools not customarily owned by the workers that are not fully consumed in the performance of the Work and which remain the property of Design Builder, including the costs of transporting, inspecting, testing, handling, installing, maintaining, dismantling, and removing such items.
- (7) Removal of debris and waste from the Site.
- (8) Service and warranty costs incurred in fulfilling any contractual obligation are allowable when not inconsistent with the terms of the contract. However, care should be taken to avoid duplication of the allowance as an element of both risk and estimated product cost.
- (9) Civil defense costs are those incurred in planning for, and protecting life and property against, the possible effects of enemy attack. Costs of civil defense measures (including costs in excess of normal plant protection costs, first-aid training and supplies, fire-fighting training and equipment, posting of additional exit notices and directions, and other approved civil defense measures) undertaken on the contractor's premises pursuant to suggestions or requirements of civil defense authorities are allowable when allocated to all work of the contractor.
- (10) All fuel and utility costs incurred in the performance of the Work.
- (11) Pre-contract costs are those incurred prior to the effective date of the contract directly pursuant to the negotiation and in anticipation of the contract award when necessary to comply with the proposed contract delivery schedule. Such costs are allowable to the extent that they would have been allowable if incurred after the date of the contract.
- (12) Permits, licenses, tests, and inspections incurred by Design Builder as a requirement of the Contract Documents.
- (13) Deposits which are lost, except to the extent caused by Design Builder's negligence or other fault.
- (14) Costs incurred in preventing damage, injury, or loss in case of an emergency affecting the safety of persons and property.
- (15) Unit Prices established by the Parties.
- (16) Other costs reasonably and properly incurred in the performance of the Work to the extent approved in writing by Owner and not included in the Cost of the Work or the Design Builder's Fee.
- (17) General Conditions
  - (i) Design-Builder shall be responsible for all Construction General Conditions, as well as the performance of the related obligations identified in this clause.
  - (ii) The Construction General Conditions shall be the sole reimbursement for all costs and expenses associated with providing the Construction General Conditions,

- regardless of whether such work is provided directly by the Design-Builder or by subcontract or vendor agreement.
- (iii) The Construction General Conditions Costs is to be inclusive of both project site and home office costs required to execute the requirements for the project. General Conditions are defined as the items and resources needed for project completion that will not be part of the finished product. These include labor and materials related but not limited to, site management, project management, material handling, and trash removal.
  - (iv) General Conditions include, but are not limited to:
    - (A) Supervisory and Administrative Personnel
      - (1) Time of all Design-Builder's supervisory and administrative personnel engaged in the on-site performance of work, including but not limited to the Project Manager, Construction Manager, Superintendent(s), and those responsible for managing and implementing Design-Builder's scheduling, cost estimating, cost control, and billing functions, including subcontractor and material procurement, management, and administration.
      - (2) Time of Design-Builder's supervisory and administrative personnel engaged off of the Project site to support the work, including visits to suppliers and manufacturing locations, attendance at workshops travel, and other activities required for the coordination, production, or transportation of material or equipment necessary for the work.
      - (3) Time of Design-Builder's supervisory and administrative personnel engaged in SBE/MBE/WBE participation, coordination, and management (as required by contract).
      - (4) Time of Design-Builder's personnel stationed at the Design-Builder's principal or branch offices and performing the work.
      - (5) Vehicles, travel, accommodations, and meals for the Design-Builder's personnel necessarily and directly incurred in connection with the performance of the work.
    - (B) All work associated with establishing, operating, and demobilizing Design-Builder's field office, including, but not limited to:
      - (1) Field office mobilization and demobilization
      - (2) Office trailer rental
      - (3) Office furniture and equipment
      - (4) Office janitorial
      - (5) Office supplies
      - (6) Office computers, software, and maintenance
      - (7) Office telephones, telephone and internet services, and all job site communication for the Project document reproduction services (off-site or custom)
      - (8) Copy machines, fax machines, printers, scanner, and paper shredders
      - (9) Postage, courier, and express delivery
      - (10) Accounting and data processing costs
      - (11) Jobsite radios/cellular phones
      - (12) Job travel, including fuel and vehicle
      - (13) Scheduling expenses
      - (14) Job meeting expenses
      - (15) Project redline drawings
      - (16) Record drawings and specifications
      - (17) Project preconstruction and progress photos
      - (18) All copying of documents and record drawings (whether on- or off-site)

- (C) Construction Supplies and Support Areas
    - (1) Temporary parking and laydown areas both on- or off-site, including rental areas
    - (2) Site security fencing and systems
    - (3) Storage facilities, both on- and off-site, whether owned or rented
    - (4) Small tools and supplies
    - (5) Small equipment and misc. consumables
    - (6) Surveying equipment and supplies
    - (7) Project specific signage
    - (8) Reference manuals
  - (D) Temporary Amenities and Utilities (including hook-up, metering, and consumption costs)
    - (1) Drinking water
    - (2) Temporary toilets
    - (3) Temporary water distribution and meters
    - (4) Temporary fire protection
    - (5) Temporary power
    - (6) Temporary and emergency lighting
    - (7) Temporary construction facilities and services
    - (8) Temporary heat and ventilation
- (18) Small business concerns. A small business concern may receive more frequent payments than every 2 weeks.
- (19) Special tooling and special test equipment is allowable and shall be allocated to the Government contracts for which acquired, except that the cost of items acquired by the contractor prior to the effective date of the contract (or replacement of such items), whether or not altered or adapted for the contract, and items which the contract schedule specifically excludes shall be allowable only as depreciation or amortization. When items are disqualified as special tooling or special test equipment because with minor expense they can be made suitable for general purpose use and have a value as such commensurate with their value as special tooling or test equipment, the cost of adapting the items for use under the contract and the cost of returning them to their prior configuration are allowable.
- (20) Professional and Consultant Service Costs.
- (A) Definition. "Professional and consultant services" are those services rendered by persons who are members of a particular profession or possess a special skill and who are not officers or employees of the contractor. Examples include those services acquired by contractors or subcontractors in order to enhance their legal, economic, financial, or technical positions. Professional and consultant services are generally acquired to obtain information, advice, opinions, alternatives, conclusions, recommendations, training, or direct assistance, such as studies, analyses, evaluations, liaison with Government officials, or other forms of representation.
  - (B) Costs of professional and consultant services are allowable when reasonable in relation to the services rendered and when not contingent upon recovery of the costs from the Government.
  - (C) Costs of professional and consultant services performed under any of the following circumstances are unallowable:

- (1) Services to improperly obtain, distribute, or use information or data protected by law or regulation.
  - (2) Services that are intended to improperly influence the contents of solicitations, the evaluation of proposals or quotations, or the selection of sources for contract award, whether award is by the Government, or by a prime contractor or subcontractor.
  - (3) Any other services obtained, performed, or otherwise resulting in violation of any statute or regulation prohibiting improper business practices or conflicts of interest.
  - (4) Services performed which are not consistent with the purpose and scope of the services contracted for or otherwise agreed to.
- (D) In determining the allowability of costs [including retainer fees] in a particular case, no single factor or any special combination of factors is necessarily determinative. However, the CO shall consider the following factors, among others:
- (1) The nature and scope of the service rendered in relation to the service required,
  - (2) The necessity of contracting for the service, considering the contractor's capability in the particular area,
  - (3) The past pattern of acquiring such services and their costs, particularly in the years prior to the award of Government contracts.
  - (4) The impact of Government contracts on the contractor's business.
  - (5) Whether the proportion of Government work to the contractor's total business is such as to influence the contractor in favor of incurring the cost, particularly when the services rendered are not of a continuing nature and have little relationship to work under Government contracts.
  - (6) Whether the service can be performed more economically by employment rather than by contracting.
  - (7) The qualifications of the individual or concern rendering the service and the customary fee charged, especially on nongovernment contracts.
  - (8) Adequacy of the contractual agreement for the service [e.g., description of the service, estimate of time required, rate of compensation, termination provisions].
- (E) Fees for services rendered shall be allowable only when supported by evidence of the nature and scope of the service furnished. Evidence necessary to determine that work performed is proper and does not violate law or regulation shall include:
- (1) Details of all agreements [e.g., work requirements, rate of compensation, and nature and amount of other expenses, if any] with the individuals or organizations providing the services and details of actual services performed;
  - (2) Invoices or billings submitted by consultants, including sufficient detail as to the time expended and nature of the actual services provided; and
  - (3) Consultants' work products and related documents, such as trip reports indicating persons visited and subjects discussed, minutes of meetings, and collateral memoranda and reports.
- (21) Royalties and other costs for use of patents.
- (i) Royalties on a patent or amortization of the cost of purchasing a patent or patent rights necessary to satisfy contract obligations are allowable unless:
    - (A) The Government has a license or the right to a free use of the patent;

