U. S. Department of Justice

Office of Dispute Resolution

Washington, D.C. 20530

April 28, 2009

MEMORANDUM FOR THE ATTORNEY GENERAL

THROUGH: THE DEPUTY ATTORNEY GENERAL 10/9/09

THROUGH: THE ASSOCIATE ATTORNEY GENERAL TJP 6/5/09

FROM: Joanna M. Jacobs
Acting Director
Acting Senior Counsel for Alternative Dispute Resolution
Office of Dispute Resolution

SUBJECT: Attorney General Consultation on Binding Arbitration Guidance To Be Issued by the Department of Energy (Bonneville Power Administration).

PURPOSE: The Department of Energy (Bonneville Power Administration) seeks, pursuant to the Administrative Dispute Resolution Act of 1996, the concurrence of the Attorney General in its proposed guidance for use of binding arbitration in its contracting activities (Tab A).

TIMETABLE: The Department of Energy (Bonneville Power Administration) seeks Justice Department concurrence in the guidance as soon as possible so that the agency may begin using the new arbitration program to facilitate an early and expeditious resolution of designated disputes.

SYNOPSIS: Pursuant to the Administrative Dispute Resolution Act of 1996, a federal agency that wishes to use binding arbitration must issue general guidance on this process in consultation with the Attorney General. The Department of Energy (Bonneville Power Administration) wishes to use binding arbitration for some of its contracting activities, and has drafted proposed guidance in the attached (Tab B) "Bonneville Power Administration's Guidance on the Use of Binding Arbitration for BPA Contracts." This memorandum recommends concurrence in the proposed guidance.

DISCUSSION:

Congress authorized federal agencies to use binding arbitration in the Administrative Dispute Resolution Act of 1996. Because participants in binding arbitration forego their right to an appeal except in very limited circumstances (such as fraud), the Act includes a number of procedural requirements before a federal agency may use this process. These requirements include authorization by the agency official having appropriate settlement authority, and an agreed-upon ceiling on federal liability in any adverse award. 5 U.S.C. §§ 575(b), 575(a)(2). Another requirement is that an agency must issue guidance on the appropriate use of arbitration "in consultation with the Attorney General." 5 U.S.C. § 575(c).

The Department's obligation under 5 U.S.C. § 575(c) is to insure that agencies seeking to use binding arbitration make appropriately informed judgments about such use and, at the same time, to weigh concerns which Congress expressed in the legislation which authorizes the limited use of this process. The Office of Dispute Resolution believes that it is generally appropriate for the Department of Justice to defer to the judgment and expertise of the requesting agencies in their use of binding arbitration to resolve issues in controversy pending before those agencies.

As a matter of policy, Bonneville Power Administration personnel are encouraged to use, as appropriate, the full range of techniques collectively known as "alternative dispute resolution." The Department of Energy (Bonneville Power Administration) requests the Attorney General's concurrence in the attached draft "Bonneville Power Administration's Guidance on the Use of Binding Arbitration for BPA Contracts." Bonneville Power Administration proposes to use binding arbitration in certain contracts for both acquiring and selling commodities and services, while excluding any of the following: contracts relating to real property; contracts relating to either providing or purchasing transmission services; and any employment or labor contracts.

The Guidance meets the legal requirements of the Act. It carefully tracks, and complies with, applicable statutory requirements. The Guidance specifies the parameters of the proposed arbitration program, and gives the parties flexibility to add provisions consistent with those parameters to their individual arbitration

agreements. The Guidance requires the General Counsel of Bonneville Power Administration to approve a request to use binding arbitration in any particular legal dispute .

The arbitration program also advances the policy considerations of the government in this area. It is entirely voluntary, giving parties the freedom to decide whether they wish to participate. Therefore, it provides the parties with another option for their consideration, rather than imposing an additional burden on them. Parties who want a quicker and less expensive decision process than typical litigation may find arbitration especially valuable, and its use may also increase agency efficiency and effectiveness in handling these limited cases.

Similar submissions from the following agencies have received approval from the Attorney General:

- Federal Deposit Insurance Corporation (October, 2000);
- Department of Transportation (Federal Motor Carrier Safety Administration) (March, 2001);
- Federal Aviation Administration (July, 2001);
- Department of the Navy (March, 2007);
- Internal Revenue Service (March, 2007); and
- Presidio Trust (January, 2008).

RECOMMENDATION: We recommend that the Office of Dispute Resolution be directed to inform the Department of Energy (Bonneville Power Administration) that the Attorney General concurs in its draft Guidance on the Use of Binding Arbitration for BPA Contracts under the Administrative Dispute Resolution Act of 1996.

APPROVE: 10-9-09

Concurring Components: 5/29/09
Office of Legal Counsel

DISAPPROVE: _____

Nonconcurring Components:
None

OTHER: _____

Attachments:

Tab A Letter dated January 15, 2009, to the Attorney General from the Secretary of Energy

Tab B Bonneville Power Administration's Guidance on the Use of Binding Arbitration for BPA Contracts.