

 Contract Specialist, BEA 10/16/2021

Battelle Energy Alliance, LLC

**General Provisions for
Professional/Consulting
Services Cost
Reimbursable**

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1. INTRODUCTION

The terms and conditions of these general provisions and those set forth in the Battelle Energy Alliance, LLC (BEA), Contract (defined below) or purchase order apply notwithstanding any different or additional terms and conditions that may be submitted or proposed by the Subcontractor, and the Contractor objects to, and shall not be bound by, any such additional or different terms and conditions. The Subcontractor must determine what provisions should be flowed down into its lower-tier subcontracts and purchase orders to implement the obligations of the Subcontractor. By entering into this Contract, the Subcontractor recognizes these obligations and agrees to implement them in its lower-tier subcontracts and purchase orders.

To assist Subcontractor in determining what provisions to insert in its lower-tier subcontracts and purchase orders, provisions required to be passed down, with value thresholds if any, are indicated by **Gray Shading**. The Subcontractor ultimately remains responsible to determine what provisions need to be flowed down to lower-tier subcontractors.

Certain Federal Acquisition Regulation (FAR) and Department of Energy Acquisition Regulation (DEAR) clauses and articles in 48 C.F.R. Parts 52, 952, and 970 are incorporated herein as if set forth in their entirety. For such clauses and articles incorporated by reference, the following definitions apply unless otherwise specified:

1. *Contractor*. Subcontractor.
2. *Subcontractor*. Subcontractor's lower-tier subcontractor.
3. *Contract*. This Purchase Order or Subcontract including elements noted in Sub-section 4.1.4 below.
4. *Contracting Officer*. Contractor's Procurement Agent, whether called a, Contract Specialist, Procurement Specialist, or another name.
5. *Government*. Contractor.
6. *DOE*. The United States (U.S.) Department of Energy.

FAR and DEAR clauses and articles incorporated by reference are, unless otherwise specified, to the version applicable under publicly available Contract No. DE-AC07-05ID14517 (Prime Contract <https://www.id.energy.gov/doiid/INLContract/INL-Contract.htm>) between Contractor and the DOE effective when this Contract or applicable modification to this Contract is entered and shall be construed and applied to require performance by the Subcontractor herein of the duties and obligations of the Contractor therein.

2. INCORPORATION BY REFERENCE

2.1 All Contracts Regardless of Price/Value

- | | |
|---------|--|
| 2.1.1 | FAR 52.222-21, Prohibition of Segregated Facilities |
| 2.1.2 | FAR 52.222-26, Equal Opportunity |
| 2.1.3 | FAR 52.225-13, Restriction on Certain Foreign Purchases |
| 2.1.4 | FAR 52.247-64, Preference for Privately Owned U.S. Flag Commercial Vessels |
| 2.1.5 | DEAR 952.203-70, Whistleblower Protection for Contractor |
| 2.1.6 | DEAR 952.204-71, Sensitive Foreign Nations Controls |
| 2.1.7 | DEAR 952.204-77, Computer Security |
| 2.1.8 | DEAR 952.247-70, Foreign Travel |
| 2.1.9 | DEAR 952.250-70, Nuclear Hazards Indemnity Agreement |
| 2.1.9.1 | This clause applies in any Contract which may involve the risk of public liability, as that term is defined by the Atomic Energy Act of 1954 as amended (Act) and as further described by DEAR 952.250-70; provided, however, this clause does not apply to a Contract in which the Subcontractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under Section 170b of the Act or NRC agreements of indemnification under Sections 170c and 170k of the Act for |

the activities under this Contract. For purposes of this clause, Government means the U.S. Government.

2.1.10 DEAR 970.5227-8, Refund of Royalties

2.1.11 DEAR 970.5232-3 (a)-(h), Accounts, Records, and Inspection with Alternate I, if applicable.

2.1.12 DEAR 970.5245-1, with Property Alternate I, if applicable.

2.1.13 FAR 52.249-14, Excusable Delays

2.1.14 FAR 52.244-6, Subcontracts for Commercial Items

2.1.15 DEAR 952.231-71, Insurance, Litigation and Claims (and Subcontractor will be authorized to flow down this provision to its lower-tier subcontractors).

2.1.15.1 This clause applies to the extent and upon condition of Subcontractor's compliance with 10 C.F.R. Part 719 and with a then current Legal Management Plan (LMP) submitted by Subcontractor and accepted by DOE and Contractor.

2.1.15.2 Enforcement of any flow down of this clause to any of Subcontractor's sub-tiers relative to DOE or Contractor is conditioned upon applicability of, and compliance by Subcontractor and such sub-tier with DEAR 952.231-71, 10 C.F.R. Part 719 and an applicable LMP submitted by Subcontractor and appropriately accepted by DOE and Contractor.

2.1.15.3 In no event shall Contractor be obligated for payment of any sum not determined to be allowable by DOE.

2.2 Contracts Priced/Valued Greater than \$10,000

2.2.1 FAR 52.222-36, Affirmative Action for Workers with Disabilities

2.3 Contracts Priced/Valued Greater than \$35,000

2.3.1 FAR 52.209-6, Protecting the Government's Interest When Subcontracting with Contractors Debarred, Suspended, or Proposed for Debarment

2.4 Contracts Priced/Valued Greater than \$100,000

2.4.1 FAR 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans

2.5 Contracts Priced/Valued Greater than \$150,000

2.5.1 FAR 52.203-12, Limitation on Payments to Influence Certain Federal Transactions (Byrd Amendment)

2.5.2 FAR 52.222-37, Employment Reports on Disabled Veterans & Veterans of the Vietnam Era

2.6 Contracts Priced/Valued Greater than \$250,000

2.6.1 FAR 52.223-6, Drug-Free Workplace

2.6.2 FAR 52.232-17, Interest

2.7 Contracts Exceeding the Simplified Acquisition Threshold (\$250,000)

2.7.1 FAR 52.203-6, Restrictions on Subcontractor Sales to Government

2.7.2 FAR 52.203-17, Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights

2.8 Contracts Priced/Valued Greater than \$2,000,000

2.8.1 FAR 52.230-2, Cost Accounting Standards

2.8.2 FAR 52.242-3, Penalties for Unallowable Costs

2.8.3 FAR 52.230-5, Cost Accounting Standards—Educational Institutions

2.8.4 FAR 52.230-6, Administration of Cost Accounting Standards

- 2.8.4.1 Flow-down is required for negotiated lower tier subcontracts valued over \$750,000.
 - 2.8.4.1.1 Dependent upon the classification of the lower tier subcontractor, FAR 52.230 5 is flowed down to educational institutions in accordance with 48 C.F.R. §30.201 4(e) and FAR 52 230 6 is flowed down to businesses in accordance with 48 C.F.R. §30.201 4(d).

- 2.8.5 FAR 52.215-10, Price Reduction for Defective Cost or Pricing Data
- 2.8.6 FAR 52.215-11, Price Reduction for Defective Cost or Pricing Data-Modification
- 2.8.7 FAR 52.215-12, Subcontractor Certified Cost or Pricing Data
- 2.8.8 FAR 52.215-13, Subcontractor Certified Cost or Pricing Data-Modification

2.9 **Reserved.**

2.10 **Reserved.**

2.11 **Buy American Act**

2.11.1 FAR 52.225-1, Buy American Act – Supplies

- 2.11.1.1 Applicable to acquisitions greater than \$10,000 but not exceeding \$25,000; and in acquisitions with a value exceeding \$25,000, if FAR 52.225-3 does not apply, except if:
 - 1) the solicitation is restricted to domestic products in accordance with 48 C.F.R. Subpart 6.3,
 - 2) the acquisition is for supplies for use within the United States and an exception to the Buy American Act applies (e.g. non-availability, public interest, or information technology that is a commercial item), or
 - 3) the acquisition is for supplies for use outside the United States.

2.11.2 FAR 52.225-3, Buy American Act – Free Trade Agreements – Israeli Trade Act

- 2.11.2.1 Applicable to acquisitions for supplies, or for services involving the furnishing of supplies, for use within the United States, and the acquisition value is \$25,000 or more but is less than \$203,000;
- 2.11.2.2 The acquisition is not for information technology that is a commercial item, using fiscal year 2004 or subsequent fiscal year funds; and
- 2.11.2.3 No exception in 48 C.F.R. §25.401 applies. For acquisitions of agencies not subject to the Israeli Trade Act (see 48 C.F.R. §25.406), see agency regulations.
 - 2.11.2.3.1 If the acquisition value is \$25,000 or more but is less than \$50,000, use the clause with its Alternate I.
 - 2.11.2.3.2 If the acquisition value is \$50,000 or more but is less than \$80,317, use the clause with its Alternate II.
 - 2.11.2.3.3 If the acquisition value is \$80,317 or more but is less than \$100,000 use the clause with its Alternative III.

2.11.3 FAR 52.225-5, Buy American Act – Trade Agreements

- 2.11.3.1 Applicable to acquisitions valued at \$203,000 or more, if the acquisition is covered by the WTO GPA (see 48 C.F.R. Subpart 25.4) and the agency has determined that the restrictions of the Buy American Act are not applicable to U.S. made end products.

2.12 **Contracts Which Involve Printing.**

DEAR 970.5208-1, Printing, applies to this Contract if it requires “printing” and must be flowed down to all subcontracts which require “printing” as described below.

2.12.1 “Printing” includes the following processes: Composition, platemaking, presswork, binding, microform publishing, or the end items produced by such processes. Provided, however, that performance of a requirement under this Contract involving the duplication of less than 5,000 copies of a single page, or no more than 25,000 units in the aggregate of multiple pages, will not be deemed to be printing.

2.13 **Reserved.**

2.14 **Competition in Subcontracting**

Except for lower-tier subcontractors that are specifically identified in the Subcontractor’s proposal, FAR 52.244-5, Competition in Subcontracting, applies and must be flowed down as specified in 48 C.F.R. §44.204(c) if any of the following is anticipated:

- A cost-reimbursement contract
- A letter Contract that exceeds the simplified acquisition threshold
- A fixed-price contract that exceeds the simplified acquisition threshold including unpriced modification or unpriced delivery order
- A time-and-materials contract that exceeds the simplified acquisition threshold
- A labor-hour contract the exceeds the simplified acquisition threshold.

2.15 **Applies when Subcontractor Personnel or Lower-tier Subcontractor Personnel are Present at Premises Owned, Leased, or Controlled by the Contractor or the U.S. Government, Regardless of Price/Value**

2.15.1 FAR 52.237-2, Protection of Government Buildings, Equipment and Vegetation

2.16 **Applies if Subcontractor Receives Access to Classified Information, Unclassified Sensitive Information, or Special Nuclear Material or Authorized Unrestricted Access to Areas Containing These, Regardless of Price/Value**

2.16.1 DEAR 970.5204-1, Counterintelligence

2.17 **Applies when Contract Value is \$5.5 million or more and with a period of performance of 120 days or longer**

2.17.1 FAR 52.203-13, Contractor Code of Business Ethics and Conduct.

2.18 **Cost Sharing**

2.18.1 FAR 52.216-12, Cost- Sharing Contract – No Fee.

3. GENERAL DEFINITIONS

As used throughout these general provisions, except in clauses and articles incorporated by reference and where otherwise indicated, the following definitions apply:

1. *Contract*. This subcontract or purchase order including elements noted in Sub-section 4.1.4 below.
2. *Contract Date*. As used in Article 9 hereof has the meaning set forth in Subsection 4.9.6.
3. *Contracting Officer, Contract Specialist, or Procurement Specialist*. The duly authorized representative of the Contractor who will administer this Contract.
4. *Contractor*. BEA or its duly authorized representative or representatives.
5. *Department of Energy (DOE) Contracting Officer*. The United States (U.S.) DOE designated agent.
6. *Government*. The United States of America or any duly authorized representative thereof.
7. *INL*. Idaho National Laboratory.

8. *Lower-tier subcontractor.* Any party entering into an agreement with the Subcontractor or any other party who has entered into a Contract with the Subcontractor, for the furnishing of supplies or services required for performance of this Contract.
9. *Reserved.* Indicates Section number still is available (reserved) for future use if required.
10. *Subcontractor or Seller.* The business entity contracted to provide the materials, supplies, or services covered by this Contract.
11. *Work.* Performance by the Subcontractor of the statement of work activities pursuant to the requirements, terms, and conditions of this Contract.

4. SECTIONS THAT APPLY REGARDLESS OF PRICE/VALUE

4.1 General

- 4.1.1 The failure of either party to enforce at any time any of the provisions of this Contract, or to require at any time performance by the other party of any of such provisions, shall in no way be construed to be a waiver of such provision, nor in any way to affect the validity of this Contract or any parts thereof, or the right of either party thereafter to enforce each and every provision.
- 4.1.2 The parties agree that electronic signatures may be used in connection with this Contract.
- 4.1.3 The Government, the Contractor, and their designees shall have access at all reasonable times to the Subcontractor's and lower-tier subcontractor facilities and quality assurance records for surveillance, inspection, or audit. The Subcontractor shall be provided 30-days' notice prior an audit being conducted and two weeks' notice prior to a surveillance or inspection being performed.
- 4.1.4 This Contract includes:
 - 1) the applicable subcontract or purchase order, including any changes, amendments or revisions thereto,
 - 2) statement of work (if any), including any changes, amendments or revisions thereto,
 - 3) these general provisions, together with,
 - 4) plans, drawings, specifications, and other documents that are expressly incorporated therein by reference.

This Contract contains the entire agreement and understanding between the parties as to the subject matter of this Contract, and merges and supersedes all prior agreements, understandings, commitments, representations, writings, and discussions between them. Neither of the parties will be bound by any prior obligations, conditions, warranties, or representations with respect to the subject matter of this Contract. The parties agree that recourse may not be had to alleged prior dealings, usage of trade, course of dealing, or course of performance to explain or supplement the express terms of this Contract.
- 4.1.5 The headings used in this Contract are not to be construed as modifying, limiting, or expanding in any way the scope or extent of the provisions in this Contract, unless otherwise indicated.
- 4.1.6 All references herein to Federal Acquisition Regulation (FAR) and United States (U.S.) DOE Acquisition Regulation (DEAR) clauses are those in effect on the date of this Contract unless otherwise expressly stated in this Contract.
- 4.1.7 The Subcontractor shall perform all Work pursuant to this Contract as an independent contractor. The Subcontractor shall not subcontract all or substantially all of the Work without prior written approval of the Contractor, except for purchases of standard commercial articles or raw materials on which the Subcontractor shall perform further Work. If any part of the Work is subcontracted, the Subcontractor is responsible for having that subcontracted Work comply with the terms of this Contract.

