Department of Energy
Washington, DC 20585

ARBITRATION GUIDANCE FOR M&O CONTRACTORS

The Office of the General Counsel, in conjunction with the Office of General Counsel of the NNSA, has reviewed the question of whether M&O contractors can include binding arbitration in their contracts with third-parties. We have determined that there is currently no legal prohibition on M&O contractors including binding arbitration clauses in their contracts with others. In fact, we believe it often will be a good idea to include arbitration clauses as a means of limiting the risk of litigation which is often more time consuming and expensive than arbitration.

The Department of Energy, including NNSA, does however "regulate" the use of arbitration once a dispute has arisen under our Contractor Legal Management Requirements. *See* 10 C.F.R. § 719. The provisions on Alternative Dispute Resolution provide, among other things, that:

> mediation will be the principal ... method of alternative dispute resolution. In exceptional circumstances, arbitration may be appropriate. However, agreement to arbitrate should generally be consistent with the Administrative Dispute Resolution Act and Department guidance .... When a decision to arbitrate is made, a statement fixing the maximum award amount should be agreed to ....

Going forward, we intend to take an expansive view under the existing rules about when post-dispute arbitration is appropriate. We also plan to adopt new arbitration rules that are consistent and sensible.

We also believe it advisable to develop a "best practices" standard arbitration clause and invite all M&O contractors with an interest in this subject to share their views with our offices. We also believe that, in drafting arbitration clauses, it would be wise to give serious consideration to using the Civilian Board of Contract Appeals as an arbitrator. While other recognized dispute resolution organizations can be considered, our research suggests that the Board would surely be appropriate and is an inexpensive option.

Our guidance, then, is that arbitration often makes sense, and that it makes most sense if care is taken in crafting provisions to limit the cost of the process and to ensure that the relief afforded is cabined in some fashion – and, at a minimum, is no broader than that which could be afforded by a court, and avoids impairing your organization's mission or interferes with its DOE contract.

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February 3, 2010