- (B) The patent is invalid due to adjudication or administrative determination;
  - (C) The patent is considered to be unenforceable; or
  - (D) The patent is expired.
  - (ii) Care should be exercised in determining reasonableness when the royalties may have been arrived at as a result of less-than-arm's-length bargaining; e.g., royalties:
    - (A) Paid to persons, including corporations, affiliated with the contractor;
    - (B) Paid to unaffiliated parties, including corporations, under an agreement entered into in contemplation that a Government contract would be awarded; or
    - (C) Paid under an agreement entered into after the award of the contract.
  - (iii) In any case involving a patent formerly owned by the contractor, the royalty amount allowed should not exceed the cost which would have been allowed had the contractor retained title.
- (22) Labor Relations Costs.
- (i) Labor relations costs incurred in maintaining satisfactory relations between the contractor and its employees including costs of shop stewards, labor management committees, employee publications, and other related activities are allowable.
  - (ii) As required by Executive Order 13494, Economy in Government Contracting, costs of any activities undertaken to persuade employees, of any entity, to exercise or not to exercise, or concerning the manner of exercising, the right to organize and bargain collectively through representatives of the employees' own choosing are unallowable. Examples of unallowable costs under this paragraph include, but are not limited to, the costs of:
    - (A) Preparing and distributing materials;
    - (B) Hiring or consulting legal counsel or consultants;
    - (C) Meetings (including paying the salaries of the attendees at meetings held for this purpose); and  
Planning or conducting activities by managers, supervisors, or union representatives during work hours.
- (23) Travel Costs
- (i) Costs for transportation, lodging, meals, and incidental expenses incurred by contractor personnel on official company business are allowable subject to the limitation contained in this subsection. Costs for transportation may be based on mileage rates, actual costs incurred, or on a combination thereof, provided the method used results in a reasonable charge. Costs for lodging, meals, and incidental expenses may be based on per diem, actual expenses, or a combination thereof, provided the method used results in a reasonable charge.
  - (ii) Costs incurred for lodging, meals, and incidental expenses shall be considered to be reasonable and allowable only to the extent that they do not exceed on a daily basis the maximum per diem rates in effect at the time of travel as set forth in the
    - (A) Federal Travel Regulations, prescribed by the General Services Administration, for travel in the conterminous 48 United States, available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock No. 022-001-81003-7;
    - (B) Joint Travel Regulations, Volume 2, DOD Civilian Personnel, Appendix A, prescribed by the Department of Defense, for travel in Alaska, Hawaii, the Commonwealth of Puerto Rico, and territories and possessions of the United States, available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock No. 908-010-00000-1; or

- (C) Standardized Regulations (Government Civilians, Foreign Areas), section 925, "Maximum Travel Per Diem Allowances of Foreign Areas," prescribed by the Department of State, for travel in areas not covered in this subsection are available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock No. 744-088-00000-0.
- (iii) In special or unusual situations, actual costs in excess of the above-referenced maximum per diem rates are allowable provided that such amounts do not exceed the higher amounts authorized for Federal civilian employees as permitted in the regulations. For such higher amounts to be allowable, all of the following conditions must be met:
- (A) One of the conditions warranting approval of the actual expense method, as set forth in the regulations referenced in (ii)(A-C) above of this subsection, must exist.
- (B) A written justification for use of the higher amounts must be approved by an officer of the contractor's organization or designee to ensure that the authority is properly administered and controlled to prevent abuse.
- (C) If it becomes necessary to exercise the authority to use the higher actual expense method repetitively or on a continuing basis in a particular area, the contractor must obtain advance approval from the CO.
- (D) Documentation to support actual costs incurred shall be in accordance with the contractor's established practices provided that a receipt is required for each expenditure of \$75.00 or more. The approved justification required by (iii)(B and C) if applicable, of this subsection must be retained.
- (iv) Subparagraphs of this subsection do not incorporate the regulations cited their entirety. Only the maximum per diem rates, the definitions of lodging, meals and incidental expenses, and the regulatory coverage dealing with specific or unusual situations are incorporated herein.
- (v) The maximum per diem rates referenced in this subsection generally would not constitute a reasonable daily charge:
- (A) When no lodging costs are incurred; and/or
- (B) On partial travel days (e.g., day of departure and return).
- (C) Appropriate downward adjustments from the maximum per diem rates would normally be required under these circumstances. While these adjustments need not be calculated in accordance with the Federal Travel Regulation or Joint Travel Regulations, they must result in a reasonable charge.
- (vi) Costs shall be allowable only if the following information is documented:
- (A) Date and place (city, town, or other similar designation) of the expenses;
- (B) Purpose of the trip; and
- (C) Name of person on trip and that person's title or relationship to the contractor.
- (D) Travel costs incurred in the normal course of overall administration of the business are allowable and shall be treated as indirect costs.
- (vii) Travel costs directly attributable to specific contract performance are allowable and may be charged to the contract.
- (viii) Airfare costs in excess of the lowest customary standard, coach, or equivalent airfare offered during normal business hours are unallowable, except when such accommodations require circuitous routing, require travel during unreasonable hours, excessively prolong travel, result in increased cost that would offset transportation savings, are not reasonably adequate for the physical or medical needs of the traveler, or are not reasonably available to meet mission requirements. However, in



order for airfare costs in excess of the above standard airfare to be allowable, the applicable condition(s) set forth in this paragraph must be documented and justified.

- (ix) "Cost of travel by contractor-owned, -leased, or chartered aircraft" includes the cost of lease, charter, operation (including personnel), maintenance, depreciation, insurance, and other related costs.
- (x) The costs of travel by contractor-owned, leased, or chartered aircraft are limited to the standard airfare described in this subsection for the flight destination unless travel by such aircraft is specifically required by contract specification, term, or condition, or a higher amount is approved by the CO. A higher amount may be agreed to when one or more of the circumstances for justifying higher than standard airfare listed in paragraph (viii) of this subsection are applicable. In all cases, travel by contractor-owned, leased, or chartered aircraft must be fully documented and justified. For each contractor-owned, leased, or chartered aircraft used for any business purpose which is charged or allocated, directly or indirectly, to a Government contract, the contractor must maintain and make available manifest/logs for all flights on such company aircraft. As a minimum, the manifest/log shall indicate:
  - (A) Date, time, and point of departure;
  - (B) Destination, date, and time of arrival;
  - (C) Name of each passenger and relationship to the contractor;
  - (D) Authorization for trip; and
  - (E) Purpose of trip.
- (xi) Costs of contractor-owned or leased automobiles, as used in this paragraph, include the costs of lease, operation (including personnel), maintenance, depreciation, insurance, etc. These costs are allowable, if reasonable, to the extent that the automobiles are used for company business. That portion of the cost of company-furnished automobiles that relates to personal use by employees including transportation to and from work unallowable.

#### (24) Construction and Architect-Engineer Contracts

- (i) Except as otherwise provided in this paragraph, the allowability of costs for construction and architect-engineer contracts shall be determined in accordance with this Clause.
- (ii) Because of widely varying factors such as the nature, size, duration, and location of the construction site, for such items as, employment of consultants, and equipment usage costs are particularly important in construction and architect-engineer contracts. When appropriate they serve to express the parties' understanding and to avoid subsequent disputes or disallowances.
- (iii) "Construction equipment," as used in this section, means Equipment (including marine equipment) in sound workable condition, either owned or controlled by the contractor, or by the subcontractor at any tier, or obtained from a commercial rental source, and furnished for its use under Bonneville contracts.
- (iv) Allowable ownership and operating costs shall be determined as follows:
  - (A) Actual cost data shall be used when such data can be determined for both ownership and operating costs for each piece of equipment, or groups of similar serial or series equipment, from the contractor's accounting records. When such costs cannot be so determined, Bonneville may specify the use of a particular schedule of predetermined rates or any part thereof to determine ownership and operating costs of construction equipment. However, costs otherwise unallowable under this Section shall not become allowable through the use of any schedule. For example, schedules need to be adjusted for contract

costing purposes if they are based on replacement cost, include unallowable interest costs, or use improper cost of money rates or computations. COs should review the computations and factors included within the specified schedule and ensure that unallowable or unacceptably computed factors are not included in cost submissions.

- (B) Predetermined schedules of construction equipment use rates (e.g., the Construction Equipment Ownership and Operating Expense Schedule published by the U.S. Army Corps of Engineers, industry-sponsored construction equipment cost guides, or commercially published schedules of construction equipment use cost) provide average ownership and operating rates for construction equipment. The allowance for operating costs may include costs for such items as fuel, filters, oil, and grease; servicing, repairs, and maintenance; and tire wear and repair. Costs of labor, mobilization, demobilization, overhead and profit are generally not reflected in schedules, and separate consideration may be necessary.
  - (C) When a schedule of predetermined use rates for construction equipment is used to determine direct costs, all costs of equipment that are included in the cost allowances provided by the schedule shall be identified and eliminated from the contractor's other direct and indirect costs charged to the contract. If the contractor's accounting system provides for site or home office overhead allocations, all costs which are included in the equipment allowances may need to be included in any cost input base before computing the contractor's overhead rate. In periods of suspension of work pursuant to a contract clause, the allowance for equipment ownership shall not exceed an amount for standby cost as determined by the schedule or contract provision.
  - (v) Costs incurred at the job site incident to performing the work, such as the cost of superintendence, timekeeping and clerical work, engineering, utility cost, supplies, material handling, restoration and cleanup, etc., are allowable as direct or indirect costs, provided the accounting practice used is in accordance with the contractor's established and consistently followed cost accounting practices for all work.
- (25) Rental Equipment
- (i) The following costs of renting construction equipment are allowable:
    - (A) Costs such as maintenance and minor or running repairs incident to operating such rented equipment that are not included in the rental rate, are allowable.
    - (B) Costs incident to major repair and overhaul of rental equipment are unallowable.
    - (C) The allowability of charges for construction equipment rented from any division, subsidiary, or organization under common control.
    - (D) Rental charges and the costs of transportation, installation, minor repairs, and replacements, dismantling and removal of temporary facilities, machinery, equipment, and hand tools not customarily owned by the workers, which are provided by Design Builder at the Site, whether rented from Design Builder or others, and incurred in the performance of the Work.
    - (E) Rates and quantities of equipment rented that exceed the local fair market rental costs shall be subject to the Owner's prior written approval.
    - (F) Total rental charges for equipment or tools shall not exceed 75% of the fair market purchase value of the equipment or the tool.
    - (G) Actual, reasonable mobilization costs are permitted if the equipment is brought to the site solely for a change in the Work.