- 4.1.8 No act or order of the Contractor shall be deemed to be an exercise of supervision or control of performance hereunder. No provision of this Contract and no action taken by the Contractor under this Contract shall be construed to make or constitute the Contractor as the employer or joint employer of any of the employees of the Subcontractor or any of its lower-tier subcontractors. The Subcontractor shall perform all Work pursuant to this Contract as an independent contractor.
- 4.1.9 In the event of an inconsistency between provisions of this Contract, the inconsistency shall be resolved by giving precedence as specified in the contract or purchase order if unspecified therein as follows:
- 4.1.9.1 Cost-Sharing Contract change documents, (if any)
 - 4.1.9.2 Cost-Sharing Contract
 - 4.1.9.3 Specifications or statement of work (SOW)
 - 4.1.9.4 Drawings
 - 4.1.9.5 Special Conditions
 - 4.1.9.6 General Provisions
 - 4.1.9.7 Other provisions of this Cost-Sharing Contract, if any.
- 4.2 **Changes**
- 4.2.1 The Contractor may at any time, by written order, and without notice to the sureties, if any, make changes, within the general scope of this Contract, in any one or more of the following:
- 4.2.1.1 Contractor-furnished resources (e.g., material, equipment, and services).
 - 4.2.1.2 Time of performance (e.g., hours of the day, days of the week).
 - 4.2.1.3 Place of performance of the services.
 - 4.2.1.4 Description of the services to be performed (e.g., statement of work and all included and referenced requirements).
 - 4.2.1.5 Drawings, designs, or specifications when the supplies/services to be furnished are to be manufactured/performed for the Contractor in accordance therewith.
 - 4.2.1.6 Place of delivery.
- 4.2.2 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 changed or not changed by the Contract, or otherwise affects any other terms and conditions of this Contract, the Contractor may make an upward or downward equitable adjustment in the cost, delivery, or completion schedule or both, and this Contract shall be modified in writing accordingly if such adjustment is made. Any claim by the Subcontractor for adjustment under this section must be asserted within 30 days from the date of receipt by the Subcontractor of the modification or change; provided, however, that the Contractor, if it decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this Contract. Where the cost of property made obsolete or excess as a result of a change is included in the Subcontractor's claim for adjustment, the Contractor shall have the right to prescribe the manner of disposition of property. Failure to agree to any adjustment shall be a dispute under Section 4.13. However, nothing in this section shall excuse the Subcontractor from proceeding with this Contract as changed.

- 4.2.3 Notwithstanding the terms and conditions of Sub-sections 4.2.1 and 4.2.2, 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 this Contract indicating the new total estimated cost and, if this Contract is incrementally funded, the new amount allotted to the Contract.
- 4.2.4 When costs are a factor in any determination of a Contract adjustment pursuant to this article, or any other provisions of this Contract, such costs shall be in accordance with the cost principles and procedures in FAR Part 31, as supplemented or modified by DEAR Part 931, in effect on the date of this Contract.
- 4.2.5 In the event that Contractor unilaterally directs the performance of a change in accordance with Sub-sections 4.2.1, 4.2.2 or 4.2.3 above, Contractor shall fund costs for such changes to the fullest extent such are allowable costs under the Prime Contract.

4.3 **Materials and Workmanship**

4.3.1 New Materials

- 4.3.1.1 Unless otherwise specifically approved by the Contractor, the Subcontractor warrants that all equipment, materials, or products, including those components, parts, and materials that are permanently installed into systems, subsystems, and/or assemblies, shall be new and of the grade/type specified by this Contract. All workmanship shall be performed in a skillful and workmanlike manner consistent with the stated requirements and other applicable criteria of this Contract.

4.3.2 Suspect/Counterfeit Material

- 4.3.2.1 Types of material, parts, and components known to have been misrepresented include, but are not limited to, fasteners; hoisting, rigging, and lifting equipment; cranes; hoists; valves; pipe and fittings; electrical equipment and devices; plate, bar, shapes, channel members, and other heat treated materials and structural items; welding rod and electrodes; and computer memory modules. The Subcontractor's warranty also extends to labels and/or trademarks or logos affixed, or designed to be affixed, to items supplied or delivered to the Contractor. In addition, because falsification of information or documentation may constitute criminal conduct, the Contractor may reject and retain such information or items, at no cost, and identify, segregate, and report such information or activities to cognizant DOE officials.

- 4.3.2.2 The following materials furnished under this Contract will be used in a Government owned or used facility and shall be manufactured domestically (i.e., within the United States of America). For fastener acquisitions, domestic origin is defined as the United States of America and Canada.

- 4.3.2.2.1 All fasteners shall comply with the Fastener Quality Act, Public Law 101-592, November 16, 1990, as amended and codified at 15 U.S.C. §§5401 et seq. Information and instruction regarding the DOE Headmark List and Idaho National Laboratory (INL) suspect/counterfeit issues and controls is available at <https://vendor.inl.gov> under Forms/Documents.

- 4.3.2.2.2 Electrical items shall exhibit manufacturers' labels and identification as specified in this Contract.

- 4.3.2.2.3 Mechanical items shall exhibit manufacturers' labels and identification as specified in this Contract.

4.3.3 Sustainable Acquisition Program

4.3.3.1 If this Contract is valued at \$250,000 or more, supports operation of a DOE facility, and offers significant opportunities for energy efficient or environmentally-sustainable products and services, the following apply:

4.3.3.1.1 DOE is committed to managing its facilities in an environmentally preferable and sustainable manner. In the performance of Work under this Contract, the Subcontractor shall provide its services in a manner that promotes the natural environment, reduces greenhouse gas emissions, and protects the health and wellbeing of federal employees, contractors, and visitors using DOE- or Contractor-owned or leased facilities.

4.3.3.1.2 Green purchasing or sustainable acquisition has several interacting initiatives. The Subcontractor must comply with initiatives that are current as of this Contract award date. DOE and/or the Contractor may require compliance with revised initiatives from time to time. The initiatives are explained at the following Government or industry Internet sites:

4.3.3.1.2.1 Recycled-content products:

<https://sftool.gov/greenprocurement>.

4.3.3.1.2.2 Bio-based products:

<http://www.biopreferred.gov/>.

4.3.3.1.2.3 Energy-efficient products:

<https://www.energystar.gov/products>.

4.3.3.1.2.4 More energy-efficient products:

<https://www.energy.gov/eere/femp/energy-efficient-products-and-energy-saving-technologies>.

4.3.3.1.2.5 Environmentally preferable and energy-efficient electronics, including desktop computers, laptops, and monitors: <http://www.epeat.net> (the Electronic Products Environmental Assessment Tool [EPEAT] on the Green Electronics Council site).

4.3.3.1.2.6 Greenhouse gas emission inventories are required, including Scope 3 emissions. These are discussed in Executive Order 13834, Section 2(h).

4.3.3.1.2.7 Non-ozone depleting alternative products:

<http://www.epa.gov/ozone/strathome.html>

4.3.3.1.2.8 Water-efficient plumbing products:

<http://epa.gov/watersense>.

4.3.3.1.3 FAR 52.223-2, FAR 52.223-15, and FAR 52.223-17 require the use of products that have bio-based content, are energy efficient, or have recycled content. To the extent that the services provided by the Subcontractor require provision of any the Subcontractor must provide the energy efficient and environmentally sustainable type of product unless that type of product is not available, is not life cycle cost effective (or does not exceed 110% of the price of alternative items if life cycle cost data is unavailable; EPEAT is an example of life cycle costs that have been analyzed by DOE and found to be acceptable at the silver and gold level), does not meet performance needs, or cannot be delivered in time to meet a critical need.

- 4.3.3.1.4 In the performance of this Contract, the Subcontractor shall comply with the requirements of relevant Executive Orders. The Subcontractor shall also consider the best practices within the DOE Acquisition Guide, Chapter 23, Acquisition Considerations Regarding Federal Leadership in Environmental, Energy, and Economic Performance. This guide includes information concerning recycled-content products, bio-based products, energy-efficient products, water-efficient products, alternative fuels, and vehicles, non-ozone depleting substances, and other environmentally preferable products and services.
- 4.3.3.1.5 In complying with the requirements of Sub-paragraph 4.3.3.1.3, the Subcontractor shall coordinate its activities with and submit required reports through the Environmental Sustainability Coordinator: sustainability@inl.gov.

4.3.4 WaterSense-Labeled Materials

- 4.3.4.1 When the Work requires the acquisition of products that are, or can be, containing WaterSense-labeled materials, the following applies:
 - 4.3.4.1.1 This Contract includes the acquisition of products that are, or can be, containing WaterSense-labeled materials. Contractor is committed to use EPA's WaterSense-labeled products or those with equivalent flow rates or flush volumes where available and choose irrigation contractors who are certified through a WaterSense-labeled program. By acceptance of this Contract, the Subcontractor certifies that the WaterSense-labeled materials meet the minimum requirements specified in the online resources Green Products Compilation Tool, Green Products Tool Explanation, EPA Water Sense, and EPA WaterSense Label, and WaterSense Products.

4.3.5 Deliberate Misrepresentations

- 4.3.5.1 Evidence of deliberate misrepresentation of any item, component, and/or material provided under this Contract may result in an investigation to determine the validity-of certification, fraud, and/or forgery.

4.3.6 Asbestos

- 4.3.6.1 In accordance with 41 C.F.R. §102-80.15, asbestos is not allowed for use in any new construction, renovation/modernization, or repair of federally owned or leased buildings. Accordingly, Subcontractor shall ensure the absence of asbestos containing materials used by Subcontractor as part of this Contract in any federally-owned or leased buildings, by performing a due diligence review of all product safety data sheets, technical specification sheets, or other manufacturer provided documentation attesting to the absence of asbestos in materials used by Subcontractor in fulfilling this Contract in any federally-owned or leased building. Documentation of this due diligence review, ensuring the absence of asbestos in any materials used by Subcontractor, shall be transmitted to Contractor's Construction, Safety and Health Department upon project completion.

4.4 Approvals

- 4.4.1 The granting of approvals by the Contractor, if any, of any data submitted by the Subcontractor under the provisions of this Contract shall not affect, or relieve, the Subcontractor's responsibility for performance of Work in compliance with this Contract.

4.5 Passage of Title and Liens

- 4.5.1 The Subcontractor agrees to furnish all deliverables free and clear of liens, claims, and encumbrances. The Subcontractor agrees to hold the Government and the Contractor harmless from all liens, claims, or demands in connection with the Work.
- 4.5.2 The Subcontractor shall bear all risk of loss, destruction, or damage to rejected supplies.
- 4.5.3 Unless otherwise expressly stated in this Contract, title to deliverables shall pass at the place of delivery to the Contractor.

4.6 Delivery and Payment

- 4.6.1 The Subcontractor shall work such hours, including night shifts and overtime operations, as may be necessary, to meet this Contract's delivery/completion dates, or any duly authorized extensions thereof. Any adjustments to the project Work or, schedule, if a Change within Section 4.2, shall be mutually agreed or funded per Section 4.2.
- 4.6.2 An invoice shall be considered to be received by the Contractor in accordance with the following:
 - 4.6.2.1 Payment is considered as being made on the day the check is dated or the settlement date of an electronic funds transfer. Unless freight and other charges are itemized, any discount will be taken on the full amount of the invoice.
 - 4.6.2.2 For invoices that are mailed, the date a proper invoice is actually received by the Contractor if the Contractor annotates the invoice with date of receipt at the time of receipt.
 - 4.6.2.3 On the date placed on the invoice by the Subcontractor when the Contractor fails to annotate the invoice with date of receipt of the invoice at the time of receipt (such invoice must be a proper invoice).
 - 4.6.2.4 For invoices that are electronically transmitted, the date a readable transmission of a proper invoice is received by the Contractor, or the next business day if received after normal working hours.
 - 4.6.2.5 On the date of delivery, when the Contract specifies that the delivery ticket may serve as an invoice.
- 4.6.3 The payment period shall be thirty (30) days from receipt of invoice, as determined under [Section 4.6.2](#). Measurement of the payment period shall start on the later of the Contractor's receipt of a correct invoice or the delivery of goods or completion of services.
- 4.6.4 The Contractor will not accept price adders for the cost of providing insurance against risk of loss in transit. If the Subcontractor chooses to ensure its risk of loss in transit, the cost of same must be included in the Contract price. There is no authorization to the Subcontractor to procure any insurance against that risk for the account of the Contractor.
- 4.6.5 Unless otherwise specified by the Contractor or in this Contract, the Subcontractor shall provide monthly invoices to the Contractor, reflecting the project costs to date.
- 4.6.6 If this Contract requires the submittal of vendor data, and if such vendor data, or any part thereof, is not delivered within the time specified by this Contract, or is deficient upon delivery, the Contractor may, until such vendor data is delivered or deficiencies are corrected, without limiting any of its other rights or remedies, withhold payment (not to exceed 20% of this Contract price) from the Subcontractor.
- 4.6.7 Unless otherwise provided in this Contract, delivery shall not be made more than 15 days prior to the delivery date specified and the Contractor may return earlier deliveries at the Subcontractor's risk and expense

4.6.8 Notwithstanding anything herein, the Contractor shall be entitled at any and all times to set off against any amounts payable at any time by the Contractor hereunder any amount owing from the Subcontractor to the Contractor whether under the Contract.

4.7 **Inspection**

- 4.7.1 The Contractor has the right either to reject or to require correction of nonconforming items. Items are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with this Contract's requirements. The Contractor may reject nonconforming items with or without disposition instructions.
- 4.7.2 Rejection of nonconforming Work shall be made as promptly as practicable after delivery, except as otherwise provided in this Contract; but the Contractor's failure to inspect or reject Work shall neither relieve the Subcontractor from responsibility for Work that is not in accordance with Contract requirements nor impose liability upon the Contractor.
- 4.7.3 Subcontractor shall provide and maintain an inspection system acceptable to the Contractor covering supplies under this Contract and shall tender to the Contractor for acceptance only supplies that have been inspected in accordance with the inspection system and have been found by the Subcontractor to be in conformity with Contract requirements. As part of the system, the Subcontractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to the Contractor during Contract performance and for as long afterwards as this Contract requires. The Contractor may perform reviews and evaluations reasonably necessary to ascertain compliance with this Sub-section. These reviews and evaluations shall be conducted in a manner that will not unduly delay the Work.
- 4.7.4 If any of the services do not conform to the Contract requirements, the Contractor may require the Subcontractor to perform the services again, in conformity with Contract requirements, at no increase in the price of this Contract. When the defects in services cannot be corrected by re-performance, the Contractor may require the Subcontractor to take necessary action to ensure that future performance conforms to Contract requirements and reduce the order price to reflect the reduced value of the services performed.
- 4.7.5 If the Subcontractor fails to remove, replace, or correct rejected supplies promptly, that are required to be removed or to be replaced or corrected, or to re-perform nonconforming services promptly in conformance with Contract requirements or to take the necessary action to ensure future performance of services in conformity with Contract requirements, the Contractor may by Contract or otherwise, remove, replace, or correct the supplies and perform the services and charge the cost to the Subcontractor; terminate this Contract for default; or require delivery and make an equitable price reduction.
- 4.7.6 When supplies or services are not ready at the time specified by the Subcontractor for inspection or test, the Contractor may charge to the Subcontractor the additional cost to the Contractor related to the inspection or test.
- 4.7.7 The Contractor may also charge the Subcontractor for any additional cost of inspection or test when prior rejection makes re-inspection or retest necessary.