- (H) The rental rates are the maximum rates allowable for equipment of modern design and in good working condition and include full compensation for furnishing all fuel, oil, lubrication, repairs, maintenance, and insurance.
  - (I) When rental rates payable do not include fuel, lubrication, maintenance, and servicing, such operating costs shall be reimbursed based on actual costs.
  - (J) Equipment not of modern design and/or not in good working condition will have lower rates.
  - (K) Hourly, weekly, and/or monthly rates, as appropriate, will be applied to yield the lowest total cost.
  - (L) The rate for equipment necessarily standing by for future use (and standing by for no longer than two (2) weeks') on the changed Work shall be 50% of the rate established above.
  - (M) The total cost of rental allowed shall not exceed the cost of purchasing the equipment outright.
  - (ii) Rental and any other costs, less any applicable credits incurred in acquiring the temporary use of land, structures, and facilities are allowable. Costs, less any applicable credits, incurred in constructing or fabricating structures and facilities of a temporary nature are allowable.
- (26) Renting or leasing real or personal property.
- (i) The following costs are allowable:
    - (A) Rental costs under operating leases, to the extent that the rates are reasonable at the time of the lease decision, after consideration of:
      - (1) rental costs of comparable property, if any;
      - (2) market conditions in the area;
      - (3) the type, life expectancy, condition, and value of the property leased;
      - (4) alternatives available; and
      - (5) Other provisions of the agreement.
    - (ii) Rental costs under a sale and leaseback arrangement only up to the amount the contractor would be allowed if the contractor retained title.
    - (iii) Charges in the nature of rent for property between any divisions, subsidiaries, or organization under common control, to the extent that they do not exceed the normal costs of ownership nor duplicate any other allowed cost. Rental cost of personal property leased from any division, subsidiary, or affiliate of the contractor under common control that has an established practice of leasing the same or similar property to unaffiliated lessees shall be allowed in accordance with subparagraph ((26)(i)(A) above.
- (27) Contract terminations generally give rise to the incurrence of costs or the need for special treatment of costs that would not have arisen had the contract not been terminated. The following cost principles are to be used in conjunction with the others in this Clause:
- (i) Common items. The cost of items reasonably usable on the contractor's other work shall not be allowable unless the contractor submits evidence that the items could not be retained at cost without sustaining a loss. The CO should consider the contractor's plans and orders for current and planned production when determining if items can reasonably be used on other work of the contractor.
  - (ii) Costs continuing after termination. Costs which cannot be discontinued immediately after the effective date of termination are generally allowable. However, any costs

- continuing after the effective date of the termination due to the negligence or willful failure of the contractor to discontinue the costs shall be unallowable.
- (iii) Initial costs. Initial costs including starting load and preparatory costs, are allowable as follows:
- (A) Starting load costs are nonrecurring labor, material, and related overhead costs that are incurred in the early part of production and result from factors such as –
    - (i) Excessive spoilage due to inexperienced labor;
    - (ii) Idle time and lower-than-expected production due to testing and changing production methods;
    - (iii) Training; and
    - (iv) Lack of familiarity or experience with the product, materials, or processes.
  - (B) Preparatory costs include such costs as those incurred for initial plant rearrangement and alterations, management and personnel organization, and production planning. They do not include special machinery and equipment and starting load costs.
  - (C) When initial costs are included in the settlement proposal as a direct charge, such costs shall not also be included in overhead. Initial costs attributable to only one contract shall not be allocated to other contracts.
  - (D) If initial costs are claimed and have not been segregated on the contractor's books, they shall be segregated for settlement purposes from cost reports and schedules reflecting the high unit cost incurred during the early stages of the contract.
  - (E) If the settlement proposal is on the inventory basis, initial costs should normally be allocated on the basis of total end items called for by the contract immediately prior to termination; however, if the contract includes end items of a diverse nature, some other equitable basis may be used, such as machine or labor hours.
- (iv) Loss of useful value. Loss of useful value of special tooling, and special machinery and equipment is generally allowable, provided:
- (A) The special tooling, or special machinery and equipment is not reasonably capable of use in the other work of the contractor;
  - (B) The Government's interest is protected by transfer of title or by other means deemed appropriate by the CO; and
  - (C) The loss of useful value for any one terminated contract is limited to that portion of the acquisition cost which bears the same ratio to the total acquisition cost as the terminated portion of the contract bears to the entire terminated contract and other Government contracts for the which the special tooling, or special machinery and equipment was acquired.
- (v) Rental under unexpired leases. Rental costs under unexpired leases, less the residual value of such leases, are generally allowable when shown to have been reasonably necessary for the performance of the terminated contract, if –
- (A) The amount of rental claimed does not exceed the reasonable use value of the property leased for the period of the contract and such further period as may be reasonable; and
  - (B) The contractor makes all reasonable efforts to terminate, assign, settle, or otherwise reduce the cost of such lease.
- (vi) Alterations of leased property. The cost of alterations and reasonable restorations required by the lease may be allowed when the alterations were necessary for the performance of the contract.
- (vii) Settlement expenses.

- (1) Settlement expenses, including the following, are generally allowable:
  - (i) Accounting, legal, clerical, and similar costs reasonably necessary for:
    - a. The preparation and presentation, including supporting data, of settlement claims to the CO; and
    - b. The termination and settlement of subcontracts.
  - (ii) Reasonable costs for the storage, transportation, protection, and disposition of property acquired or produced for the contract.
  - (iii) If settlement expenses are significant, a cost account or work order shall be established to separately identify and accumulate them.
- (2) Subcontractor claims. Subcontractor claims, including the allocable portion of claims common to the contract and to other work of the contractor, are generally allowable. An appropriate share of the contractor's indirect expense may be allocated to the amount of settlements with subcontractors; provided that the amount allocated is reasonably proportionate to the relative benefits received. The indirect expense so allocated shall exclude costs claimed directly or indirectly as settlement expenses.

(28) Design-Builder Bonding Costs

- (i) Bonding costs that arise when Bonneville requires assurance against financial loss to itself or others by reason of the act or default of the contractor. Any bonding costs attributed to the project are compensable expenses. The Design-Builder's Fee shall not be applied to the cost of the bonds. Any bonds for the normal conduct of business of the Design-Builder are covered under the Design-Builder's Fee.
- (ii) Subcontractor Default Insurance (SDI) in place of subcontractor bond is an allowable expense. The Design-Builder's Fee shall not be applied to SDI costs.
- (iii) All subcontractor bonds are included in the Cost of the Work.

(29) Public Relations and Advertising Costs

- (i) "Public relations" means all functions and activities dedicated to –
  - (A) Maintaining, protecting, and enhancing the image of a concern or its products; or
  - (B) Maintaining or promoting reciprocal understanding and favorable relations with the public at large, or any segment of the public. The term "public relations" includes activities associated with areas such as advertising, customer relations, etc.
- (ii) "Advertising" means the use of media to promote the sale of products or services and to accomplish the activities referred to in paragraph (d) of this subsection, regardless of the medium employed, when the advertiser has control over the form and content of what will appear, the media in which it will appear, and when it will appear. Advertising media include but are not limited to conventions, exhibits, free goods, samples, magazines, newspapers, trade papers, direct mail, dealer cards, window displays, outdoor advertising, radio, and television.
- (iii) Public relations and advertising costs include the costs of media time and space, and purchased services performed by outside organizations, as well as the applicable portion of salaries, travel, and fringe benefits of employees engaged in the functions and activities identified in paragraphs (a) and (b) of this subsection.
- (iv) The only advertising costs that are allowable are those specifically required by contract, or that arise from requirements of Bonneville contracts and that are exclusively for –
  - (A) Advertising subcontractor/sub consultant bid opportunities;
  - (B) Acquiring scarce items for contract performance; or
  - (C) Disposing of scrap or surplus materials acquired for contract performance.

(30) Insurance and Indemnification

- (i) Insurance by purchase or by self-insuring includes coverage the contractor is required to carry, or to have approved, under the terms of the contract and any other coverage the contractor maintains in connection with the general conduct of its business. The amount of insurance costs which may be allowed is subject to the cost limitations and exclusions in the following subparagraphs.
  - (A) Project specific insurance costs required or approved, and maintained by the contractor pursuant to the contract, are allowable as part of the cost of work.
  - (B) Costs of insurance maintained by the contractor in connection with the general conduct of its business beyond the costs covered in paragraph (A) above are covered in the Design-Builder's fee.
  - (C) Actual losses are unallowable unless expressly provided for in the contract, except –
    - (1) Losses incurred under the nominal deductible provisions of purchased insurance, in keeping with sound business practice, are allowable for contracts not subject to 48 CFR 9904.416 and when the contractor did not establish a self-insurance program. Such contracts are not subject to the self-insurance requirements of 48 CFR 9904.416. For contracts subject to 48 CFR 9904.416, and for those made subject to the self-insurance requirements of that Standard as a result of the contractor's having established a self-insurance program (see paragraph a) above), actual losses may be used as a basis for charges under a self-insurance program when the actual amount of losses will not differ significantly from the projected average losses for the accounting period (see 48 CFR 9904.416.50(a) (2) (ii)). In those instances where an actual loss has occurred and the present value of the liability is determined under the provisions of 48 CFR 9904.416-50(a) (3) (ii), the allowable cost shall be limited to an amount computed using as a discount rate the interest rate determined by the Secretary of the Treasury pursuant to 50 USC App. 1215(b) (2) in effect at the time the loss is recognized. However, the full amount of a lump sum settlement to be paid within a year of the date of settlement is allowable.
  - (D) The cost of insurance to protect the contractor against the costs of correcting its own defects in materials or workmanship is unallowable. However, insurance costs to cover fortuitous or casualty losses resulting from defects in materials or workmanship are allowable as a normal business expense.
  - (E) Premiums for retroactive or backdated insurance written to cover occurred and known losses are unallowable.
- (ii) If purchased insurance is available, the charge for any self-insurance coverage plus insurance administration expenses shall not exceed the cost of comparable purchased insurance plus associated insurance administration expenses.
- (iii) Insurance provided by captive insurers (insurers owned by or under the control of the contractor) is considered self-insurance, and charges for it must comply with the self-insurance provisions. However, if the captive insurer also sells insurance to the general public in substantial quantities and it can be demonstrated that the charge to the contractor is based on competitive market forces, the insurance will be considered purchased insurance.
- (iv) The allowability of premiums for insurance purchased from fronting insurance companies (insurance companies not related to the contractor but who reinsure with a captive insurer of the contractor) shall not exceed the amount (plus reasonable

- fronting company charges for services rendered) which the contractor would have been allowed had it insured directly with the captive insurer.
- (v) Self-insurance charges for risks of catastrophic losses are not allowable.
  - (vi) The Government is obligated to indemnify the contractor only to the extent authorized by law, as expressly provided for in the contract, except as provided in paragraph (i)(C) above.
  - (vii) Late premium payment charges related to employee deferred compensation plan insurance incurred pursuant to Section 4007 (29 U.S.C. 1307) or Section 4023 (29 U.S.C. 1323) of the Employee Retirement Income Security Act of 1974 are unallowable.
- (31) Training and Education Costs
- (i) Training and education costs are allowable to the extent indicated below.
  - (ii) The training is specific to the requirements related to performance of the Work (e.g. Owner required site specific safety training, etc.) These costs include:
    - (A) salaries or wages of trainees (excluding overtime compensation),
    - (B) salaries of the director of training and staff when the training program is conducted by the contractor,
    - (C) tuition and fees when the training is in an institution not operated by the contractor, and/or
    - (D) Training materials and textbooks.
- (32) Taxes
- (i) The following types of costs are allowable:
    - (A) Federal, State, and local taxes, solely attributable to the project shall be included in the Cost of the Work.
  - (ii) All additional taxes incurred by the Design-Builder in conduct of its normal business operations are covered by the Design-Builder's Fee.
- (33) Relocation Costs.
- (i) Relocation costs are costs incident to the permanent change of duty assignment (for an indefinite period or for a stated period, but in either event for not less than 12 months) of an existing employee or upon recruitment of a new employee. Only relocation expenses that solely benefit the project will be allowed. These costs are direct costs and will be included in the Cost of Work. The following types of relocation costs are allowable:
    - (A) Cost of travel of the employee and members of the immediate family and transportation of the household and personal effects to the new location.
    - (B) Cost of finding a new home, such as advance trips by employees and spouses to locate living quarters, and temporary lodging during transition periods not exceeding separate cumulative totals of 60 days for employees and 45 days for spouses and dependents, including advance trip time.
    - (C) Closing costs (i.e., brokerage fees, legal fees, appraisal fees, points, finance charges, etc.) incident to the disposition of actual residence owned by the employee when notified of transfer, except that these costs when added to the costs described in subparagraph (i)(D) below shall not exceed 14 percent of the sales price of the property sold.
    - (D) Continuing costs of ownership of the vacant former actual residence being sold, such as maintenance of building and grounds (exclusive of fixing-up expenses), utilities, taxes, property insurance, mortgage interest, after settlement date or lease date of new permanent residence, except that these costs when added to

the costs described in subparagraph (i) (C) above, shall not exceed 14 percent of the sales price of the property sold.

- (E) Other necessary and reasonable expenses normally incident to relocation, such as disconnecting and connecting household appliances; automobile registration; driver's license and use taxes; cutting and fitting rugs, draperies, and curtains; forfeited utility fees and deposits; and purchase of insurance against damage to or loss of personal property while in transit.
  - (F) Costs incident to acquiring a home in a new location, except that these costs will not be allowable for existing employees or newly recruited employees who, before the relocation, were not homeowners and the total costs shall not exceed 5 percent of the purchase price of the new home.
  - (G) Mortgage interest differential payments, except that these costs are not allowable for existing or newly recruited employees who, before the relocation, were not homeowners and the total payments are limited to an amount determined as follows:
    - (1) The difference between the mortgage interest rates of the old and new residences times the current balance of the old mortgage times 3 years.
    - (2) When mortgage differential payments are made on a lump sum basis and the employee leaves or is transferred again in less than 3 years, the amount initially recognized shall be proportionately adjusted to reflect payments only for the actual time of the relocation.
  - (H) Rental differential payments covering situations where relocated employees retain ownership of a vacated home in the old location and rent at the new location. The rented quarters at the new location must be comparable to those vacated, and the allowable differential payments may not exceed the actual rental costs for the new home, less the fair market rent for the vacated home times 3 years.
  - (I) Cost of canceling an unexpired lease.
- (ii) The costs described in paragraph (i) above must also meet the following criteria to be considered allowable:
- (A) The move must be for the benefit of the employer.
  - (B) Reimbursement must be in accordance with an established policy or practice that is consistently followed by the employer and is designed to motivate employees to relocate promptly and economically.
  - (C) The costs must not otherwise be unallowable under this clause.
  - (D) Amounts to be reimbursed shall not exceed the employee's actual expenses, except that for miscellaneous costs of the type discussed in subparagraph (i)(E) above, a flat amount, not to exceed \$1,000, may be allowed in lieu of actual costs.
- (iii) The following types of costs are not allowable:
- (A) Loss on sale of a home.
  - (B) Costs incident to acquiring a home in a new location as follows:
    - (1) Real estate brokers fees and commissions.
    - (2) Cost of litigation.
    - (3) Real and personal property insurance against damage or loss of property.
    - (4) Mortgage life insurance.
    - (5) Owner's title policy insurance when such insurance was not previously carried by the employee on the old residence (however, cost of a mortgage title policy is allowable).
    - (6) Property taxes and operating or maintenance costs.
  - (C) Continuing mortgage principal payments on residence being sold.



- (D) Payments for employee income or FICA (social security) taxes incident to reimbursed relocation costs.
- (E) Payments for job counseling and placement assistance to employee spouses and dependents who were not employees of the contractor at the old location.
- (F) Costs incident to furnishing equity or no equity loans to employees or making arrangements with lenders for employees to obtain lower-than-market rate mortgage loans.
- (iv) If relocation costs for an employee are allowed, and the employee resigns within 12 months for reasons within the employee's control, the contractor shall refund or credit the relocation costs to the Government.
- (v) Subject to the requirements of paragraphs (i) through (iv) above, the costs of family movements and of personnel movements of a special or mass nature are allowable. The cost, however, should be assigned on the basis of work (contracts) or time period benefited.
- (vi) Relocation costs (both outgoing and return) of employees who are hired for performance on specific contracts or long-term field projects are allowable if –
  - (A) The term of employment is not less than 12 months;
  - (B) The employment agreement specifically limits the duration of employment to the time spent on the contract or field project for which the employee is hired;
  - (C) The employment agreement provides for return relocation to the employee's permanent and principal home immediately prior or the outgoing relocation, or other location of equal or lesser cost; and
  - (D) The relocation costs are determined under the rules of paragraphs (i) through (iv) above. However, the costs to return employees, who are released from employment upon completion of field assignments pursuant to their employment agreements, are not subject to the refund or credit requirement of paragraph (iv).