- 4.7.8 If acceptance is not conclusive for any reason, the Contractor, in addition to any other rights and remedies provided by law, or under other provisions of this Contract, shall have the right to require the Subcontractor, at no increase in Subcontractor price, to correct or replace the defective or nonconforming supplies, at the original point of delivery or at the Subcontractor's plant, at the Contractor's election, in accordance with a reasonable delivery schedule as may be agreed upon between the Subcontractor and the Contractor, provided that the Contractor may require a reduction in Contract price if the Subcontractor fails to meet such delivery schedule; or within a reasonable time after receipt by the Subcontractor of notice of defects or nonconformance, to repay such portion of this Contract as is equitable under the circumstances, if the Contractor elects not to require correction or replacement.
- 4.7.9 When supplies are returned to the Subcontractor, the Subcontractor shall bear the transportation cost from the original point of delivery to the Subcontractor's plant and return to the original point when that point is not the Subcontractor's plant. If the Subcontractor fails to perform or act as required in this Sub-section and does not cure such failure within a period of 10 days (or such longer period as the Contractor may authorize in writing) after receipt of notice from the Contractor specifying such failure, the Contractor shall have the right, by Contract or otherwise, to replace or correct such supplies and charge the cost occasioned thereby, to the Subcontractor.
- 4.7.10 However, the Contractor may require correction in place, promptly after notice, by and at the expense of the Subcontractor. The Subcontractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and, when required, shall disclose the corrective action taken.
- 4.7.11 Subcontractor shall perform, or have performed, all inspections and tests necessary to substantiate that services furnished under this Contract conform to Contract requirements. "Services" as used in this clause includes services performed, workmanship, and material furnished or used in performing the services portion of the Work.
- 4.7.12 Subcontractor shall provide and maintain an inspection system acceptable to Contractor that covers the services under this Contract. As part of the system, Subcontractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to Contractor during Contract performance and for as long afterwards as this Contract requires. Contractor may perform reviews and evaluations reasonably necessary to ascertain compliance with this Subsection 4.7.12. These reviews and evaluations shall be conducted in a manner that will not unduly delay the Work. The right of review, whether exercised or not, does not relieve Subcontractor of its obligations under this Contract. If Contractor performs a review or evaluation, on the premises of Subcontractor, or its Lower-tier Subcontractor(s), Subcontractor shall furnish, and shall require its Lower-tier Subcontractors to furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient performance thereof.
- 4.7.13 Rejection of nonconforming work will be made as promptly as practicable. Contractor's failure to review or evaluate the work shall neither relieve Subcontractor from responsibility for performance in accordance with the Contract requirements nor impose liability upon the Contractor.
- 4.7.14 Contractor's review or evaluation of the services does not in any way relieve the Subcontractor from its contractual obligations or from any other liability that the Subcontractor may incur as a result of nonconformance; nor does such review or evaluation constitute an acceptance of nonconforming services not discovered.

4.7a Inspection of Supplies – Cost-Reimbursement

- 4.7a.1 Definitions. As used in this clause:

Subcontractor's managerial personnel means any of the Subcontractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of -

- 4.7a.1.1 All or substantially all of the Subcontractor's business;
- 4.7a.1.2 All or substantially all of the Subcontractor's operation at a plant or separate location where the Contract is being performed; or
- 4.7a.1.3 A separate and complete major industrial operation connected with performing this Contract.
- 4.7a.2 Supplies includes but is not limited to raw materials, components, intermediate assemblies, end products, lots of supplies, and data.
- 4.7a.3 The Subcontractor shall provide and maintain an inspection system acceptable to the Contractor covering the supplies, fabricating methods, and special tooling under this Contract. Complete records of all inspection work performed by the Subcontractor shall be maintained and made available to the Contractor during Contract performance and for as long afterwards as the Contract requires.
- 4.7a.4 The Contractor has the right to inspect and test the contract supplies, to the extent practicable at all places and times, including the period of manufacture, and in any event before acceptance. The Contractor may also inspect the plant or plants of the Subcontractor or any of its lower tier subcontractor engaged in the Contract performance. The Contractor shall perform inspections and tests in a manner that will not unduly delay the work.
- 4.7a.5 If the Contractor performs inspection or test on the premises of the Subcontractor or a its lower tier subcontractor, the Subcontractor shall furnish and shall require its lower tier subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.
- 4.7a.6 Unless otherwise specified in the Contract, the Contractor shall accept supplies as promptly as practicable after delivery, and supplies shall be deemed accepted 60 days after delivery, unless accepted earlier.
- 4.7a.7 At any time during Contract performance, but no later than 6 months (or such other time as may be specified in the Contract) after acceptance of the supplies to be delivered under the Contract, the Contractor may require the Subcontractor to replace or correct any supplies that are nonconforming at time of delivery. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. Except as otherwise provided in paragraph 4.7a.10 below, the cost of replacement or correction shall be included in allowable cost, determined as provided in the Allowable Cost and Payment clause, but no fee shall be paid. The Subcontractor shall not tender for acceptance supplies required to be replaced or corrected without disclosing the former requirement for replacement or correction, and, when required, shall disclose the corrective action taken.
- 4.7a.8 If the Subcontractor fails to proceed with reasonable promptness to perform required replacement or correction, the Contractor may:
 - 4.7a.8.1 By contract or otherwise, perform the replacement or correction and charge to the Subcontractor any increased cost or make an equitable reduction in any fixed fee paid or payable under the Contract;
 - 4.7a.8.2 Require delivery of undelivered supplies at an equitable reduction in any fixed fee paid or payable under the Contract; or
 - 4.7a.8.3 Terminate the Contract for default.
- 4.7a.9 Failure to agree on the amount of increased cost to be charged to Subcontractor shall be a dispute.

4.7a.10 Notwithstanding paragraphs 4.7a.7, 4.7a.8 and 4.7a.9 above, the Contractor may at any time require the Subcontractor to correct or replace, without cost to the Contractor, nonconforming supplies, if the nonconformances are due to (1) fraud, lack of good faith, or willful misconduct on the part of the Subcontractor's managerial personnel or (2) the conduct of one or more of the Subcontractor's employees selected or retained by the Subcontractor after any of the Subcontractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

4.7a.10.1 This clause applies in the same manner to corrected or replacement supplies as to supplies originally delivered.

4.7a.11 The Subcontractor shall have no obligation or liability under this Contract to replace supplies that were nonconforming at the time of delivery, except as provided in this clause or as may be otherwise provided in the Contract.

4.7a.12 Except as otherwise specified in the Contract, the Subcontractor's obligation to correct or replace Contractor-furnished property shall be governed by the clause pertaining to Contractor property.

4.8 **Assignment**

4.8.1 Neither this Contract nor any interest herein nor claim hereunder shall be assigned or transferred by the Subcontractor, except as expressly authorized in writing by the Contractor, with such authorization not being unreasonably withheld. This Contract may be assigned by the Contractor to the U.S. DOE or the DOE designee.

4.8.2 The Subcontractor may assign, with the Contractor's written approval, with such approval not being unreasonably withheld, claims for monies due or to become due hereunder to a bank, trust company, or other financial institution including any federal lending agency. Any such assignment may cover all amounts payable under this Contract and not already paid and shall not be made to more than one party, except that any such assignment may be made to one party, as agent or trustee, or two or more parties participating in the Subcontractor's financing. Payments to an assignee of any monies due, or to become due hereunder, shall be subject to setoff or recoupment for any present or future claim or claims which the Contractor may have against the Subcontractor arising under this and other Contracts, in accordance with applicable requirements including, when applicable, DEAR 932.803 and FAR 32.804. The Subcontractor shall supply the Contractor immediately with two copies of any such assignment and shall indicate on each invoice to whom payment is to be made.

4.9 **Federal, State, and Local Taxes**

4.9.1 Except as otherwise provided in this Contract, the Contract prices include all applicable federal, state, and local taxes and duties. The Contractor is exempt under Idaho law from the payment of certain Idaho sales or use taxes (*see* Idaho Code §63-3622BB) and is authorized by agreement with the State of Idaho Department of Revenue and Taxation to pay directly to the State of Idaho any sales or use taxes owing on purchases of tangible personal property. Billing under this Contract shall not include Idaho sales or use tax for any tangible personal property purchased hereunder.

4.9.2 Nevertheless, if a statute, court decision, written ruling, or regulation takes effect after the Contract date and results in the Subcontractor being required to pay any tax, duty, interest, or penalty, which would not otherwise have been payable on the transactions or property covered by this Contract, the Contract price shall be increased by the amount of such duty, rate increase, interest, or penalty, if the Subcontractor warrants in writing that the Contract price does not include any contingency for the same and if liability for such rate increase, interest, or penalty was not incurred through the Subcontractor's fault, negligence, or failure to follow the instruction of the Contractor.

- 4.9.3 If a statute, court decision, written ruling, or regulation takes effect after this Contract date and results in the Subcontractor being relieved of any tax, duty, rate increase, or penalty related to the transaction or property covered by this Contract, or in the refund or drawback of any portion thereof, the Contract price shall be decreased by the amount of such relief, refund, or drawback. If the Contractor has already paid the amount of such tax, duty, rate increase, or penalty, the same shall be repaid by the Subcontractor to the Contractor, including any interest received from the Government by the Subcontractor incident to such relief, refund, or drawback.
- 4.9.4 The Contract price shall be decreased by the amount of any tax or duty, or any portion thereof, that was included in this Contract price and that the Subcontractor is required to pay or bear, or for which no refund or other relief is obtained, through the Subcontractor's fault, negligence, or failure to follow the instructions of the Contractor.
- 4.9.5 No adjustment shall be made in this Contract price under this Section unless the amount of the adjustment exceeds \$500.
- 4.9.6 As used in Sub-section 4.9.2 through 4.9.5, the term "contract date" means the date set for the bid opening, or if this is a negotiated contract, the date of this Contract. As to additional supplies or services procured by modification to this Contract, the term "contract date" means the date of such modification.
- 4.9.7 The Subcontractor shall promptly notify the Contractor of all tax matters that may reasonably be expected to result in either an increase or decrease in this Contract price and shall take action with respect thereto as directed by the Contractor

4.10 Compliance with Laws and Indemnity

- 4.10.1 Section 6.3 supersedes this Section when Subcontractor personnel or lower-tier subcontractor personnel are present at premises owned, leased, or controlled by the Government or the Contractor regardless of price.
- 4.10.2 The Subcontractor shall procure all necessary permits or licenses and abide by all applicable laws, regulations, and ordinances of the United States and of the state, territory, and political subdivision in which the Work under this Contract is performed and by any applicable DOE directive.
- 4.10.3 The Subcontractor shall indemnify and hold the Government and the Contractor harmless for injury (physical or otherwise) or death to persons or damage to property arising from the negligent, willful, intentional, unauthorized, or illegal acts or omissions of the Subcontractor, lower-tier subcontractors, or their respective employees, agents or representatives; provided, however, nothing in this indemnification shall be construed to indemnify or save harmless the Government or the Contractor from any liability arising solely as a result of the negligence of the Government or the Contractor, or to the extent indemnified by DOE under the applicable Nuclear Hazards Indemnity Agreement (see DEAR 952.250-70).

4.11 Suspension of Work

This Section 4.11 applies only to the extent this Contract includes architectural-engineering (AE) services as defined in 48 C.F.R. 2.101:

- 4.11.1 The Contractor may order the Subcontractor in writing to suspend, delay, or interrupt all or any part of the Work for such period of time as may be determined appropriate for the convenience of the Contractor. Upon expiration of the period of suspension, the Subcontractor shall promptly proceed with the Work.

- 4.11.2 If the performance of all or any part of the Work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the Contractor in the administration of this Contract, or by the Contractor's failure to act within the time specified in this Contract (or if no time is specified, within a reasonable time), an adjustment may be made for any increase in the cost and schedule of performance of this Contract (excluding profit) necessarily caused by such suspension, delay, or interruption of an unreasonable period of time and this Contract may be modified in writing accordingly. However, no adjustment shall be made under this Contract for any suspension, delay, or interruption by any other cause, including the fault or negligence of the Subcontractor; or for which an equitable adjustment is provided for or excluded under any other provision of this Contract. Such other causes include, without limit, acts of nature or of the public enemy, earthquakes, fires, floods, other physical natural disasters, epidemics, quarantine restrictions, strikes, embargoes, and unusually severe weather.
- 4.11.3 No claim under this Contract shall be allowed for any costs incurred more than 20 days before the Subcontractor shall have notified the Contractor, in writing, of the act or failure to act (but this requirement shall not apply to a claim resulting from a suspension order pursuant to Sub section 4.11.1); and unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under this Contract. No part of any claim for suspension under this Contract by the Subcontractor shall be allowed, if not supported by adequate evidence showing that the cost would not have been incurred, but for a suspension within the meaning of this Section 4.11.

4.12 **Gratuities**

- 4.12.1 The Government and the Contractor prohibit their employees from using their official position for personal financial gain and from accepting any personal advantage from anyone under circumstances that might reasonably be interpreted as an attempt to influence the recipients in the conduct of their official duties. Therefore, the Subcontractor and its employees shall not, under circumstances that might reasonably be interpreted as an attempt to influence the recipients in the conduct of their duties, extend any gratuity or special favor to employees of the Government or the Contractor; and neither the Subcontractor nor its employees shall accept any gratuity or special favor from individuals or organizations with whom the Subcontractor is doing business, or proposing to do business, in accomplishing Work under this Contract.

4.13 **Disputes**

- 4.13.1 The parties agree that the appropriate forum for resolution of any dispute pertaining to this Contract shall be a court of competent jurisdiction as follows:
- 4.13.1.1 Subject to Paragraph 4.13.1.2 below, any such litigation shall be brought and prosecuted exclusively in Federal District Court; with venue in the U.S. District Court for the District of Idaho in Pocatello, Idaho.
- 4.13.1.2 Provided, however, that in the event that the requirements for jurisdiction in the Federal District Court for the District of Idaho, in Pocatello, Idaho, are not present, such litigation shall be brought exclusively in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, with venue in Idaho Falls, Idaho.

- 4.13.2 Any substantive issue of law in dispute shall be determined in accordance with the law of the State of Idaho, except an issue involving a Federal Acquisition Regulation (FAR) or DOE Acquisition Regulation (DEAR) clause, which shall be determined in accordance with federal procurement law. Nothing in this Section shall grant to the Subcontractor by implication any statutory rights or remedies not expressly set forth in this Contract.
- 4.13.3 There shall be no interruption in the prosecution of the Work, and the Subcontractor shall proceed diligently with the performance of this Contract pending final resolution of any dispute, claim, or litigation arising under, or related to, this Contract, between the parties hereto or between the Subcontractor and its lower-tier subcontractors or suppliers.
- 4.13.4 The Contract Disputes Act of 1978 (41 U.S.C. §§7101–7109) shall not apply to this Contract; provided, however, nothing in this Section shall prohibit the Contractor, at its sole discretion, from sponsoring a claim of the Subcontractor for resolution under the provisions of its Prime Contract with DOE. In the event that the Contractor sponsors a claim at the request of the Subcontractor, the Subcontractor shall be bound by the decision of the cognizant DOE Contracting Officer to the same extent and in the same manner as the Contractor.

4.14 **Default**

- 4.14.1 The Contractor may, subject to Sub-sections 4.14.3 and 4.14.4, by written notice of default to the Subcontractor, terminate this Contract in whole or in part, if the Subcontractor fails to:
 - 4.14.1.1 Deliver the supplies or to perform the services within the time specified in this Contract or any extension agreed to in writing by the Contractor;
 - 4.14.1.2 Make progress, so as to endanger performance of this Contract; or
 - 4.14.1.3 Perform any of the other material provisions of this Contract that the Subcontractor does not promptly remedy.
- 4.14.2 The Contractor's right to terminate this Contract under Paragraphs 4.14.1.1, 4.14.1.2, or 4.14.1.3 may be exercised if the Subcontractor does not commence to cure such failure within 10 days (or more if authorized in writing by the Contractor) after receipt of the notice from the Contractor specifying the failure.
- 4.14.3 If the Contractor terminates this Contract in whole or in part due to Subcontractor default under Section 4.14.1, the Contractor's obligations for providing financial support of the Work shall cease, consistent with the extent of the termination. The Subcontractor shall perform the Work not terminated, if any.
- 4.14.4 Except for defaults of lower-tier subcontractors at any tier, the Subcontractor shall not be liable for any excess costs or schedule delays if the failure to perform this Contract arises from causes beyond the control and without the fault or negligence of the Subcontractor. Examples of such causes include acts of God or of the public enemy; acts of the Government in either its sovereign or contractual capacity; fires; floods; epidemics; quarantine restrictions; strikes; freight embargoes; and unusually severe weather. In each instance the failure to perform must be beyond the control and without the fault or negligence of the Subcontractor.
- 4.14.5 If the failure to perform is caused by the default of a lower-tier subcontractor at any tier, and if the cause of the default is beyond the control of both the Subcontractor and the lower-tier subcontractor and without the fault or negligence of either, the Subcontractor shall not be liable for any excess costs or schedule delays for failure to perform, unless the required supplies or services were obtainable from another source in sufficient time for the Subcontractor to meet the required delivery schedule.

- 4.14.6 If this Contract is terminated for Subcontractor default under Section 4.14.1, the Contractor may require the Subcontractor to transfer title to the Government and deliver to the Contractor, as directed by the Contractor, any completed supplies, and partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (collectively referred to as “manufacturing materials” in this Section 4.14) that the Subcontractor has specifically produced or acquired for the terminated portion of this Contract.
- 4.14.7 Upon direction of the Contractor, the Subcontractor shall also protect and preserve property in its possession under this Contract in which the Government or the Contractor has an interest, to the extent such are allowable costs under the Prime Contract.
- 4.14.8 The Contractor shall pay the Contract price for conforming supplies delivered and accepted. The Subcontractor and the Contractor shall agree on the amount of payment for manufacturing materials delivered and accepted and for the protection and preservation of the property. Failure to agree will be a dispute under Section 4.13. The Contractor may withhold from these amounts any sum it determines to be necessary to protect itself against loss because of outstanding liens or claims of former lien holders.
- 4.14.9 If, after termination, it is determined that the Subcontractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Contractor.
- 4.14.10 The rights and remedies of the Contractor in this section are in addition to any other rights and remedies provided by law or under this Contract.

4.15 **Warranty**

- 4.15.1 Subcontractor warrants that services performed by Subcontractor and its sub-tiers under this Contract shall conform to the requirements of this Contract. With respect to warranties from sub-tier subcontractors or suppliers for services performed and materials furnished or used in performing the services, the Subcontractor shall: 1) obtain all warranties for commercial items that would be given in normal commercial practice, and 2) require such warranties be for the benefit of the Contractor and the Government. Nothing herein shall limit Contractor or Government rights with respect to latent defects lack of good faith, willful misconduct, fraud or illegal acts or omissions by the Subcontractor or its sub-tiers.
- 4.15.2 Subcontractor warrants that the Work shall be free from defects and shall be in compliance with all requirements of this Subcontract, until one (1) year from the completion of the Work. If services do not conform to Section 4.15.1, Subcontractor will reperform such services in accordance with Section 4.7.4 herein.
- 4.15.3 If Contractor learns of such non-conforming services, Contractor shall provide Subcontractor written notice of the defect or nonconformity as soon as reasonably possible in order to permit Subcontractor to make a timely investigation of the facts.
- 4.15.4 Contractor will provide Subcontractor with a reasonable opportunity to perform such corrective work as specified in Section 4.7 above.
- 4.15.5 If a service is re-performed, the re-performed service will be subject to the same warranties, the same conditions and the same remedies provided for the original service. Notwithstanding the foregoing, no warranty claims shall be accepted by Subcontractor after two (2) years from completion of the Work under the applicable Phase.
- 4.15.6 The services warranty shall not be applicable in the event that the failure to meet the warranty is the result of the negligence or illegal acts or omissions of the Government or Contractor or the Contractor’s unauthorized alteration or misuse of the services.

THE EXPRESS WARRANTIES SET FORTH IN THIS CONTRACT ARE THE EXCLUSIVE SUCH WARRANTIES THEREUNDER.

4.16 Government Property

- 4.16.1 This Section supplements DEAR 970.5245-1, Property (Aug. 2016) which is hereby incorporated by reference.
- 4.16.2 To the extent authorized by this Contract and applicable law, the Contractor may deliver to the Subcontractor, or the Subcontractor shall acquire, for use in connection with and under the terms of this Contract, Government property, together with such related data and information as the Subcontractor may request and as may be reasonably required for the intended use of such property.
- 4.16.3 The delivery or performance dates for this Contract are based upon the expectation that Government property suitable for use will be delivered to the Subcontractor, or acquired by the Subcontractor, at the times stated in the schedule or, if not so stated, in sufficient time to enable the Subcontractor to meet the Contract delivery or performance dates.
- 4.16.4 If the property is received by the Subcontractor in a condition not suitable for the intended use, the Subcontractor shall, upon receipt, notify the Contractor, detailing the facts. If the Government Property is Contractor-furnished, the Contractor will effect any repairs, modification, or replacement required or authorize the Subcontractor to correct at the Contractor's expense and be entitled to an equitable adjustment.
- 4.16.5 If said Contractor-furnished property is not delivered to the Subcontractor by the required time or times, the Contractor shall, upon the Subcontractor's timely written request, make a determination of the delay, if any, caused the Subcontractor and may, if appropriate, make an equitable adjustment in accordance with this Contract.
- 4.16.6 Changes in Government Property.
- 4.16.6.1 The Contractor may, by written notice:
- 4.16.6.1.1 Decrease the Government property provided or to be provided under this Contract; or
- 4.16.6.1.2 Substitute other Government property for the property to be provided under this Contract.
- 4.16.7 The Subcontractor shall promptly take such action as the Contractor may direct regarding the removal, preparation for shipment, or disposal of the property covered by this notice.
- 4.16.8 Upon the Subcontractor's timely written request, the Contractor may, as appropriate, make an equitable adjustment to this Contract, if the Contractor has agreed to make such property available for performing this Contract and there is any:
- 4.16.8.1 Decrease or substitution in such property pursuant to Paragraph 4.16.6.1 above; or
- 4.16.8.2 Withdrawal of authority to use such property if provided under other Contract or lease.
- 4.16.9 Title and Access
- 4.16.9.1 Reserved.
- 4.16.9.2 Reserved.
- 4.16.9.3 Reserved.
- 4.16.9.4 Reserved.
- 4.16.9.5 The Contractor and the Government and their designees shall have access at all reasonable times to the premises in which any Government property is located for the purpose of inspecting the Government property.
- 4.16.9.6 Reserved.
- 4.16.9.7 Reserved.

4.16.9.8 Reserved.

4.16.10 Risk of Loss.

4.16.10.1 Reserved.

4.16.10.2 Reserved.

4.16.10.3 Subcontractor shall do nothing to prejudice the Contractor's and/or the Government's right to recover against third parties for any loss or destruction of, or damage to, Government property. Upon the request of the Contractor, the Subcontractor shall, at the Contractor's expense, furnish to the Contractor all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment in favor of the Contractor and/or the Government) in obtaining recovery.

4.16.10.4 Upon completing this Contract, or at such earlier dates as may be fixed by the Contractor, the Subcontractor shall submit, in a form acceptable to the Contractor, inventory schedules covering all items of Government property not consumed in performing this Contract or delivered to the Contractor. Subcontractor shall follow the instructions of Contractor regarding the disposition of all Government property not consumed in performing this Contract or previously delivered to Contractor. Subcontractor shall prepare for shipment, delivery duty paid (DDP) or F.O.B. destination to such designation as Contractor may direct, or dispose of the Government property, as may be directed by Contractor. The net proceeds of any such disposal, if any, shall be credited to the Contract price or shall be paid to Contractor, as directed by Contractor.

4.16.10.5 If this Contract is to be performed outside the United States of America, its territories, or possessions, the words "Government", "Government Property", "Contractor-Furnished Government Property", and "Contractor-Furnished and Subcontractor-Acquired Government Property" (wherever they appear in this Section 4.16) shall be construed as "United States Government" and "United States Government Property" and "Contractor-Furnished United States Government Property" and "Contractor-Furnished and Subcontractor-Acquired United States Government property," respectively.

4.16.10.6 All communication under this Section 4.16 shall be in writing.

4.17 Damages Limitation

As between Contractor and Subcontractor, but not with respect to third party claims/liability or Subcontractor indemnity obligations, neither party shall be liable to the other for any indirect, consequential, exemplary, special, incidental, or punitive damages arising under this Contract, including, but not necessarily limited to: loss of profits, earnings, or revenues from collateral or ancillary transactions; loss of business or business opportunity; loss of reputation or goodwill; lost sales or contracts; failure to realize expected savings or business interruption; provided, however, that this provision shall not preclude payment of allowable costs payable as compensation under this Contract. The releases from or limitations of liability in this paragraph shall extend to each party's directors, officers, and employees. For the avoidance of doubt, the

foregoing limitations exclude and do not apply to Contractor's recovery of costs disallowed by the Government or claims by the Government under the terms of the Prime Contract.

4.18 **Authorization and Consent**

- 4.18.1 The Government hereby gives its authorization and consent (without prejudice to any rights of indemnification) for all use and manufacture in the performance of this Contract, or any part hereof, or any amendment hereto, or any lower-tier subcontract hereunder, of any invention described in and covered by a patent of the United States, and that is embodied in the structure or composition of any article, the delivery of which is accepted by the Government under this Contract; or utilized in the machinery, tools, or methods the use of which necessarily results from compliance by the Subcontractor, or using the lower-tier subcontractor, with specifications or written provisions now or hereafter forming a part of this Contract, or specific written instructions given by the Contractor directing the manner of performance.
- 4.18.2 The entire liability to the Government and the Contractor for infringement of a patent of the United States shall be determined solely by the provisions of the indemnity clause, if any, included in this Contract, or any lower-tier subcontract hereunder, and the Government assumes liability for all other infringement to the extent of the authorization and consent herein granted.

4.19 **Intellectual Property Indemnity**

The Subcontractor shall indemnify the Government and the Contractor and their officers, agents, and employees against liability, including costs, for infringement of any copyright or U.S. patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. §181) 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 the Government or the Contractor of such supplies or construction work.

This indemnity shall not apply unless the Subcontractor shall have been informed as soon as practicable by the Government or the Contractor 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 an infringement resulting from compliance with specific written instructions of the Contractor 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 this Contract not normally used by the Subcontractor; an infringement resulting from addition to or change in supplies furnished or construction work performed that was made subsequent to delivery or performance; or a claimed infringement that is unreasonably settled without the consent of the Subcontractor, unless required by final decree of a court of competent jurisdiction.

4.20 **Rights in Data**

4.20.1 Definitions applicable to this Section 4.20:

- 4.20.1.1 *Computer databases.* A collection of data in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.
- 4.20.1.2 *Computer software.* Computer programs that are data comprising a series of instructions, rules routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the

computer program to be produced, created, or compiled. The term does not include computer databases.

- 4.20.1.3 *Data*. Recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include data incidental to the administration of this Contract, such as financial, administrative, cost and pricing, or management information.
- 4.20.1.4 *Form, fit, and function data*. Data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating, and attachment characteristics, functional characteristics, and performance requirements; except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.
- 4.20.1.5 *Limited rights data*. Data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice in Paragraph 4.20.7.2.
- 4.20.1.6 *Restricted computer software*. Computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice, of this Section 4.20.
- 4.20.1.7 *Technical data*. Recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software but does include manuals and instructional materials and technical data formatted as a computer database.
- 4.20.1.8 *Unlimited rights*. The rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

4.20.2 Allocation of Rights

4.20.2.1 Except as provided in Sub-section 4.20.3 regarding copyright, the Government shall have unlimited rights in:

- 4.20.2.1.1 Data first produced in the performance of this Contract.
- 4.20.2.1.2 Form, fit, and function data delivered under this Contract.
- 4.20.2.1.3 Data delivered under this Contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this Contract.
- 4.20.2.1.4 All other data delivered under this Contract, unless provided otherwise for limited rights data or restricted computer software in accordance with Sub-section 4.20.7.

4.20.2.2 The Subcontractor and its subcontractors shall each have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Subcontractor or its subcontractors of any tier in the performance of this Contract, unless provided otherwise in Sub-section 4.20.4; protect from unauthorized disclosure and use those data that are limited rights data or restricted

computer software to the extent provided in Sub-section 4.20.7; substantiate use of, add or correct limited rights, restricted rights, or copyright notices and to take other appropriate action, in accordance with Sub-sections 4.20.5 and 4.20.6; and establish claim to copyright subsisting in data first produced in the performance of this Contract to the extent provided in Paragraph 4.20.3.1.

4.20.3 Copyright

- 4.20.3.1 Unless provided otherwise in Sub-section 4.20.4, the Subcontractor may establish, without prior approval of DOE or the Contractor, claim to copyright subsisting in scientific and technical articles based on or containing data first produced in the performance of this Contract and published in academic, technical or professional journals, symposia proceedings or similar works. Prior, expressly written permission of the DOE Contracting Officer, through the Contractor, is required to establish claim to copyright subsisting in all other data first produced in the performance of this Contract. When claim to copyright is made, the Subcontractor shall affix the applicable copyright notices of 17 U.S.C. §401 or §402 and acknowledgment of the Government sponsorship (including the Contract number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software the Subcontractor grants to the Government, and others acting on its behalf, a paid up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Subcontractor grants to the Government and others acting in its behalf, a paid up nonexclusive, irrevocable worldwide license in such copyrighted computer software to reproduce, prepare derivative works, and perform publicly and display publicly by or on behalf of the Government.
- 4.20.3.2 The Subcontractor shall not, without prior written permission of the DOE Contracting Officer, through the Contractor, incorporate in data delivered under this Contract any data not first produced in the performance of this Contract and that contains the copyright notice of 17 U.S.C. §401 or §402, unless the Subcontractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in Paragraph 4.20.3.1; provided, however, that if such data are computer software the Government shall acquire a copyright license as set forth in this Section 4.20, or as otherwise may be provided in a collateral agreement incorporated in or made part of this Contract.
- 4.20.3.3 The Government agrees not to remove any copyright notices placed on data pursuant to this section, and to include such notices on all reproductions of the data.

4.20.4 Release, Publication, and Use of Data

- 4.20.4.1 The Subcontractor and its subcontractors shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Subcontractor in the performance of this Contract, except to the extent prohibited by the federal export control or national security laws or regulations, or unless otherwise provided in this Section 4.20 or expressly set forth in this Contract.
- 4.20.4.2 The Subcontractor agrees that to the extent it receives or is given access to data necessary for the performance of this Contract that contain restrictive markings, the Subcontractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the DOE Contracting Officer, through the Contractor.
- 4.20.4.3 The Subcontractor agrees not to assert copyright in computer software first produced in the performance of this Contract without prior written permission of the

DOE Patent Counsel assisting the subcontracting activity. When such permission is granted, the Patent Counsel shall specify appropriate terms, conditions, and submission requirements to assure utilization, dissemination, and commercialization of the data. The Subcontractor, when requested, shall promptly deliver to the Patent Counsel a duly executed and approved instrument fully confirmatory of all rights to which the Government is entitled.

4.20.5 Unauthorized Marking of Data

4.20.5.1 Notwithstanding any other provisions of this Contract concerning inspection or acceptance, if any data delivered under this Contract are marked with restrictive or limiting markings not authorized by this Contract, the Contractor with DOE approval may at any time either return the data to the Subcontractor, or cancel or ignore the markings. However, the following procedures shall apply prior to canceling or ignoring the markings:

4.20.5.1.1 The Contractor, in coordination with DOE, shall make written inquiry to the Subcontractor affording the Subcontractor 30 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings.

4.20.5.1.2 If the Subcontractor fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 30-day period (or a longer time not exceeding 90 days approved in writing by the Contractor, in coordination with DOE, for a good cause shown), the Government, and the Contractor, shall have the right to cancel or ignore the markings at any time after said period and the data will no longer be made subject to any disclosure prohibitions.