(e) Section 4 – Other Unallowable Costs

- (1) The following costs are determined to be unallowable and shall not be included in the Cost of the Work or the Design-Builder's Fee:
  - (i) Costs of alcoholic beverages are unallowable.
  - (ii) Goodwill, an unidentifiable intangible asset, originates under the purchase method of accounting for a business combination when the price paid by the acquiring company exceeds the sum of the identifiable individual assets acquired less liabilities assumed, based upon their fair values. The excess is commonly referred to as goodwill. Goodwill may arise from the acquisition of a company as a whole or a portion thereof. Any costs for amortization, expensing, write-off, or write-down of goodwill (however represented) are unallowable.
  - (iii) Interest and Other Financial Costs. Interest on borrowings (however represented), bond discounts, costs of financing and refinancing capital (net worth plus long-term liabilities), legal and professional fees paid in connection with the preparation of prospectuses, costs of preparation and issuance of stock rights, and directly associated costs are unallowable except for interest assessed by State or local taxing authorities.
  - (iv) Lobbying and Political Activity Costs
- (2) Costs associated with the following activities are unallowable:
  - (i) Attempts to influence the outcomes of any Federal, State, or local election, referendum, initiative, or similar procedure, through in-kind or cash contributions, endorsements, publicity, or similar activities;

- (ii) Establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee or other organization established for the purpose of influencing the outcomes of elections;
  - (iii) Any attempt to influence the introduction of Federal, state, or local legislation, or the enactment or modification of any pending Federal, state, or local legislation through communication with any member or employee of the Congress or state legislature (including efforts to influence state or local officials to engage in similar lobbying activity), or with any government official or employee in connection with a decision to sign or veto enrolled legislation;
  - (iv) Any attempt to influence the introduction of Federal, state, or local legislation, or the enactment or modification of any pending Federal, state, or local legislation by preparing, distributing or using publicity or propaganda, or by urging members of the general public or any segment thereof to contribute to or participate in any mass demonstration, march, rally, fund raising drive, lobbying campaign or letter writing or telephone campaign;
  - (v) Legislative liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of or in knowing preparation for an effort to engage in unallowable activities; or
  - (vi) Costs incurred in attempting to improperly influence, either directly or indirectly, an employee or officer of the Executive branch of the Federal Government to give consideration to or act regarding a regulatory or contract matter.
- (3) The following activities are excepted from the coverage of (2) above:
- (i) Providing a technical and factual presentation of information on a topic directly related to the performance of a contract through hearing testimony, statements or letters to the Congress or a state legislature, or subdivision, member, or cognizant staff member thereof, in response to a documented request (including a Congressional Record notice requesting testimony or statements for the record at a regularly scheduled hearing) made by the recipient member, legislative body or subdivision, or a cognizant staff member thereof; provided such information is readily obtainable and can be readily put in deliverable form; and further provided that costs under this section for transportation, lodging or meals are unallowable unless incurred for the purpose of offering testimony at a regularly scheduled Congressional hearing pursuant to a written request for such presentation made by the Chairman or Ranking Minority Member of the Committee or Subcommittee conducting such hearing.
  - (ii) Any lobbying made unallowable by (2) (iii) above to influence state or local legislation in order to directly reduce contract cost, or to avoid material impairment of the contractor's authority to perform the contract.
  - (iii) Any activity specifically authorized by statute to be undertaken with funds from the contract.
- (4) Contractors shall maintain adequate records to demonstrate that the certification of costs as being allowable, or unallowable, pursuant to this subsection complies with the requirements of this subsection. Existing procedures should be utilized to resolve in advance any significant questions or disagreements concerning the interpretation or application of the subsection.

(End of clause)

As prescribed in 25.3.3, insert the following clause in all IGC awards.

**IGC CLOSEOUT (APR 2024)**

The Federal awarding agency shall closeout the IGC when it determines that all applicable administrative actions and work of the IGC have been completed by the non-Federal entity. If the non-Federal entity fails to provide the closeout documents, the Federal awarding agency shall proceed to closeout the Federal award with the information available. This section specifies the actions the non-Federal entity and Federal awarding agency must take to complete this process at the end of the period of performance.

- (a) The non-Federal entity shall submit, no later than 180 calendar days after the end date of the period of performance, all invoices (including final invoice), financial reports, performance reports, and other reports, as required by the terms and conditions of the IGC. If the non-Federal entity cannot meet this requirement, the non-Federal entity shall notify the BPA CO prior to the due date of the mitigating circumstances as to why they could not submit the closeout documents and state when the closeout documents will be provided.
- (b) When the non-Federal entity completes and submits all closeout requirements and documentation, the Federal awarding agency shall promptly complete all closeout actions for IGC. The Federal awarding agency must make every effort to complete closeout actions no later than one year after the end of the period of performance unless otherwise directed by authorizing statutes.
- (c) If the non-Federal entity does not submit all reports and invoices in accordance with this section and the terms and conditions of the IGC, the Federal awarding agency shall proceed to closeout with the information available within one year of the period of performance end date.
- (d) Post-closeout adjustments and continuing responsibilities allow BPA to make financial adjustments to a previously closed award such as resolving indirect cost payments and making adjustments to final payments. In such instances, the CO may open a closed IGC to make a financial adjustment, with the Supervisory CO's approval.
- (e) If the non-Federal entity does not submit all reports and invoices in accordance with this section within one year of the period of performance end date, the Federal awarding agency must report the non-Federal entity's material failure to comply with the terms and conditions of the award with the OMB-designated integrity and performance system (currently sam.gov). Federal awarding agencies may also pursue other enforcement actions per CFR 200.339.

(End of clause)

35.2.328 Clause 28-1.1 Contract – Basic Terms

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**CONTRACT – BASIC TERMS (FEB 2020)**

- (a) By signing the contract cover page, Bonneville and the Contractor agree, subject to the attached terms and conditions, that Contractor shall sell to Bonneville the items and/or services identified herein at the prices set forth in the Schedule of Items.

- (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 Bonneville's Convenience. Bonneville 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)

35.2.329 Clause 28-1.2 Indefinite Delivery - Definite Quantity Contract – Basic Terms

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**INDEFINITE DELIVERY - DEFINITE QUANTITY CONTRACT – BASIC TERMS (FEB 2020)**

- (a) By signing the contract cover page, Bonneville and the Contractor agree, subject to the attached terms and conditions, that Contractor shall sell to Bonneville items and/or services identified herein at the prices set forth in the Schedule of Items.
- (b) This Indefinite Delivery - Definite Quantity (IDDDQ) Contract shall become effective upon receipt of the signed IDDDQ 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 Bonneville's Convenience. Bonneville 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)

35.2.330 Clause 28-1.3 Indefinite Delivery - Indefinite Quantity Contract – Basic Terms

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**INDEFINITE DELIVERY - INDEFINITE QUANTITY CONTRACT – BASIC TERMS (FEB 2020)**

- (a) By signing the contract cover page, Bonneville and the Contractor agree, subject to the attached terms and conditions, that Contractor shall sell to Bonneville items and/or services identified herein at the prices set forth in the Schedule of Items.
- (b) This Indefinite Delivery - Indefinite Quantity (IDIQ) Contract shall become effective upon receipt of the signed IDIQ 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 Bonneville's Convenience. Bonneville 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)

35.2.331 Clause 28-1.4 Blanket Purchase Agreement – Basic Terms

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**BLANKET PURCHASE AGREEMENT – BASIC TERMS (FEB 2020)**

- (a) By signing the Blanket Purchase Agreement cover page, Bonneville and the Contractor agree that Bonneville is under no obligation until a binding order (release), subject to the Blanket Purchase 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. Bonneville is obligated only to the extent of authorized orders actually placed against this Blanket Purchase Agreement.
- (b) This Blanket Purchase Agreement shall become effective upon Bonneville's receipt of the fully executed Blanket Purchase Agreement. The task/delivery orders (releases) become binding contracts upon Bonneville's receipt of the Contractor's written confirmation of the order. The Blanket Purchase 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 Bonneville's Convenience.
- (c) Ordering: Orders shall identify the number of the task/delivery order (release) and the Blanket Purchase 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 Items.
- (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) Blanket Purchase Agreement Number; (3) Date of order; (4) Name of the Bonneville 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)

### 35.2.332 Clause 28-1.5 Purchase Order – Basic Terms

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

#### **PURCHASE ORDER – BASIC TERMS (FEB 2020)**

- (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 Bonneville the items and/or services) identified herein as set forth in the Schedule of Items.
- (b) This Purchase Order shall become effective upon Contractor's acceptance of Bonneville's Purchase Order as evidenced by (1) Bonneville's receipt of Contractor's order confirmation; (2) Bonneville'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 Bonneville's termination clauses.

(End of clause)

35.2.333 Clause 28-1.6 Blanket Ordering Agreement – Basic Terms

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**BLANKET ORDERING AGREEMENT – BASIC TERMS (FEB 2020)**

- (a) By signing the Blanket Ordering Agreement cover page, Bonneville and the Contractor agree that Bonneville is under no obligation until a binding order (release), subject to the Blanket Ordering Agreement terms and conditions, is issued by the Contracting Officer or his/her authorized representative to the Contractor.
- (b) This Blanket Ordering Agreement shall become effective upon Contractor’s acceptance of Bonneville’s Blanket Ordering Agreement as evidenced by (1) Bonneville’s receipt of Contractor’s order confirmation; (2) Bonneville’s receipt of the fully executed Blanket Ordering Agreement; (3) Shipment of the goods or any portion thereof; or (4) Contractor’s performance under the Master Purchase Order. This Blanket Ordering Agreement shall continue until the earlier of its expiration or termination pursuant to Bonneville’s termination clauses.

(End of clause)

35.2.334 Clause 28-2 Schedule of Items

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**SCHEDULE OF ITEMS (FEB 2022)**

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]*.

<u>Item No.</u>	<u>Description</u>	<u>Quantity</u>	<u>Unit</u>	<u>Price</u>	<u>Amount</u>
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)

35.2.335 Clause 28-3 Invoice

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**INVOICE (OCT 2014)**

- (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)

35.2.336 Clause 28-4.1 Payment – Firm-Fixed-Price

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**PAYMENT – FIRM-FIXED-PRICE (FEB 2020)**

(a) Payment.