4.20.5.1.3 If the Subcontractor provides written justification to substantiate the propriety of the markings within the period set in Sub-paragraph 4.20.5.1.1, the Contractor, in coordination with DOE, shall consider such written justification and determine whether or not the markings are to be cancelled or ignored. If the DOE Contracting Officer determines that the markings are authorized, the Subcontractor shall be notified in writing. If the Contractor determines, with concurrence of the DOE Contracting Officer, that the markings are not authorized, the Contractor shall furnish the Subcontractor a written determination, which determination shall become the final decision regarding the appropriateness of the markings, unless the Subcontractor files suit in a court of competent jurisdiction within 90 days of receipt of the Contractor's decision. The Contractor and DOE shall continue to abide by the markings under this paragraph until final resolution of the matter either by the Contractor's determination becoming final (in which instance the Government and the Contractor shall thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.

4.20.5.1.4 The time limits in the procedures set forth in Paragraph 4.20.5.1 may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. §552) if necessary, to respond to a request thereunder.

4.20.5.1.5 This Sub-section 4.20.5 does not apply if this Contract is for a major system or for support of a major system by a civilian agency other than National Aeronautics and Space Administration and the U.S. Coast

Guard agency subject to the provisions of Title I of the Federal Property and Administrative Services Act of 1949.

- 4.20.5.1.6 Except to the extent the Contractor's action occurs as the result of the final disposition of the matter by a court competent jurisdiction, the Subcontractor is not precluded by this Sub-paragraph from bringing a claim pursuant to this Sub-section 4.20.5, as applicable, that may arise as the result of the Contractor removing or ignoring authorized markings on data delivered under this Contract.

4.20.6 Omitted or Incorrect Marking

- 4.20.6.1 Data delivered to the Contractor without either the Limited Rights Notice or the Restricted Rights Notice as authorized by Sub-section 4.20.7, or the copyright notice required by Sub-section 4.20.3 shall be deemed to have been furnished with unlimited rights, and the Government and the Contractor assume no liability for the disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the Subcontractor may request, within six months (or a longer time approved by the Contractor for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Subcontractor's expense, and the Contractor, in coordination with DOE, may agree to do so if the Subcontractor identifies the data to which the omitted notice is to be applied; demonstrates that the omission of the notice was inadvertent; establishes that the use of the proposed notice is authorized; and acknowledges that the Government and the Contractor have no liability with respect to the disclosure, use, or reproduction of any such data made prior to the addition of the notice or resulting from the omission of the notice.
- 4.20.6.2 The Contractor, in coordination with DOE, may also permit correction at the Subcontractor's expense of incorrect notices if the Subcontractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized; or correct any incorrect notices.

4.20.7 Protection of Limited Rights Data and Restricted Computer Software

- 4.20.7.1 When data other than that listed in Sub-paragraphs 4.20.2.1.1, 4.20.2.1.2, and 4.20.2.1.3 are specified to be delivered under this Contract and qualify as either limited rights data or restricted computer software, if the Subcontractor desires to continue protection of such data, the Subcontractor shall withhold such data and not furnish them to the Contractor under this Contract. As a condition to this withholding, the Subcontractor shall identify the data being withheld and furnish form, fit, and function data in lieu thereof. Limited rights data that are formatted as a computer database for delivery to the Contractor are to be treated as limited rights data and not restricted computer software.
- 4.20.7.2 Notwithstanding Paragraph 4.20.7.1, the Contractor may identify and specify the delivery of limited rights data, or the Contractor's Contract Specialist or Procurement Specialist may require by written request the delivery of limited rights data that has been withheld or would otherwise be withholdable. If delivery of such data is so required, the Subcontractor may affix the following Limited Rights Notice to the data and the Contractor will thereafter treat the data, subject to the provisions of Sub-sections 4.20.5 and 4.20.6, in accordance with such notice:

LIMITED RIGHTS NOTICE

- A. These data are submitted with limited rights under Contract No. _____ between _____ (Subcontractor) and Battelle Energy Alliance, LLC (Contractor), acting in its capacity as the management and operating contractor to the U.S. Department of Energy at Idaho National Laboratory. These data may be reproduced and used

by the Government and the Contractor with the express limitation that they will not, without written permission of the Subcontractor, be used for purposes of manufacture nor disclosed outside the Government or the Contractor; except that the Government or the Contractor may disclose these data outside the Government or the Contractor for the following purposes, if any; provided that the Government and the Contractor make such disclosure subject to prohibition against further use and disclosure:

1. Use (except for manufacture) by support services contractors or subcontractors in connection with the work performed within the scope of their contracts or subcontracts that are part of the Government's program of which this Contract is part.
2. This limited rights data may be disclosed for evaluation purposes under the restriction that the limited rights data be retained in confidence and not be further disclosed.
3. This limited rights data may be disclosed on a need-to-know basis to other contractors or subcontractors participating in the Government's program of which this Contract is a part for information or use (except for manufacture) in connection with the Work performed under their contracts or subcontracts and under the restriction that the limited rights data be retained in confidence and not be further disclosed.
4. This limited rights data may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the limited rights data be retained in confidence and not be further disclosed.
5. Release to a foreign government, or instrumentality thereof, as the interests of the U.S. Government may require, for information or evaluation, or for emergency repair or overhaul work by such government.

B. This notice shall be marked on any reproduction of these data, in whole or in part.

4.20.8 Subcontracting

4.20.8.1 The Subcontractor has the responsibility to obtain from its lower-tier subcontractors all data and rights therein necessary to fulfill the Subcontractor's obligations under this Contract. If a lower-tier subcontractor refuses to accept terms affording the Government and the Contractor such rights, the Subcontractor shall promptly bring such refusal to the attention of the Contractor and not proceed with the lower-tier subcontract award without written authorization by the Contractor.

4.20.9 Relationship to Patents

4.20.9.1 Nothing contained in this Section shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

4.20.10 Inspection

4.20.10.1 The Subcontractor agrees, except as may be otherwise specified in this Contract for specific data items listed as not subject to this Sub-section 4.20.10, that the DOE Contracting Officer or an authorized representative may, up to three years after acceptance of all items to be delivered under this Contract, inspect at a Subcontractor's facility any data withheld pursuant to Sub-section 4.20.7 for purposes of verifying the Subcontractor's assertion pertaining to the limited rights or restricted rights status of the data or for evaluating work performance. Where the Subcontractor whose data are to be inspected demonstrates to the DOE Contracting Officer that there would be a possible conflict of interest if the inspection were made by a particular representative, the DOE Contracting Officer shall designate an alternate inspector.

4.21 Additional Technical Data Requirements

- 4.21.1 In addition to the technical data specified elsewhere in this Contract to be delivered, the Contractor may at any time during this Contract performance or within one year after final payment call for the Subcontractor to deliver any technical data first produced or specifically used in the performance of this Contract, except technical data pertaining to items of standard commercial design.
- 4.21.2 The provisions of Section 4.20 are applicable to all technical data called for under this section. Accordingly, nothing contained in this section shall require the Subcontractor to actually deliver any technical data, the delivery of which is excused by Section 4.20.
- 4.21.3 When technical data are to be delivered under this contract, the Subcontractor will be compensated for appropriate costs for converting such data into the prescribed form for reproduction and for delivery.

4.22 Patent Rights—Small Business Firms or Nonprofit Organizations- See Addendum A

4.23 Patent Rights—Other than Small Business Firms or Nonprofit Organizations- See Addendum B

4.24 Cooperation with the Office of Inspector General

- 4.24.1 The Subcontractor must ensure that all employees of the Subcontractor and its lower-tier subcontractors understand that they must comply with requests for interviews and briefings and must provide affidavits or sworn statements, if so requested by an employee of the Office of Inspector General (OIG) so designated to take affidavits or sworn statements; not impede or hinder another employee's cooperation with the OIG; and ensure that reprisals are not taken against employees who cooperate with or disclose information to the OIG or other lawful appropriate authority.

4.25 Compliance with Internet Protocol Version 6 in Acquiring Information Technology

- 4.25.1 If this Contract involves the acquisition of information technology that uses Internet Protocol (IP) technology, the Subcontractor agrees that all deliverables that involve information technology that uses IP (products, services, software, etc.) will comply with Internet Protocol Version 6 (IPv6) standards and interoperate with both IPv6 and Internet Protocol Version 4 (IPv4) systems and products, and it has IPv6 technical support for development and implementation and fielded product management available.
- 4.25.2 Should the Subcontractor find that the statement of work or specifications of this Contract do not conform to the IPv6 standard, the Subcontractor must notify the Contractor of such nonconformance and act in accordance with instructions of the Contractor.

4.26 Export Control

- 4.26.1 The Subcontractor is responsible to ensure (i) the proper identification of commodities, technology, technical data, and items subject to export control laws, in each case as provided by the Subcontractor (including its sub-tier subcontractors); and (ii) the proper access, control, and disposition of all commodities, technology, technical data, and items subject to export control laws, in each case as provided by the Subcontractor (including its sub-tier subcontractors), or as provided and identified by or on behalf of Contractor. These export control laws include, without limitation, the Arms Export Control Act, the Export Administration Act, the International Economic Emergency Powers Act, the Atomic Energy Act, the Nuclear Non Proliferation Act, and regulations issued pursuant to these including the Export Administration Regulations (15 C.F.R. Parts 730-774), the International Traffic in Arms Regulations (22 C.F.R. Parts 120-130), and the Nuclear Regulatory Commission and DOE export regulations (10 C.F.R. Parts 110 and 810). The parties acknowledge that export control requirements may change and that the export of goods, technical data, or services from the United States without an export license or other governmental authorization may result in criminal and/or other liability. In the performance of this Contract, the Subcontractor agrees that it will not export, re export or otherwise transfer, directly or indirectly, commodities, technology, or technical data in violation of U.S. export control laws and regulations.
- 4.26.2 The Subcontractor is responsible for its own compliance with laws and regulations governing export controls in the performance of this Contract and acknowledges that it can contact the U.S. Departments of Commerce, State, Energy and Treasury for guidance as to applicable licensing requirements and other restrictions. This Contract does not provide the Subcontractor any express or implied governmental export authorization or license.
- 4.26.3 Subcontractor understands and agrees to comply with the U.S. Foreign Corrupt Practices Act that prohibits the Subcontractor from providing items of value to a foreign public official, members of a foreign political party, or certain relatives of such persons in order to obtain or retain business. The Subcontractor agrees not to give anything of value, including, but not limited to, business gratuities and reimbursement for travel, to any such persons in violation of the U.S. Foreign Corrupt Practices Act. The Subcontractor shall comply with all requirements relevant to its business arrangement with the Contractor, including any registration requirements and warrants its performance under this Contract shall comply with all applicable laws and regulations of the country or countries in which it performs any services for the Contractor.
- 4.26.4 If requested, the Subcontractor agrees to identify in writing for each item it produces or provides to the Contractor under this Contract whether or not it is subject to export control laws and agrees to provide the applicable Export Control Classification Number, if any, under the Export Administration Regulations, the applicable U.S. Munitions List category, if any, under the International Traffic in Arms Regulations and other applicable export classification, if any.

4.27 Protection of Personally Identifiable Information

- 4.27.1 To the extent that the Work under this Contract requires the Subcontractor to have access to personally identifiable information (PII) about an individual, the Subcontractor shall after receipt thereof, treat such PII as confidential and safeguard such information from unauthorized use and disclosure. Further, the Subcontractor agrees not to appropriate such PII for its own use or to disclose such information to third parties unless specifically authorized in writing by the Contractor.

- 4.27.2 The Subcontractor agrees to allow access only to those employees who need the PII to perform services under this Contract and agrees that PII will be used solely for the purpose of performing services under this Contract. The Subcontractor shall ensure that its employees will not discuss, divulge, or disclose any such PII to any person or entity except those persons within the Subcontractor's organization directly concerned with performance under the Contract.
- 4.27.3 The Subcontractor shall administer a monitoring process to ensure compliance with the provisions of this Section 4.27. Immediately upon discovery of a real or suspected loss of PII the Subcontractor shall promptly report any breaches to the BEA Contract Specialist or Procurement Specialist, and implement immediate, appropriate corrective actions to contain and prevent recurrence.
- 4.27.4 PII is an individual's first name or first initial and last name in combination with any one or more of the following data elements including, but not limited to, social security number; passport number; credit card numbers; clearances; bank numbers; biometrics; date and place of birth; mother's maiden name; criminal, medical, and financial records; and educational transcripts.
- 4.27.5 The Contractor may terminate this Contract for default if the Subcontractor or an employee of the Subcontractor fails to comply with the provisions of this Section 4.27. The Contractor may also exercise any other rights and remedies provided by law or this Contract, including criminal and civil penalties.
- 4.27.6 The Subcontractor shall include this clause in all appropriate lower-tier subcontracts. However, such provision in this Contract shall not relieve the Subcontractor of its obligation to assure compliance with the provisions of this Section 4.27.

4.28 **Privacy or Security Safeguards**

- 4.28.1 If this Contract is for information technology that requires security of information technology, and/or is for the design, development, or operation of a system of records using commercial information technology services or support services, the following apply:
- 4.28.1.1 The Subcontractor shall not publish or disclose in any manner, without the Contractor's written consent, the details of any safeguards either designed or developed by the Subcontractor under this Contract or otherwise provided by the Government or the Contractor.
- 4.28.1.2 To the extent required to carry out a program of inspection to safeguard against threats and hazards to the security, integrity, and confidentiality of Government data, the Subcontractor shall afford the Government or the Contractor access to the Subcontractor's facilities, installations, technical capabilities, operations, documentation, records, and databases.
- 4.28.2 If new or unanticipated threats or hazards are discovered by either the Government, the Contractor, or the Subcontractor, or if existing safeguards have ceased to function, the discoverer shall bring the situation to the attention of the other party within 72 hours.

4.29 **Compliance with INL Computer Hardware and Software Standards**

- 4.29.1 If, in the performance of this Contract, computer connectivity to INL (e.g., virtual private network [VPN] network access) is necessitated, the Subcontractor shall recognize that INL maintains and uses a standard set of computer hardware and software for all common desktop computers and laptops. It is the Subcontractor's responsibility to work within the INL standard set of computer hardware and software for all common desktop computers and laptops or request a variance when performance of this Contract necessitates connecting to the INL network or equipment.

4.30 **Reserved.**

4.31 **Public Release of Information**

4.31.1 Data, photographs, sketches, and advertising relating to the Work under this Contract, which the Subcontractor desires to submit in a press release, shall be submitted to the Contractor for approval four weeks prior to the desired release date. As part of the approval request, the Subcontractor shall identify the specific media to be used as well as other pertinent details of the proposed release. All releases, regardless of tier or supplier, must have prior approval of the Contractor. The Subcontractor shall include all provisions of this Section, including this paragraph, in all lower-tier subcontracts under this Contract.

4.32 **Notice of Labor Disputes**

4.32.1 Whenever an actual or potential labor dispute is delaying or threatening the performance of Work, the Subcontractor shall notify the Contractor in writing within five (5) business days. Such notice shall include all relevant information concerning the dispute and its background.

4.33 **Termination**

4.33.1 The Contractor may terminate performance of Work under this Contract in whole, or, from time to time in part, if the Contractor determines that a termination is in the Contractor's interest, or the Subcontractor defaults in performing this Contract and fails to cure the default within-10-days (unless extended in writing by the Contractor) after receiving a notice specifying the default. "Default" includes failure to make progress in the Work so as to endanger performance.

4.33.2 The Contractor shall terminate by delivering to the Subcontractor a Notice of Termination specifying whether termination is for default of the Subcontractor or for convenience of the Contractor, the extent of termination and the effective date. If, after termination for default, it is determined that the Subcontractor was not in default or that the Subcontractor's failure to perform or to make progress in performance is due to causes beyond the control and without the fault or negligence of the Subcontractor and is excusable (see Sub-section 4.14.4 and FAR 52.249-14), the rights and obligations of the parties will be the same as if the termination was for convenience). In the event of termination for convenience, the Subcontractor shall be reimbursed as specified in this Contract including the Estimated Cost and Cost Sharing section thereof.