- (1) Items accepted. Payment shall be made for items accepted by Bonneville that have been delivered to the delivery destinations set forth in this contract.
- (2) Prompt Payment. Bonneville 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 Bonneville to make payments through EFT. Receipt of payment information, including any changes, must be received by Bonneville 30 days prior to effective date of the change. Bonneville 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. Bonneville 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 Bonneville. The Contractor shall submit EFT enrollment banking information directly to Bonneville Vendor Maintenance Team, using Substitute IRS Form w9e, Request for Taxpayer Identification Number and Certification, available from the CO or the Bonneville Vendor Maintenance Team. Contact and mailing information:

Bonneville Power Administration  
 PO Box 61409  
 Vancouver, WA 98666-1409  
 ATTN: NSTS-4400-LL  
 Vendor Maintenance

email: [VendorMaintenance@bpa.gov](mailto: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 Bonneville 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 Bonneville 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) Bonneville 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 Bonneville 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)

### 35.2.337 Clause 28-4.2 Payment – Time-and-Materials/Labor Hour

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

#### **PAYMENT – TIME-AND-MATERIALS/LABOR HOUR (FEB 2020)**

- (a) Services accepted. Payments shall be made for services accepted by Bonneville that have been delivered to the delivery destination(s) set forth in this contract. Bonneville will pay the Contractor as follows upon the submission of proper invoices approved by the Contracting Officer:
  - (1) Hourly rate.
    - (i) 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.
    - (ii) 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.
    - (iii) 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.
    - (iv) 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.
    - (v) 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.
      - (A) If no overtime rates are provided in the Schedule and the Contracting Officer approves overtime work in advance, overtime rates shall be negotiated.
      - (B) Failure to agree upon these overtime rates shall be treated as a dispute under the Disputes clause of this contract.
      - (C) 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.
  - (2) Materials.
    - (i) If the Contractor furnishes materials that meet the definition of a commercial item at BPI 2.2, the price to be paid for such materials shall not exceed the Contractor's established catalog or market price, adjusted to reflect the –

- (A) Quantities being acquired; and
- (B) Any modifications necessary because of contract requirements.
- (ii) Except as provided for in paragraph (a)(2)(i) and (a)(2)(iii)(B) of this clause, Bonneville 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 –
  - (A) Has made payments for materials in accordance with the terms and conditions of the agreement or invoice; or
  - (B) Makes these payments within 30 days of the submission of the Contractor's payment request to Bonneville and such payment is in accordance with the terms and conditions of the agreement or invoice.
- (iii) To the extent able, the Contractor shall –
  - (A) Obtain materials at the most advantageous prices available with due regard to securing prompt delivery of satisfactory materials; and
  - (B) Give credit to Bonneville for cash and trade discounts, rebates, scrap, commissions, and other amounts that are identifiable to the contract.
- (iv) Other Costs. Unless listed below, other direct and indirect costs will not be reimbursed.
  - (A) Other Direct Costs. Bonneville will reimburse the Contractor on the basis of actual cost for the following, provided such costs comply with the requirements in paragraph (a)(2)(ii) of this clause; see Schedule of Items.
  - (B) Indirect Costs (Material handling, Subcontract Administration, etc.). Bonneville will reimburse the Contractor for indirect costs on a pro-rata basis over the period of contract performance at the following fixed price: None.
- (b) Total cost. It is estimated that the total cost to Bonneville 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 Bonneville 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 Bonneville 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, Bonneville 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.
- (c) Ceiling price. Bonneville 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.

- (d) 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):
- (1) 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.
  - (2) For labor hours (including any subcontractor hours reimbursed at the hourly rate in the Schedule), when timecards are required as substantiation for payment—
    - (i) The original timecards (paper-based or electronic);
    - (ii) The Contractor's timekeeping procedures;
    - (iii) Contractor records that show the distribution of labor between jobs or contracts; and
    - (iv) 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.
  - (3) For material and subcontract costs that are reimbursed on the basis of actual cost—
    - (i) Any invoices or subcontract agreements substantiating material costs; and
    - (ii) Any documents supporting payment of those invoices.
- (e) 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. Bonneville 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 Bonneville has otherwise overpaid on an invoice payment, the Contractor shall—
- (1) Remit the overpayment amount to the payment office cited in the contract along with a description of the overpayment including the—
    - (i) Circumstances of the overpayment (e.g., duplicate payment, erroneous payment, liquidation errors, date(s) of overpayment);
    - (ii) Affected contract number and delivery order number, if applicable;
    - (iii) Affected contract line item or subline item, if applicable; and
    - (iv) Contractor point of contact.
  - (2) Provide a copy of the remittance and supporting documentation to the Contracting Officer.
- (f) All amounts that become payable by the Contractor to Bonneville 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.
- (1) Bonneville may issue a demand for payment to the Contractor upon finding a debt is due under the contract.
  - (2) Final Decisions. The Contracting Officer will issue a final decision as required by BPI 21.3.11 if—
    - (i) The Contracting Officer and the Contractor are unable to reach agreement on the existence or amount of a debt in a timely manner;
    - (ii) 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

- (iii) The Contractor requests a deferment of collection on a debt previously demanded by the Contracting Officer.
- (1) 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.
- (2) Amounts shall be due at the earliest of the following dates:
  - (i) The date fixed under this contract.
  - (ii) The date of the first written demand for payment, including any demand for payment resulting from a default termination.
- (3) The interest charge shall be computed for the actual number of calendar days involved beginning on the due date and ending on—
  - (i) The date on which the designated office receives payment from the Contractor;
  - (ii) The date of issuance of a Bonneville check/payment to the Contractor from which an amount otherwise payable has been withheld as a credit against the contract debt; or
  - (iii) The date on which an amount withheld and applied to the contract debt would otherwise have become payable to the Contractor.
- (4) 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.
- (5) 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.
- (g) 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 Bonneville’s request, execute and deliver, at the time of and as a condition precedent to final payment under this contract, a release discharging Bonneville, 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.
  - (1) Specified claims in stated amounts, or in estimated amounts if the amounts are not susceptible to exact statement by the Contractor.
  - (2) 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 Bonneville is prepared to make final payment, whichever is earlier.
  - (3) Claims for reimbursement of costs (other than expenses of the Contractor by reason of its indemnification of Bonneville against patent liability), including reasonable incidental expenses, incurred by the Contractor under the terms of this contract relating to patents.
- (h) Prompt payment. Bonneville will make payment in accordance with the Prompt Payment Act (31 U.S.C. 3903) and prompt payment regulations at 5 CFR part 1315.
- (i) Electronic Funds Transfer (EFT).
  - (1) 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 Bonneville to make payments through EFT. Receipt of payment

information, including any changes, must be received by Bonneville 30 days prior to effective date of the change. Bonneville 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. Bonneville shall notify the Contractor within 7 days of its receipt of EFT information which it determines to be defective.

- (2) 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.
- (3) Submission of EFT banking information to Bonneville: The Contractor shall submit EFT enrollment banking information directly to Bonneville Vendor Maintenance Team, using Substitute IRS Form w9e, Request for Taxpayer Identification Number and Certification, available from the CO or the Bonneville Vendor Maintenance Team. Contact and mailing information:

Bonneville Power Administration  
 PO Box 61409  
 Vancouver, WA 98666-1409  
 ATTN: NSTS-4400-LL  
 Vendor Maintenance

email: [VendorMaintenance@bpa.gov](mailto:VendorMaintenance@bpa.gov)  
 phone: 360-418-2800  
 fax: 360-418-8904

- (j) 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)

35.2.338 Clause 28-5.1 Inspection/Acceptance-Firm-Fixed-Price

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**INSPECTION/ACCEPTANCE – FIRM-FIXED-PRICE (MAR 2018)**

The Contractor shall only tender for acceptance those items that conform to the requirements of this contract. Bonneville reserves the right to inspect or test any supplies or services that have been tendered for acceptance. Bonneville 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, Bonneville may seek an equitable price reduction or adequate consideration for acceptance of nonconforming supplies or services. Bonneville must exercise its post-acceptance rights:

- (a) within a reasonable time after the defect was discovered or should have been discovered; and
- (b) 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)

35.2.339 Clause 28-5.2 Inspection/Acceptance-Time-and-Materials/Labor Hour

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**INSPECTION/ACCEPTANCE – TIME-AND-MATERIALS/LABOR HOUR (FEB 2020)**

- (a) Bonneville 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. Bonneville may also inspect the plant or plants of the Contractor or any subcontractor engaged in contract performance. Bonneville will perform inspections and tests in a manner that will not unduly delay the work.
- (b) If Bonneville 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, Bonneville 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, Bonneville 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(a)(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. 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 replaced or corrected without disclosing the former requirement for replacement or correction, and when required, shall disclose the corrective action taken.
- (e) (1) 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 Bonneville), Bonneville may:
  - i. 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
  - ii. Terminate this contract for cause.(2) 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)(1) and (2) above, Bonneville may at any time require the Contractor to remedy by correction or replacement, without cost to Bonneville, any failure by the Contractor to comply with the requirements of this contract, if the failure is due to:
  - (1) Fraud, lack of good faith, or willful misconduct on the part of the Contractor’s managerial personnel; or
  - (2) 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 Bonneville-furnished property shall be governed by the clause relating to Bonneville property, if included in this contract.

(End of clause)

#### 35.2.340 Clause 28-6 Changes

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

#### **CHANGES (JUL 2013)**

Changes in the terms and conditions of this contract may be made only by written agreement of the parties.