4.33.3 After receipt of a Notice of Termination, and except as directed by the Contractor, the Subcontractor shall immediately proceed with the following obligations regardless of any delay in determining or adjusting any amounts due under the Contract.

4.33.3.1 Stop work as specified in the notice.

4.33.3.2 Place no further subcontracts or contracts (referred to as lower-tier subcontracts in this Section 4.33), except as necessary to complete the continued portion, if any, of this Contract.

4.33.3.3 Terminate all lower-tier subcontracts to the extent they relate to the Work terminated.

4.33.3.4 Assign to the Contractor, as directed by the Contractor, all right, title, and interest of the Subcontractor under the lower-tier subcontracts terminated, in which case the Contractor shall have the right to settle or to pay any termination settlement proposal arising out of those terminations.

4.33.3.5 With approval or ratification to the extent required by the Contractor, settle all outstanding liabilities and termination settlement proposals arising from the termination of lower-tier subcontracts, the cost of which would be reimbursable in

whole or in part, under this Contract; the approval or ratification will be final for purposes of this Section.

- 4.33.3.6 Transfer title as Contractor may direct and, as directed by the Contractor, deliver to the Contractor:
- 1) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the Work terminated,
 - 2) the completed or partially completed plans, drawings, information, and other property that, if this Contract had been completed, would be required to be furnished to the Contractor, and
 - 3) the jigs, dies, fixtures, and other special tools and tooling acquired or manufactured for this Contract, the cost of which the Subcontractor has been or will be reimbursed under this Contract.
- 4.33.3.7 Complete performance of the Work not terminated.
- 4.33.3.8 Take any actions that may be necessary, or that the Contractor may direct, for the protection and preservation of the property related to this Contract that is in the possession of the Subcontractor and in which the Contractor has or may acquire an interest.
- 4.33.3.9 Use its best efforts to sell, as directed or authorized by the Contractor, any property of the types referred to in Paragraph 4.33.3.6; provided, however, that the Subcontractor:
- 1) is not required to extend credit to any purchaser, and
 - 2) may acquire the property under the conditions prescribed by, and at prices approved by, the Contractor.

The proceeds of any transfer or disposition will be applied to reduce any payments to be made by the Contractor under this Contract, credited to the price or cost of the Work, or paid in any other manner directed by the Contractor.

- 4.33.4 After expiration of the plant clearance period (see, where applicable, FAR Subpart 45.6 and the definition in FAR 49.001), the Subcontractor may submit to the Contractor a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contractor. The Subcontractor may request the Contractor to remove those items or enter into an agreement for their storage. Within 15 days of list submission to Contractor, the Contractor will accept the items and remove them or enter into a storage agreement. The Contractor may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.
- 4.33.5 After termination, the Subcontractor shall submit a final termination settlement proposal to the Contractor in the form and with the certification prescribed by the Contractor. The Subcontractor shall submit the proposal promptly, but no later than one year from the effective date of termination, unless extended in writing by the Contractor, upon written request of the Subcontractor, within this one-year period, however, if the Contractor determines that the facts justify it, a termination settlement proposal may be received and acted on after one year or any extension. If the Subcontractor fails to submit the proposal within the time allowed, the Contractor may determine, on the basis of information available to the Contractor, the amount, if any, due the Subcontractor because of the termination and shall pay the amount determined.
- 4.33.6 Subject to Sub-section 4.33.5, the Subcontractor and the Contractor may agree on the whole or any part of the amount to be paid (including an allowance for fee) because of the termination. The Contract shall be appropriately amended, and the Subcontractor paid the agreed amount.

- 4.33.7 If the Contractor and the Subcontractor fail to agree in whole or in part on the amount of costs and/or fee to be paid because of the termination of Work, the Contractor shall determine, on the basis of information available, the amount, if any, due the Subcontractor, and shall pay that amount, which shall include the following:
- 4.33.7.1 The reasonable costs of settlement of the Work terminated, including
 - 1) accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposal and supporting data,
 - 2) the termination and settlement of lower-tier subcontracts, excluding the amounts of such settlements, and
 - 3) storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory.If the termination is for default, no amounts for the preparation of the Subcontractor's termination settlement proposal may be included.
 - 4.33.7.2 All costs reimbursable under this Contract, not previously paid, for the performance of this Contract before the effective date of the termination, and those costs that may continue for a reasonable time with the approval of or as directed by the Contractor; however, the Subcontractor shall discontinue those costs as rapidly as practicable.
 - 4.33.7.3 The cost of settling and paying termination settlement proposals under terminated subcontracts that are properly chargeable to the terminated portion of this Contract, if not included in Subsection 4.33.7.2.
 - 4.33.7.4 A portion of the fee under this Contract, determined as follows:
- 4.33.8 If the Contract is terminated for the convenience of the Contractor, the settlement shall include a percentage of the fee equal to the percentage of completion of Work contemplated under the Contract, but excluding effort included in lower-tier subcontractors' termination proposals, less previous payments for fee.
- 4.33.9 If the Contract is terminated for default, the total fee payable shall be such proportionate part of the fee as the total number of articles (or amount of services) delivered to and accepted by the Contractor is to the total number of articles (or amount of services) of a like kind required by the Contract.
- 4.33.10 If the settlement includes only fee, it will be determined under this Paragraph 4.33.7.4.
- 4.33.11 The cost principles and procedures of FAR Part 31, in effect on the date of this Contract, shall govern all applicable costs claimed, agreed to, or determined under this Section.
- 4.33.12 The Subcontractor shall have the right of appeal, under Section 4.13, from determination made by the Contractor under Sub-sections 4.33.5, 4.33.7, or 4.33.11, except that if the Subcontractor failed to submit the termination settlement proposal within the time provided in Sub-section 4.33.5 and failed to request a time extension in writing, there is no right of appeal. If the Contractor has made a determination of the amount due under Sub-sections 4.33.5, 4.33.7, or 4.33.11, the Contractor shall pay the Subcontractor the amount determined by the Contractor, if there is no right of appeal or if no timely appeal has been taken; or the amount finally determined on an appeal.
- 4.33.13 In arriving at the amount due the Subcontractor under this Section, there shall be deducted:
- 1) all unliquidated advance or other payments to the Subcontractor under the terminated portion of this Contract,
 - 2) any claim which the Contractor has against the Subcontractor under this Contract, and
 - 3) the agreed price for, or the proceeds of the sale of, materials, supplies, or other things acquired by the Subcontractor or sold under this Section and not recovered by or credited to the Contractor.

4.33.14 The Subcontractor and the Contractor must agree to any equitable adjustment in fee for the continued portion of this Contract when there is a partial termination. The Contractor shall amend the Contract to reflect the agreement.

4.33.14.1 The Contractor may, under the terms and conditions it prescribes, make partial payments and payments against costs incurred by the Subcontractor for the terminated portion of this Contract, if the Contractor believes the total of these payments will not exceed the amount to which the Subcontractor will be entitled.

4.33.14.2 If the total payments exceed the amount finally determined to be due, the Subcontractor shall repay the excess to the Contractor upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 41 U.S.C. §7109. Interest shall be computed for the period from the date the excess payment is received by the Subcontractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Subcontractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by the Contractor because of the circumstances.

4.33.15 Unless otherwise provided in this Contract or by statute, the Subcontractor shall maintain all records and documents relating to the terminated portion of this Contract for three years after final settlement. This includes all books and other evidence bearing on the Subcontractor's costs and expenses under this Contract. The Subcontractor shall make these records and documents available to the Contractor, at the Subcontractor's office, at all reasonable times, without any direct charge. If approved by the Contractor, photographs, microphotographs, or other authentic reproductions may be maintained instead of original records and documents.

4.33.16 The provisions of this Section relating to fee are inapplicable if this Contract does not include a fee.

4.34 **Rights to Proposal Data**

4.34.1 Except for the information, including technical data, contained on those pages of the Subcontractor's proposal which are specifically marked by the Subcontractor as being proprietary information, it is agreed that, as a condition of the award of this Contract, the Government and the Contractor shall have the right to use, duplicate, disclose and have others do so, for any purpose whatsoever, the technical data contained in the proposal upon which this Contract is based.

4.35 **Reserved.**

4.36 **Limitation of Cost**

4.36.1 The parties estimate that performance of this Contract, exclusive of any fee, will not cost the Contractor more than the total estimated cost specified. The Subcontractor agrees to use its best efforts to perform the Work and all obligations under this Contract within the total estimated cost.

4.36.2 The Subcontractor shall notify the Contractor in writing whenever it has reason to believe that

- 1) the cost the Subcontractor expects to incur under this Contract in the next 45 days when added to all costs previously incurred, will exceed 75% of the total estimated cost specified, or
- 2) the total estimated cost for the performance of this Contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.

4.36.3 As part of the notification, the Subcontractor shall provide the Contractor a revised estimate of the total cost of performing this Contract.

- 4.36.4 Except as required by other provisions of this Contract, specifically citing and stated to be an exception to this Section,
- 4.36.4.1 The Contractor is not obligated to reimburse the Subcontractor for costs incurred in excess of the total estimated cost specified; and
 - 4.36.4.2 The Subcontractor is not obligated to continue performance under this Contract (including actions under Section 4.33) or otherwise incur costs in excess of the total estimated cost specified, until the Contractor notifies the Subcontractor by written modification of this Contract, that the total estimated cost has been increased; and provides a revised total estimated cost of performing this Contract.
- 4.36.5 No notice, communication, or representation in any form other than that specified in Paragraph 4.36.4.2 or from any person other than Contractor, shall affect the total estimated cost of this Contract to the Contractor. In the absence of the specified notice, the Contractor is not obligated to reimburse the Subcontractor for any costs in excess of the total estimated cost, whether those excess costs were incurred during the course of this Contract or a result of termination.
- 4.36.6 If the total estimated cost is increased, any costs the Subcontractor incurs before the increase that are in excess of the previously estimated cost shall be allowable to the same extent as if incurred afterward, unless the Contractor issues a termination or other notice directing that the increase is solely to cover termination or other specified expenses.
- 4.36.7 Change orders shall not be considered an authorization to exceed the total estimated cost unless they contain a statement specifically increasing the total estimated cost.
- 4.36.8 If this Contract is terminated or the total estimated cost is not increased, the Contractor and the Subcontractor shall negotiate an equitable distribution of all property produced or purchased under this Contract, based upon the share of costs incurred by each.

4.37 **Notice of Radioactive Materials**

- 4.37.1 The Subcontractor shall notify the Contractor or its designee, in writing, 30 days prior to the delivery of, or prior to completion of any servicing required by this Contract of, items containing either:
- 1) radioactive material requiring specific licensing under the regulations issued pursuant to the Atomic Energy Act of 1954, as amended, as set forth in Title 10 of the Code of Federal Regulations in effect on the date of this Contract, or
 - 2) other radioactive material not requiring specific licensing in which the specific activity is greater than 0.002 microcuries per gram or the activity per-item equals or exceeds 0.01 microcuries. Such notice shall specify the part or parts of the items that contain radioactive materials, a description of the materials, the name and activity of the isotope, the manufacturer of the materials, and any other information known to the Subcontractor which will put users of the items on notice as to the hazards involved (OMB No. 9000-0107).
- 4.37.2 If there has been no change affecting the quantity of activity, or the characteristics and composition of the radioactive material from deliveries under this Contract or prior contracts, the Subcontractor may request that the Contractor waive the notice requirement in Sub-section 4.37.1. Any such request shall:
- 1) be submitted in writing,
 - 2) state that the quantity of activity, characteristics, and composition of the radioactive material have not changed, and
 - 3) cite the Contract number on which prior notification was submitted and the Contracting Office to which it was submitted.

- 4.37.3 All items, parts, or subassemblies that contain radioactive materials in which the specific activity is greater than 0.002 microcuries per gram or activity per item equals or exceeds 0.01 microcuries, and all containers in which such items, parts or subassemblies are delivered to the Contractor shall be clearly marked and labeled as required by the latest revision of MIL-STD 129 in effect on the date of the Contract.
- 4.37.4 This Section, including this Sub-section, shall be inserted in all lower-tier subcontracts for radioactive materials meeting the criteria in Sub-section 4.37.1.

4.38 Allowable Cost and Payment

4.38.1 Invoicing

- 4.38.1.1 The Contractor shall make payments to the Subcontractor when requested, as Work progresses, but not more often than once each calendar month (unless otherwise agreed in writing by the parties' authorized representatives), except for small business concerns, in amounts determined to be allowable by the Contractor in accordance with FAR Subpart 31.2 or FAR Subpart 31.1 for educational institutions or FAR Subpart 31.7 for nonprofit organizations and DEAR Subpart 931.2 (not applicable to educational institutions and nonprofit organizations) in effect on the date of this Contract, and the terms of this Contract. The Subcontractor may submit to the Contractor, in such form and in reasonable detail as the Contractor may require, an invoice supported by a statement of the claimed allowable cost for performing this Contract. Reasonable detail of costs includes, but is not limited to, labor categories used, hours expended for each category, direct labor rate(s) for each category, direct labor cost for each category, overhead rate(s) and total, General and Administrative costs (if applicable), travel costs (number of trips, number of days in a travel status; location of travel); and material costs and other direct costs (with identification of purchases greater than \$5,000 per unit). Subcontractor shall be reimbursed as specified in this Contract including the Estimated and Cost Sharing Section thereof.

4.38.2 Reimbursing Costs

- 4.38.2.1 For the purpose of reimbursing allowable costs, except as provided in Paragraph 4.38.2.2, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions, the term "costs" includes only:
- 1) those recorded costs that, at the time of the request for reimbursement, the Subcontractor has paid by cash, check, or other form of actual payment for items or services purchased directly for this Contract performance in the ordinary course of business,
 - 2) cost incurred, but not necessarily paid, for materials issued from the Subcontractor's inventory and placed in the production process for use on this Contract, direct labor, direct travel, other direct in house costs, and properly allocable and allowable indirect costs, as shown in the records maintained by the Subcontractor for purposes of obtaining reimbursement under subcontracts and
 - 3) the amount of progress payments that have been paid to the Subcontractor's lower-tier subcontractors under similar cost standards.
- 4.38.2.2 The Subcontractor's contributions to any pension, profit sharing, or employee stock ownership plan funds that are paid quarterly, or more often, may be included in indirect costs for payment purposes; provided that the Subcontractor pays the contribution to the fund within 30 days after the close of the period covered. Payments made 30 days or more after the close of a period shall not be included until the Subcontractor actually makes the payment. Accrued costs for such contribution that are paid less often than quarterly shall be excluded from indirect costs for payment purposes until the Subcontractor actually makes the payment.

- 4.38.2.3 Notwithstanding the audit and adjustment of invoices or vouchers under Sub-section 4.38.7, allowable indirect costs under this Contract shall be obtained by applying indirect cost rates established in accordance with Sub-section 4.38.4.
- 4.38.2.4 Notwithstanding any provision in the Contract to the contrary, (excepting a section the non-application of which would result in unallowable cost to the Contractor under its Prime Contract), any provision in this Contract, including any statements in specifications or other documents incorporated in this Contract by reference designating performance of services or furnishing of materials at the Subcontractor's expense and/or at no cost to the Contractor shall be disregarded for purpose of cost reimbursement under this Section 4.38.

4.38.3 Small Business Concerns

- 4.38.3.1 A small business concern may be paid every two weeks and may invoice and be paid for recorded costs for items or services purchased directly for this Contract, even though the concern has not yet paid for the items or services.

4.38.4 Final Indirect Cost Rates

- 4.38.4.1 Final annual indirect cost rates and the appropriate bases shall be established in accordance with FAR Subpart 42.7 and DEAR Subpart 942.7 in effect for the period covered by the indirect cost rate proposal.
- 4.38.4.2 The Subcontractor shall, within six (6) months after the expiration of each of its fiscal years, or by a later date approved by the Contractor, submit to the cognizant Contracting Officer responsible for negotiating its final indirect cost rates and, if required by DOE procedures, to the cognizant audit activity, proposed final indirect cost rates for that period and supporting cost data specifying the Contract and any lower-tier subcontract to which the rates apply. The proposed rates shall be based on the Subcontractor's actual cost experience for that period. The appropriate Government representative and the Subcontractor shall establish the final indirect cost rates as promptly as practical after receipt of the Subcontractor's proposal.
- 4.38.4.3 The Subcontractor and the appropriate Government representative shall execute a written understanding setting forth the final indirect cost rates. The understanding shall specify
- 1) the agreed upon final annual indirect cost rates,
 - 2) the bases to which the rates apply,
 - 3) the periods for which the rates apply,
 - 4) any specific indirect cost items treated as direct costs in the settlement, and
 - 5) the affected subcontract and/or lower-tier subcontracts, 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.

- 4.38.4.4 Failure by the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of Section 4.13.

4.38.5 Billing Rates

- 4.38.5.1 Until final annual indirect cost rates are established for any period, the Contractor shall reimburse the Subcontractor at billing rates established by the Subcontractor or by any authorized representative (the cognizant auditor), subject to adjustment when the final rates are established. These billing rates shall be the anticipated final rates and may be prospectively or retroactively revised by mutual agreement, at either party's request, to prevent substantial overpayment or underpayment.

4.38.6 Quick Closeout Procedures

4.38.6.1 When the Subcontractor and the Contractor agree, the quick closeout procedures of FAR Subpart 42.7 may be used.

4.38.7 Audit

4.38.7.1 At any time or times before final payment, the Contractor may have the Subcontractor's invoices or vouchers and statements of cost audited by a US government representative (e.g. DCAA) or a mutually agreeable third party. Auditors other than the US Government will be required to enter into a non-disclosure agreement with the Subcontractor or its lower-tier subcontractors. Any payment may be reduced by amounts found by the Contractor not to constitute allowable costs or adjusted for prior overpayments.

4.38.8 Final Payment

4.38.8.1 Within 120 days (or longer if approved by the Contractor) after settlement of the final annual indirect cost rates for all years of the physically complete contract, the Subcontractor shall submit a completion invoice to reflect the settled amounts and rates. Upon approval of that invoice, and upon the Subcontractor's compliance with all terms of this Contract, the Contractor shall promptly pay any balance of allowable costs not previously paid.

4.38.8.2 The Subcontractor shall pay to the Contractor any refunds, rebates, credits, or other amounts (including interest, if any) accruing to or received by the Subcontractor or any assignee under this Contract, to the extent that those amounts are properly allocable to costs for which the Subcontractor has been reimbursed by the Contractor. Reasonable expenses incurred by the Subcontractor for securing refunds, rebates, credits, or other amounts shall be allowable costs if approved by the Contractor. Before final payment under this Contract, the Subcontractor and each assignee whose assignment is in effect at the time of final payment shall execute and deliver an assignment to the Contractor, in form and substance satisfactory to the Contractor, of refunds, rebates, credits, or other amounts (including interest, if any) properly allocable to costs for which the Subcontractor has been reimbursed by the Contractor under this Contract; and a release discharging the Government and the Contractor, their officers, agents, and employees, from all liabilities, obligations, and claims arising out of or under this Contract, except for specified claims stated in exact amounts, or in estimated amounts when the exact amounts are not known; claims including reasonable incidental expenses, based upon liabilities of the Subcontractor to third parties arising out of the performance of this Contract, provided, that the claims are not known to the Subcontractor on the date of the execution of the release, and that the Subcontractor gives notice of the claims in writing to the Contractor within six years following the release date or notice of final payment date, whichever is earlier; and claims for reimbursement of costs, including reasonable incidental expenses, incurred by the Subcontractor under the patent clauses of this Contract, excluding, however, any expenses arising from the Subcontractor's indemnification of the Government or the Contractor against patent liability.

4.38.9 Determination of Allowability

4.38.9.1 In no case, however, shall the foregoing arrangement and provisions preclude determination by the Contractor of the allowability or unallowability of Subcontractor costs claimed for reimbursement by the Subcontractor; provided, however, Contractor shall make its determination of allowability consistent with this Contract and the Contractor's DOE Prime Contract. The Subcontractor shall have the right of appeal, under Section 4.13 Disputes, from any determination made by the Contractor.

4.39 **Reserved.**

4.40 **Accrual Schedule**

4.40.1 The Subcontractor shall submit a schedule forecasting costs to be incurred for each calendar month for the duration of this Contract.

4.41 **Notice of Intent to Disallow Costs Notwithstanding any other Section of this Contract,**

4.41.1 Notwithstanding any other Section of this Contract:

4.41.1.1 The Contractor may, at any time, issue, to the Subcontractor, a written notice of intent to disallow specified costs incurred or planned for incurrence under this Contract that have been determined not to be allowable under the Contract terms; and

4.41.1.2 The Subcontractor may, after receiving a notice under Paragraph 4.41.1.1, submit a written response to the Contractor, with justification for allowance of the costs. If the Subcontractor does respond within 60 days, the Contractor shall, within 60 days of receiving the response, either make a written withdrawal of the notice or issue a written decision.

4.41.2 Failure to issue a notice under this Section 4.41 shall not affect the Contractor's rights to take exception to incurred cost.

4.42 **Payment for Overtime Premiums**

4.42.1 The use of overtime is authorized under this Contract only for Work

- 1) necessary to cope with emergencies such as those resulting from accidents, natural disasters, breakdowns of production equipment, or occasional production bottlenecks of a sporadic nature
- 2) by indirect labor employees such as those performing duties in connection with administration, protection, transportation, maintenance, standby plant protection, operation of utilities, or accounting
- 3) to perform tests, industrial processes, laboratory procedures, loading or unloading of transportation conveyances, and operations in flight or afloat that are continuous in nature and cannot reasonably be interrupted or completed otherwise or
- 4) that will result in lower overall costs to the Contractor.

4.42.2 Any request for estimated overtime premiums that does not involve the Work specified in Sub-section 4.42.1 shall:

- 1) Include all estimated overtime for Contract completion and shall identify the work unit (e.g., department or section in which the requested overtime will be used), together with present workload, staffing, and other data of the affected unit sufficient to permit the Contractor to evaluate the necessity for the overtime
- 2) Demonstrate the effect that denial of the request will have on the Contract delivery or performance schedule
- 3) Identify the extent to which approval of overtime would affect the performance or payments in connection with other Government related Contracts, together with identification of each affected Contract, and
- 4) Provide reasons why the required Work cannot be performed by using multi shift operations or by employing additional personnel.

4.43 **Subcontracting.**

4.43.1 Subcontractor's lower tier subcontractors are as specified in Subcontractor's proposal. Except as stated therein Subcontractor shall select its lower tier subcontractors on a competitive basis to the maximum extent consistent with the requirements of this Contract.

4.44 Acquisition of Real Property

- 4.44.1 Notwithstanding any other provision of this Contract, prior approval of the Contractor shall be obtained when, in performance of this Contract, the Subcontractor acquires or proposes to acquire use of real property by:
 - 4.44.1.1 Purchase, on the Contractor's behalf or in the Subcontractor's own name, with title eventually vesting in the Government.
 - 4.44.1.2 Lease, and the Contractor assumes liability for, or will otherwise pay for, the obligation under the lease as a reimbursable subcontract cost.
 - 4.44.1.3 Acquisition of temporary interest through easement, license, or permit, and the Contractor funds the entire cost of the temporary interest.
- 4.44.2 Justification of and execution of any real property acquisitions shall be in compliance with directions provided by the Contractor.
- 4.44.3 The substance of this Section, including this paragraph, shall be included in any lower-tier subcontract occasioned by this Contract, under which property described in Sub-section 4.44.1 will be acquired.

4.45 Legal Costs

- 4.45.1 Regarding any directly charged legal costs that the Subcontractor proposes for reimbursement under this Contract, the Subcontractor agrees to comply with paragraph 2.1.15.1 hereinabove.
- 4.45.2 Enforcement of any effort to flow down to a sub-tier is as specified in subsection 2.1.15 hereinabove including paragraph 2.1.15.2 therein.

5. RESERVED.

6. SECTIONS THAT APPLY WHEN SUBCONTRACTOR PERSONNEL OR LOWER-TIER SUBCONTRACTOR PERSONNEL, ARE PRESENT AT THE PREMISES OWNED, LEASED, OR CONTROLLED BY THE CONTRACTOR OR THE U.S. GOVERNMENT, REGARDLESS OF PRICE/VALUE

6.1 Occurrence, Notification, and Reporting by the Subcontractor

- 6.1.1 The Subcontractor shall report to the Contractor any unusual occurrence or unplanned event occurring within the boundaries of DOE or Contractor facilities during the performance of this Contract. The report shall be provided, either orally or in writing, to the designated Contractor Contract Specialist, Procurement Specialist, or project manager. Occurrences/events that require reporting include any out of the ordinary situations that occur. A list (Form PROC 1861) of situations that require reporting will be provided to the Subcontractor by the Contractor prior to the Subcontractor's arrival on site. The list is not all inclusive but provides necessary guidance.

6.2 Environmental, Safety, and Health

- 6.2.1 The environmental, safety, and health (ES&H) requirements established by this Contract shall not relieve the Subcontractor from complying with more stringent laws and regulations issued by a federal, state, or local authority, as well as any manufacturer's instructions.
- 6.2.2 The Subcontractor shall protect the safety and health of employees, lower-tier subcontractor employees, members of the public, and any other persons, and shall comply with all applicable safety and health regulations and requirements (including reporting requirements) of the Contractor. The Contractor shall notify the Subcontractor, in writing, of any noncompliance with the provisions of this section and the immediate corrective action to be taken.

- 6.2.3 The Contractor reserves the right to have removed from the site and deny reentry to any Subcontractor employee or lower-tier subcontractor employee (including supervision and management) if:
 - 1) found to be in a situation of imminent danger to life and health created by violating procedures, including, without limit, those for fall protection, confined space entry and work, lockout/tagout requirements, respiratory protection, and excavations, where injury could occur,
 - 2) advising an employee to work in an unsafe condition/position, or
 - 3) willfully violating any environment, safety, and health policy, procedure, rule or regulation.
- 6.2.4 If the Subcontractor's superintendent/management knowingly places an employee (including themselves) in an imminent danger situation, this Contract may be terminated for default.

6.3 Compliance, Permits, and Indemnification

- 6.3.1 This Section 6.3 supersedes Section 4.10 when Subcontractor personnel or lower-tier subcontractor personnel are present at premises owned, leased, or controlled by the Government or the Contractor regardless of price.
- 6.3.2 At its expense, the Subcontractor shall comply with all federal, state, county, and municipal laws, ordinances, and regulations applicable to the Work to be performed under this Contract. The Subcontractor shall secure all required licenses and permits prior to commencing the Work.
- 6.3.3 The Subcontractor shall indemnify and hold harmless the Government, the Contractor (BEA), and each of their respective officers, directors, employees, agents, and successors in interest from and against all liability, claims, suits, damages, losses, costs, fines, civil penalties, remediation, corrective action or other response action costs, and any associated expense (including, without limitation, costs of defense; settlement; reasonable attorneys' fees; and costs incurred in enforcing this indemnification) arising out of or in connection with any of the following attributable to the conduct of the Subcontractor, its lower-tier subcontractors, or their respective employees, agents, or representatives:
 - 6.3.3.1 Injury, whether physical or otherwise, or death of persons or damage to property.
 - 6.3.3.2 Contamination of, or adverse effects on, the environment.
 - 6.3.3.3 The Subcontractor's failure to comply with all applicable laws, ordinances, or regulations or to secure and/or comply with licenses or permits required to perform the Work including, without limitation, violations, or alleged violations, of the following federal laws and any state or federal implementing laws or regulations:
 - 6.3.3.3.1 Clean Water Act as amended, 33 U.S.C. §§1251 et seq. (including, but not limited to, liability for fines incurred by the indemnified parties for the Subcontractor's violations of the Construction Storm Water Discharge Regulations or Requirements).
 - 6.3.3.3.2 Comprehensive Environmental Response Compensation and Recovery Act as amended, 42 U.S.C. §§9601 et seq.
 - 6.3.3.3.3 Resource Conservation and Recovery Act as amended, 42 U.S.C. §§6901 et seq.
 - 6.3.3.3.4 Clean Air Act as amended, 42 U.S.C. §§7401 et seq.
 - 6.3.3.3.5 Toxic Substances Control Act as amended, 15 U.S.C. §§2601 et seq.
 - 6.3.3.3.6 Atomic Energy Act as amended (including, but not limited to, DOE orders and ALARA requirements), 42 U.S.C. §§2014 et seq.

- 6.3.3.3.7 Atomic Energy Act, Sections 234A, 234B, and 234C (42 U.S.C. §§2282a, 2282b, and 2282c), including, but not limited to, applicable nuclear and industrial/construction safety regulations, requirements, or orders.
- 6.3.3.4 The Subcontractor's generation and management of, or arranging the transportation, treatment, storage, or disposal of, waste generated at INL at a treatment, storage, or disposal facility or other location that has not been approved in writing by the Contractor.
- 6.3.3.5 Loss of fee suffered by the Contractor under its Prime Contract with DOE.
- 6.3.3.6 Any claim maintained in tort against the Government or the Contractor for negligence or otherwise concerning any injury or death of a Subcontractor employee or lower-tier subcontractor employee which was, or could have been, the basis for a statutory worker's compensation claim. To make the indemnity under this paragraph fully effective, the Subcontractor hereby expressly waives the exclusive remedy and indemnity limitation under the Idaho Worker's Compensation Law of Title 72 of the Idaho Code or under any other applicable state or federal worker's compensation law.
- 6.3.3.7 Costs incurred by the Contractor under applicable FAR and/or DEAR provisions addressing costs related to legal and other proceedings.
- 6.3.4 Nothing in the foregoing indemnification of the Government and the Contractor by the Subcontractor shall be construed to indemnify or save harmless the Government or the Contractor from any liability arising solely as a result of the negligence of the Government or the Contractor, or to the extent DOE provides indemnity under a Nuclear Hazards Indemnity Agreement (see DEAR 952.250-70).
- 6.3.5 The Subcontractor shall procure or cause to be procured, at its expense, and likewise shall maintain, or cause to be maintained, during performance of the Work, and for such period thereafter as may be necessary under the circumstances, insurance sufficient to protect the Subcontractor, the Contractor, the Contractor's subcontractors, and DOE against all liability with respect to bodily injury or death, or property loss or damage that may be imposed by law upon the Subcontractor or that is assumed by the Subcontractor under this Contract. Such insurance shall be written on an "occurrence" basis and shall be with a company or companies with an AM Best rating of "A" or better and in such forms as are satisfactory to the Contractor. The Subcontractor shall maintain the following insurance coverages and limits under this Sub-section:
 - 6.3.5.1 Commercial general liability:
 - 6.3.5.1.1 Each occurrence: \$1 million.
 - 6.3.5.1.2 Fire damage (any one fire): \$100,000.
 - 6.3.5.1.3 Medical expense (any one person): \$5,000.
 - 6.3.5.1.4 Personal and advertising injury: \$1 million.
 - 6.3.5.1.5 General aggregate: \$1 million.
 - 6.3.5.1.6 Products/completed operations aggregate: \$1 million.
 - 6.3.5.2 Automobile liability:
 - 6.3.5.2.1 Combined single limit (each accident): \$1 million.
 - 6.3.5.3 Worker compensation and employer liability:
 - 6.3.5.3.1 Worker compensation: Statutory limits.
 - 6.3.5.3.2 Employer liability (each accident): \$100,000.
 - 6.3.5.3.3 Employer liability disease/each employee: \$100,000.
 - 6.3.5.3.4 Employer liability disease/policy limit: \$500,000.