(End of clause)

#### 35.2.341 Clause 28-7 Stop Work Order

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

#### **STOP WORK ORDER (MAR 2018)**

- (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 Bonneville'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 Bonneville, 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)

**35.2.342 Clause 28-8 Force Majeure/Excusable Delay**

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**FORCE MAJEURE/EXCUSABLE DELAY (JUL 2013)**

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)

**35.2.343 Clause 28-9.1 Termination for Cause – Firm-Fixed-Price**

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**TERMINATION FOR CAUSE – FIRM-FIXED-PRICE (MAR 2018)**

Bonneville 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 Bonneville, upon request, with adequate assurances of future performance. In the event of termination for cause, Bonneville shall not be liable to the Contractor for any amount for supplies or services not accepted, and the Contractor shall be liable to Bonneville for any and all rights and remedies provided by law. If it is determined that Bonneville improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(End of clause)

**35.2.344 Clause 28-9.2 Termination for Cause – Time-and-Materials/Labor Hour**

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**TERMINATION FOR CAUSE – TIME-AND-MATERIALS/LABOR HOUR (MAR 2018)**

Bonneville 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 Bonneville, 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-Hour, but the “hourly rate” for labor hours expended in furnishing work not delivered to or accepted by Bonneville 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-Hour, 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 Bonneville for any and all rights and remedies provided by law. If it



is determined that Bonneville improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

(End of clause)

#### 35.2.345 Clause 28-10.1 Termination for Bonneville's Convenience-Firm-Fixed-Price

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

##### **TERMINATION FOR BONNEVILLE'S CONVENIENCE – FIRM-FIXED-PRICE (MAR 2018)**

Bonneville 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 Bonneville 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 Bonneville 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)

#### 35.2.355 Clause 28-10.2 Termination for Bonneville's Convenience – Time-and-Materials/Labor Hour

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

##### **TERMINATION FOR BONNEVILLE'S CONVENIENCE –TIME-AND-MATERIALS/LABOR HOUR (MAR 2018)**

Bonneville 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 Bonneville 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 Bonneville 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)

**35.2.356 Clause 28-11 Warranty**

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**WARRANTY (JUL 2013)**

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)

**35.2.357 Clause 28-12 Limitation of Liability**

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**LIMITATION OF LIABILITY (JUL 2013)**

Except as otherwise provided by an express warranty, the Contractor shall not be liable to Bonneville for consequential damages resulting from any defect or deficiencies in accepted items.

(End of clause)

**35.2.358 Clause 28-13 Disputes**

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**DISPUTES (JUL 2013)**

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)

**35.2.359 Clause 28-14 Indemnification**

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**INDEMNIFICATION (MAR 2018)**

The Contractor shall indemnify Bonneville 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)

#### 35.2.360 Clause 28-15 Risk of Loss – FOB

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

##### **RISK OF LOSS – FOB (FEB 2020)**

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 Bonneville upon:

- (a) Delivery of the supplies to a carrier, if transportation is f.o.b. origin; or
- (b) Delivery of the supplies to Bonneville at the destination specified in the contract, if transportation is f.o.b. destination.

(End of clause)

#### 35.2.361 Clause 28-15.1 Risk of Loss - Incoterms

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

##### **RISK OF LOSS – INCOTERMS (FEB 2020)**

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 Bonneville upon:

- (a) Delivery of the supplies to a carrier, if transportation is using INCOTERMS® EXW; or
- (b) Delivery of the supplies to Bonneville at the destination specified in the contract, if transportation is using INCOTERMS® DAP or DDP.

(End of clause)

#### 35.2.362 Clause 28-16 Title

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

##### **28-16 TITLE (MAR 2018)**

Unless specified elsewhere in this contract, title to items furnished under this contract shall pass to Bonneville upon acceptance, regardless of when or where Bonneville takes physical possession.

(End of clause)

#### 35.2.363 Clause 28-17 Taxes

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

##### **TAXES (JUL 2013)**

The contract price includes all applicable Federal, State, and local taxes and duties.

(End of clause)

### 35.2.364 Clause 28-18 Assignment

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

#### **ASSIGNMENT (MAR 2018)**

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 Bonneville purchase card), the Contractor may not assign its rights to receive payments under this contract.

(End of clause)

### 35.2.365 Clause 28-19 Other Compliances

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

#### **OTHER COMPLIANCES (JUL 2013)**

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)

### 35.2.366 Clause 28-20.1 Requirements Unique to Government Contracts – Supplies

As prescribed in 28.3.4(bb), insert the following clause in solicitations and contracts for commercial acquisitions:

#### **REQUIREMENTS UNIQUE TO GOVERNMENT CONTRACTS – SUPPLIES (FEB 2022)**

The Contractor shall comply with the following clauses that are incorporated by reference to implement provisions of law or Executive Orders applicable to acquisitions of commercial supplies:

#### APPLICABLE TO ALL SOLICITATIONS AND CONTRACTS:

- (a) The following clauses are applicable to all contracts and solicitations:
- (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 15-14)
  - (3) Contractor Employee Whistleblower Rights (Clause 3-10)
  - (4) Utilization of Supplier Diversity Program Categories (Clause 8-3)
  - (5) Restriction on Certain Foreign Purchases (Clause 9-8)
  - (6) Child Labor-Cooperation with Authorities and Remedies (Clause 10-24)
  - (7) Combating Trafficking in Persons (Clause 10-25)
  - (8) Printing (Clause 11-9)
  - (9) Ozone Depleting Substances (Clause 15-7)
  - (10) Refrigeration Equipment (Clause 15-8)
  - (11) Energy Efficiency in Energy Consuming Products (Clause 15-9)

- (12) Acceleration of Payments to Small Business Contractors (Clause 22-21)
- (13) Subcontracting with Debarred or Suspended Entities (Clause 11-7)
- (14) Affirmative Action for Workers with Disabilities (Clause 10-2) except under the following conditions:
  - (i) Work performed outside the United States by employees who were not recruited within the United States; or
  - (ii) Contracts with State or local governments (or any agency, instrumentality, or subdivision) when that entity does not participate in work on or under the contract.
- (15) Equal Opportunity (Clause 10-1) except under the following conditions:
  - (i) Work performed on or within 40 miles of an Indian reservation where a Tribal Employment Rights Ordinance (TERO) is known to be in effect.
  - (ii) Work performed outside the United States by employees who were not recruited within the United States;
  - (iii) Individuals (as opposed to a firm with multiple employees); or
  - (iv) Contracts with State or local governments or any agency, instrumentality, or subdivision thereof.
- (16) Buy American Act – Supplies (Clause 9-3) except for the purchase of –
  - (i) Civil aircraft and related articles;
  - (ii) Supplies subject to trade agreement thresholds; or
  - (iii) Commercial IT equipment and supplies.

APPLICABLE TO ALL SOLICITATIONS AND CONTRACTS ABOVE \$150K:

- (b) In addition to the requirements above, the following clauses are applicable to all contracts and solicitations that exceed or are expected to exceed \$150K:
  - (1) Equal Opportunity for Veterans (Clause 10-19)
  - (2) Employment Reports on Veterans (Clause 10-20)
  - (3) Examination of Records (Clause 12-3).
    - (i) 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 –
      - (A) Examine any of the Contractor’s or any subcontractors’ records that pertain to, and involve transactions relating to, this contract: and
      - (B) Interview any officer or employee regarding such transactions.
    - (ii) The Contractor shall make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction, until three 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 three 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.
    - (iii) 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.

## ADDITIONAL CLAUSES FOR SOLICITATIONS AND CONTRACTS AS APPLICABLE

- (c) Contractor Code of Business Ethics and Conduct (Clause 3 -11) is applicable if the value of the contract is expected to exceed \$6 million and the performance period is 120 days or more.

## ADDITIONAL REQUIREMENTS FOR SUBCONTRACTS

- (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 (b)(3) Examination of Record of this clause. This paragraph shall be included in all subcontracts, except the authority of the Inspector General does not flow down; and
  - (2) Those clauses contained in this paragraph, unless there is an exception noted;
    - (i) Contractor Employee Whistleblower Rights (Clause 3-10)
    - (ii) Contractor Code of Business Ethics and Conduct (Clause 3 -11), (Exception: If the value of the contract is less than 6 million and the performance period is less than 120 days).
    - (iii) Utilization of Supplier Diversity Program Categories (Clause 8-3), (Exception: Do not insert unless the subcontract offers further subcontracting opportunities)
    - (iv) Equal Opportunity (Clause 10-1)
    - (v) Affirmative Action for Workers with Disabilities (Clause 10-2)
    - (vi) Equal Opportunity for Veterans (Clause 10-19)
    - (vii) Employment Reports on Veterans (Clause 10-20)
    - (viii) Child Labor-Cooperation with Authorities and Remedies (Clause 10-24)
    - (ix) Combating Trafficking in Persons (Clause 10-25)
    - (x) Subcontracting with Debarred or Suspended Entities (Clause 11-7), (Exception: Do not insert if subcontracting for COTS items)
    - (xi) Acceleration of Payments to Small Business Contractors (Clause 22-21)
- (e) Text of clauses incorporated by reference is available at <http://www.bpa.gov/Doing%20Business/purchase/Pages/default.aspx>

(End of clause)

### 35.2.367 Clause 28-20.2 Requirements Unique to Government Contracts – Services

As prescribed in 28.3.4(bb), insert the following clause in solicitations and contracts for commercial acquisitions:

#### **REQUIREMENTS UNIQUE TO GOVERNMENT CONTRACTS – SERVICES (FEB 2022)**

The Contractor shall comply with the following clauses that are incorporated by reference to implement provisions of law or Executive Orders applicable to acquisitions of commercial services.

#### APPLICABLE TO ALL SOLICITATIONS AND CONTRACTS:

- (a) The following clauses are applicable to all contracts and solicitations:
- (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 15-14)
  - (4) Contractor Employee Whistleblower Rights (Clause 3-10)

- (5) Utilization of Supplier Diversity Program Categories (Clause 8-3)
- (6) Restriction on Certain Foreign Purchases (Clause 9-8)
- (7) Combating Trafficking in Persons (Clause 10-25)
- (8) Printing (Clause 11-9)
- (9) Ozone Depleting Substances (Clause 15-7)
- (10) Refrigeration Equipment (Clause 15-8)
- (11) Energy Efficiency in Energy Consuming Products (Clause 15-9)
- (12) Recovered Materials (Clause 15-10)
- (13) Bio-Based Materials (Clause 15-11)
- (14) Acceleration of Payments to Small Business Contractors (Clause 22-21)
- (15) Subcontracting with Debarred or Suspended Entities (Clause 11-7)
- (16) Affirmative Action for Workers with Disabilities (Clause 10-2) except under the following conditions –
  - (i) Work performed outside the United States by employees who were not recruited within the United States; or
  - (ii) Contracts with State or local governments (or any agency, instrumentality, or subdivision) when that entity does not participate in work on or under the contract.
- (2) Equal Opportunity (Clause 10-1) except under the following conditions –
  - (i) Work performed on or within 40 miles of an Indian reservation where a Tribal Employment Rights Ordinance (TERO) is known to be in effect;
  - (ii) Work performed outside the United States by employees who were not recruited within the United States;
  - (iii) Individuals (as opposed to a firm with multiple employees); or
  - (iv) Contracts with State or local governments or any agency, instrumentality, or subdivision thereof.
- (3) Minimum Wage for Federal Contracts (Clause 10-28), except for work performed outside the United States by employees recruited outside the United States.
- (4) Buy American Act – Supplies (Clause 9-3) except for the purchase of –
  - (i) Civil aircraft and related articles;
  - (ii) Supplies subject to trade agreement thresholds; or
  - (iii) Commercial IT equipment and supplies.

**APPLICABLE TO ALL SOLICITATIONS AND CONTRACTS ABOVE \$150K:**

- (b) In addition to the requirements above, the following clauses are applicable to all contracts and solicitations that exceed or are expected to exceed \$150K:
  - (1) Equal Opportunity for Veterans (Clause 10-19)
  - (2) Employment Reports on Veterans (Clause 10-20)
  - (3) Contract Work Hours and Safety Standards Act – Overtime Compensation (Clause 10-21)
  - (4) Nondisplacement of Qualified Workers (Clause 23-5), except for:
    - (i) Contracts and subcontracts awarded pursuant to 41 U.S.C. chapter 85, Committee for Purchase from People Who Are Blind or Severely Disabled;
    - (ii) 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;
    - (iii) Agreements for vending facilities entered into pursuant to the preference regulations issued under the Randolph Sheppard Act, 20 U.S.C. 107; or
    - (iv) 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.

- (5) Employment Eligibility Verification (Clause 10-18). All solicitations, contracts and IGCs; unless one, or more, of the following conditions exists:
- (A) Are only for work that will be performed outside the United States;
  - (B) Are for a period of performance of less than 120 days; or
  - (C) Are only for:
    - (1) Commercially available off-the-shelf items;
    - (2) Items that would be COTS items, but for minor modifications (as defined in BPI 2.2); or
    - (3) 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.
- (6) Examination of Records (Clause 12-3).
- (i) 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 –
    - (A) Examine any of the Contractor's or any subcontractors' records that pertain to, and involve transactions relating to, this contract: and
    - (B) Interview any officer or employee regarding such transactions.
  - (ii) The Contractor shall make available at its offices at all reasonable times the records, materials, and other evidence for examination, audit, or reproduction, until three 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 three 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.
  - (iii) 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.

#### ADDITIONAL CLAUSES FOR SOLICITATIONS AND CONTRACTS AS APPLICABLE

- (c) Contractor Code of Business Ethics and Conduct (Clause 3 -11) is applicable if the value of the contract is expected to exceed \$6 million and the performance period is 120 days or more.

#### ADDITIONAL REQUIREMENTS FOR SUBCONTRACTS

- (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 (b)(6) Examination of Record of this clause. This paragraph shall be included in all subcontracts, except the authority of the Inspector General does not flow down; and



- (2) Those clauses contained in this paragraph, unless there is an exception noted;
- (i) Contractor Employee Whistleblower Rights (Clause 3-10)
  - (ii) Contractor Code of Business Ethics and Conduct (Clause 3 -11), (Exception: If the value of the contract is less than 6 million and the performance period is less than 120 days).
  - (iii) Utilization of Supplier Diversity Program Categories (Clause 8-3), if the subcontract offers further subcontracting opportunities.
  - (iv) Equal Opportunity (Clause 10-1)
  - (v) Affirmative Action for Workers with Disabilities (Clause 10-2)
  - (vi) Employment Eligibility Verification (Clause 10-18), (Exception: Do not insert if subcontracting for commercial items)
  - (vii) Equal Opportunity for Veterans (Clause 10-19)
  - (viii) Employment Reports on Veterans (Clause 10-20)
  - (ix) Contract Work Hours and Safety Standards Act (Clause 10-21)
  - (x) Combating Trafficking in Persons (Clause 10-25)
  - (xi) Minimum Wage for Federal Contracts (Clause 10-28)
  - (xii) Subcontracting with Debarred or Suspended Entities (Clause 11-7), unless subcontracting for COTS items.
  - (xiii) Acceleration of Payments to Small Business Contractors (Clause 22-21)
  - (xiv) 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)

35.2.368 Clause 28-21 Order of Precedence

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

**ORDER OF PRECEDENCE (FEB 2020)**

Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:

- (a) The Schedule of Items;
- (b) Contract clauses;
- (c) The specifications or statement of work; and
- (d) Other documents, exhibits, and attachments.

(End of clause)

Alternate I Order of Precedence - IT/OT Contracts

As prescribed in 17.3.4, insert the following clause in all solicitations and contracts for Information Technology or Operational Technology contracts and Information Technology or Operational Technology service, support or maintenance contracts:

**ORDER OF PRECEDENCE - IT/OT CONTACTS (APR 2024)**

Any inconsistencies in this solicitation or contract shall be resolved by giving precedence in the following order:

- (a) The Schedule of Items;
- (b) Bonneville's contract clauses;
- (c) The requirements/specifications, statement of work or statement of objectives;
- (d) Other documents, exhibits, and attachments; and
- (e) Contractor's licence or clauses.

(End of clause)

#### 35.2.369 Clause 28-22 Applicable Law

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

##### **Clause 28-22 APPLICABLE LAW (JUL 2013)**

United States law will apply to resolve any claim of breach of this contract.

(End of clause)

#### 35.2.370 Clause 28-23 Internet Protocol Version 6

As prescribed in 28.3.4, insert the following clause in solicitations and contracts for commercial acquisitions:

##### **INTERNET PROTOCOL VERSION 6 (FEB 2022)**

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. Contractor agrees to use the USGv6 Profile (NIST Standards for wide-spread adoption of IPv6 in the U.S. Government) to fulfill contractual requirements for IPv6 capabilities of equipment, networked information technologies and professional support provided for equipment and technologies purchased. Additionally, the Contractor agrees to document compliance with such IPv6 requirement statements through the USGv6 Test Program.

(End of clause)

#### 35.2.371 Clause 28-24 Authorized Purchaser

As prescribed in 28.3.4 insert the following clause Authorized Purchaser in material and equipment contracts if a contractor (including EPC contractors) may order materials using a Bonneville contract (s) or agreement (s):

**AUTHORIZED PURCHASER (FEB 2020)**

- (a) The following definition applies to this contract:
  - (1) Authorized Purchaser: An independent individual or company authorized in writing by the Bonneville Contracting Officer to make purchases on behalf of Bonneville under the terms and conditions of this contract.
- (b) The Contractor will honor and accept orders from the Authorized Purchaser as if ordered directly by the Bonneville Contracting Officer.
  - (1) The terms and conditions of this contract flow down to the Authorized Purchaser.
- (c) The Contractor will only honor orders placed by the Authorized Purchaser under this contract for work identified as Bonneville project materials that reference this contract by number and title.
- (d) The Authorized Purchaser is responsible for all logistics related activities such as ordering, receiving, transportation, and payment.
- (e) If the Contractor and the Authorized Purchaser have a conflict they cannot resolve, the Contractor will immediately notify the Contracting Officer for resolution. If a conflict cannot be readily resolved, the Contracting Officer may direct the Contractor to continue performance pending resolution.
- (f) The Contractor will provide a record to the Contracting Officer of all purchases made by the Authorized Purchaser at the close of each order.
- (g) Notwithstanding any of the above, if the Authorized Purchaser fails to comply in any way with the terms of this contract, Bonneville guarantees that all authorized commitments under the terms of the contract will be fulfilled.

(End of clause)

BONNEVILLE POWER ADMINISTRATION

BPA I-4829 • April 2024