6.3.5.4 Asbestos liability (if the work includes any asbestos related work [such as inspection, handling, removal, or other]):

6.3.5.4.1 Per occurrence/annual aggregate: \$2 million.

6.3.6 The Subcontractor's insurance policies shall be endorsed to include:

6.3.6.1 "Battelle Energy Alliance, LLC, and its successors in interest" and the "U.S. Department of Energy" named as additional insured parties for all coverage specified in this Section, except for worker compensation and employer liability.

6.3.6.2 Waiver of subrogation in favor of Contractor and its successors in interest and DOE.

6.3.6.3 The Subcontractor's insurance is primary.

6.3.6.4 Thirty-days prior written notice to the Contractor in the event of any coverage cancellation.

6.3.7 A certificate of insurance shall be furnished to the Contractor upon the earlier of either 10-calendar days after award of this Contract or before the Subcontractor begins any Work under this Contract on DOE or Contractor controlled property or facilities. Each certificate of insurance shall include the endorsements required by Sub-section 6.3.6 and shall be signed by an authorized representative of the insurance company who must indicate the capacity in which he/she is signing. Separate certificates shall be provided by each insurance company providing coverage to the Subcontractor.

6.3.8 The Subcontractor's procurement, maintenance, limits, or coverage of any insurance policies, whether or not approved by the Contractor, shall not relieve the Subcontractor from any liability assumed pursuant to this Section 6.3.

6.3.9 Failure by the Subcontractor to comply with the insurance requirements of this Section 6.3, including timely submittal of properly executed certificates, is a basis for termination under Section 4.14.

6.3.10 The Subcontractor shall include all the requirements of this Section 6.3, including the specifically required insurance coverage, in all lower-tier subcontracts under this Contract that require Work on Government owned premises. The Subcontractor shall obtain appropriate certificates of insurance from said lower-tier subcontractors, maintain the certificates on file, and make the certificates available to the Contractor upon request

6.4 Real ID Act

6.4.1 Subcontractor personnel requiring access to Government or Contractor owned, leased, or controlled facilities must present proof of identity that is compliant with the Real ID Act. If Subcontractor personnel do not have compliant identification, the following forms of current identification may be accepted, subject to Contractor approval:

6.4.1.1 U.S. Passport or U.S. Passport Card.

6.4.1.2 Military ID card or Military dependent's ID card.

6.4.1.3 HSPD-12 credential or Common Access Card.

6.4.1.4 Permanent Resident Card or Alien Registration Receipt Card (Form I-551).

6.4.1.5 Foreign Passport that contains a temporary I-551 stamp or temporary I-551 printed notations on a machine-readable immigrant visa.

6.4.1.6 Employment Authorization Document that contains a photograph (Form I-776).

6.5 Stop Work Authority

6.5.1 The Government or the Contractor may stop all, or any part of, the Work in the event the following occurs, or if comparable situations are encountered:

- 6.5.1.1 Observation and determination of conditions that present an immediate threat to the life and/or health of employees, workers, or the general public.
- 6.5.1.2 Observation of any activity or action, which is determined to be a threat to the environment or surrounding ecology.
- 6.5.1.3 Observation and determination of any activity that could result in the potential or actual damage to Government material, property, facilities, or equipment.
- 6.5.1.4 The Subcontractor fails to comply with the quality requirements of the Contract.
- 6.5.1.5 The Subcontractor fails to comply or fails to provide resolution to a noncompliance with applicable environment, safety, and health requirements.
- 6.5.1.6 The Subcontractor fails to comply with applicable federal, state, or local laws or regulations or requirements of DOE.

6.5.2 If Work is stopped by a representative of the Government or the Contractor, other than the technical point of contact or the Contract Specialist or Procurement Specialist, the Subcontractor shall immediately notify the Contract Specialist or Procurement Specialist or their supervisor.

6.5.3 Any stop work order issued under this Section shall be without prejudice to any legal or contractual rights of the Contractor. The Subcontractor shall not be entitled to an extension of time or additional costs, compensation or damages by reason of, or in connection with, any Work stoppage ordered as a result of the Subcontractor's fault or failure to comply with any Contract requirements.

6.6 Radiological Control Requirements for the Subcontractor and/or Lower-Tier Subcontractor Personnel

6.6.1 The Subcontractor shall conduct its radiological control operations in accordance with the Subcontractor Requirements Manual, including the Radiological Control Information Management System, and all other restrictions established by the Contractor.

6.6.2 The Subcontractor shall take all reasonable precautions in the performance of its Work at INL to protect the health and safety of its employees and members of the public and to minimize danger from all hazards to life and property. The Contractor's Radiological Control Technicians shall assist in identifying and resolving radiological control problems. The Radiological Control Technicians will provide radiological surveillance over all work activities and advise the Contractor on matters concerning radiation safety related to plant activities or conditions affecting the Work. The Subcontractor shall comply with all directions relative to radiological safety given by the Contractor.

7. SECTIONS THAT APPLY WHEN THE SUBCONTRACTOR RECEIVES ACCESS TO CLASSIFIED INFORMATION, CONTROLLED UNCLASSIFIED INFORMATION, SENSITIVE NUCLEAR TECHNOLOGY, OR SPECIAL NUCLEAR MATERIAL OR AUTHORIZED UNRESTRICTED ACCESS TO AREAS CONTAINING THESE

7.1 Classified Inventions

7.1.1 The Subcontractor shall not file, or cause to be filed, on any invention or discovery conceived or first actually reduced to practice in the course of, or under, this Contract, in any country other than the United States, an application or registration for a patent without obtaining written approval of the Contractor.

7.1.2 When filing a patent application in the United States on any invention or discovery conceived or first actually reduced to practice in the course of, or under, this Contract, the subject matter of which is classified for reasons of security, the Subcontractor shall observe all applicable security regulations covering the transmission of classified subject matter. In transmitting the patent application to the U.S. Patent and Trademark Office, the Subcontractor shall, by separate letter, identify, by agency and number, the Contract that require security classification markings to be placed on the application.

7.2 Classification of Unclassified Sensitive Information

7.2.1 In the performance of the Work under this Contract, the Subcontractor shall ensure that all documents, material, and equipment originated or generated under this Contract involving a classified or potentially classified subject, or unclassified sensitive or potentially unclassified sensitive subject, are reviewed by a Federal Government Original Classifier or a Federal Government or Contractor Derivative Classifier and authorized reviewing official in accordance with classification and unclassified sensitive information regulations and guidance furnished to the Subcontractor by the Contractor.

7.3 Marking and Control of Controlled Unclassified Information

7.3.1 Data generated or made available in performance of this Contract may be marked as appropriate with markings referenced in

- 1) the Contractor Requirements Document (CRD) affixed as Attachment 1 to DOE O 471.3, Change 1,
- 2) the CRD affixed as Attachment 1 to DOE Manual 471.3-1, Change 1 and
- 3) any other CRD made applicable to Contractor or Subcontractor regarding marking and treatment of Official Use Only (OUO) or Controlled Unclassified Information (CUI).

The requirements of said CRDs are made applicable to the Subcontractor as if set forth here verbatim in their entirety. In the event successor or replacement requirements to those specified in said CRDs are made applicable to the Contractor with a requirement the same be made applicable to the Subcontractor, the same shall thereupon be immediately effective and applicable to the Subcontractor with or without written amendment to the Contract.

7.3.2 The Subcontractor shall handle, and control information designated as Unclassified Controlled Nuclear Information (UCNI) in accordance with 10 C.F.R. Part 1017.

8. RESERVED.

9. SECTIONS THAT APPLY WHEN CONTRACT PRICE/VALUE IS GREATER THAN \$25,000

9.1 Examination of Records by the Comptroller General

9.1.1 Except for purchase orders less than \$25,000, or subcontracts or purchase orders for public utilities services at rates established by law, the Subcontractor agrees that the comptroller general or a duly authorized representative from the General Accounting Office shall, until three years after final payment under this Contract, or for any shorter period specified in FAR Subpart 4.7, the Contractor's records retention, have access to, and the right to examine, any of the Subcontractor's directly pertinent books, documents, papers, or other records involving transactions related to this Contract.

10. SECTIONS THAT APPLY WHEN CONTRACT PRICE/VALUE IS GREATER THAN \$100,000

10.1 Notice and Assistance Regarding Patent and Copyright Infringement

10.1.1 The Subcontractor shall report to the Contractor, 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 Subcontractor has knowledge.

10.1.2 In the event of any claim or suit against the Government or the Contractor 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 hereunder, the Subcontractor shall furnish to the Government or the Contractor upon request all evidence and information in possession of the Subcontractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except in those cases in which the Subcontractor has agreed to indemnify the Government and the Contractor.

10.1.3 This Section shall be included in all lower-tier subcontracts and purchase orders priced greater than \$100,000.

10.2 Utilization of Small, Small Disadvantaged, and Women-Owned Small Business Concerns

10.2.1 Definitions

10.2.1.1 *Small business concern.* A small business as defined pursuant to Section 3 of the Small Business Act as codified in 15 U.S.C. §632 and relevant regulations promulgated thereto.

10.2.1.2 *Small business concern owned and controlled by socially and economically disadvantaged individuals.*

1) A small business concern that is at least 51% unconditionally owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly owned business, at least 51% of the stock of which is unconditionally owned by one or more socially and economically disadvantaged individuals; and whose management and daily business operations are controlled by one or more of such individuals.

2) A small business concern that is at least 51% unconditionally owned by an economically disadvantaged Indian Tribe or Native Hawaiian Organization, or a publicly owned business having at least 51% of its stock unconditionally owned by one of these entities and that has its management and daily business controlled by members of an economically disadvantaged Indian Tribe or Native Hawaiian Organization, and which meets the requirements of 13 C.F.R. §124.

The Contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to Section 8(a) of the Small Business Act as codified in 15 U.S.C. §637. The Subcontractor shall presume that socially and economically disadvantaged entities also include Indian Tribes and Native Hawaiian Organizations.

10.2.1.3 *Small business concern owned and controlled by women.* A small business concern that is at least 51% owned by one or more women, or, in the case of a publicly owned business, at least 51% of the stock of which is owned by one or more women; and whose management and daily business operations are controlled by one or more women.

10.2.2 Procedures

10.2.2.1 Small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women shall have the maximum practicable opportunity to participate in this Contract. The Subcontractor shall establish procedures to ensure the timely payment of amounts due, pursuant to the terms of its subcontracts with small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

- 10.2.2.2 The Subcontractor hereby agrees to award subcontracts and purchase orders pursuant to Paragraph 10.2.2.1 to the fullest extent consistent with efficient Contract performance. The Subcontractor further agrees to cooperate in any studies or surveys as may be conducted by the U.S. Small Business Administration or the Contractor, as may be necessary to determine the extent of the Subcontractor's compliance with this Section.

11. SECTIONS THAT APPLY WHEN SUBCONTRACT PRICE/VALUE IS GREATER THAN \$150,000

11.1 Contract Work Hours and Safety Standards Act, Overtime Compensation General

11.1.1 Overtime Requirement

- 11.1.1.1 The Subcontractor, or any lower-tier subcontractor, contracting for any part of the Work that may require or involve the employment of laborers or mechanics (see FAR Subpart 22.3), shall not require or permit any such laborers or mechanics, in any workweek in which the individuals are employed on such Work, to work in excess of 40 hours in such workweek, unless such laborers or mechanics receive compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of 40 hours in such workweek.

11.1.2 Violation, Liability for Unpaid Wages, and Liquidated Damages

- 11.1.2.1 In the event of any violation of the provisions set forth in Sub-section 11.1.1, the Subcontractor and any lower-tier subcontractor responsible for the violation shall be liable for the unpaid wages. In addition, the Subcontractor and such lower-tier subcontractor shall be liable to the United States for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic employed in violation of the provision set forth in Sub-section 11.1.1, at the greater of
- 1) the sum of \$10 for each calendar day on which each such individual was required or permitted to work in excess of the standard workweek of 40 hours without payment of the overtime wages required by provisions set forth in Sub-section 11.2.1, and
 - 2) the rate specified in 29 C.F.R. §5.5(b)(2) per affected employee for each calendar day the employer required or permitted the employee to work in excess of the standard without paying overtime wages required by the Contract Work Hours and Safety Standards statute (found in 40 U.S.C. Chapter 37).

11.1.3 Withholding, Liability for Unpaid Wages, and Liquidated Damages

- 11.1.3.1 The Contractor may, upon its own action or upon written request of an authorized representative of the Contracting Office or the U.S. Department of Labor withhold, or cause to be withheld, from any amounts payable on account of Work performed by the Subcontractor or lower-tier subcontractor under this Contract or any other federal contract with the Contractor, or any other federally assisted contract subject to the Contract Work Hours and Safety Standards Act that is held by the Contractor, such sums as may be determined to be necessary to satisfy any liability of the Subcontractor or lower-tier subcontractor for unpaid wages and liquidated damages as set forth in Sub-section 11.1.2.

11.1.4 Payroll and Basic Records

- 11.1.4.1 The Subcontractor and its lower-tier subcontractor shall maintain payrolls and basic payroll records during the course of Work and shall preserve them for a period of three years from the completion of this Contract for all laborers and mechanics working on this Contract. Such records shall contain the name and address of each such employee, social security number, correct classification, hourly rate of wages

paid daily, and weekly number of hours worked, deductions made, and actual wages paid. Nothing in this section shall require the duplication of records required to be maintained for construction work by the Department of Labor regulations at 29 C.F.R. §5.5(a)(3).

11.1.4.2 The records to be maintained under Paragraph 11.1.4.1 shall be made available by the Subcontractor or lower-tier subcontractor for inspection, copying, or transcription by authorized representatives of the Contractor, DOE, or the Department of Labor. The Subcontractor and its lower-tier subcontractor shall permit such representatives to interview employees during working hours on the job.

11.1.5 Subcontracts

11.1.5.1 The Subcontractor and its lower-tier subcontractor shall insert in any subcontracts priced greater than \$150,000 the provisions set forth in Section 11.1. The subcontractor in each such subcontract must be responsible for compliance by its subcontractors, at the next lower-tier, with the provisions of this Section.

12. SECTIONS THAT APPLY WHEN CONTRACT PRICE/VALUE IS GREATER THAN \$250,000

12.1 Covenant Against Contingent Fees

12.1.1 Definitions

12.1.1.1 *Bona fide agency.* An established commercial or selling agency, maintained by the Subcontractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain contracts nor holds itself out as being able to obtain any contracts through improper influence.

12.1.1.2 *Bona fide employee.* A person, employed by the Subcontractor and subject to the Subcontractor's supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain contracts nor holds out as being able to obtain any contracts through improper influence.

12.1.1.3 *Contingent fee.* Any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a Contract.

12.1.1.4 *Improper influence.* Any influence that induces or tends to induce a Government or Contractor employee or officer to give consideration, or to act, regarding a Contractor's Subcontract, on any basis other than the merits of the matter.

12.1.2 Procedures

12.1.2.1 The Subcontractor warrants that no person or agency has been employed or retained to solicit or obtain this Contract upon an agreement or understanding for a contingent fee, except a bona fide employee or agency. For breach or violation of this warranty, the Contractor shall have the right to annul this Contract without liability to the Subcontractor, or, at its discretion, to deduct from the order price or consideration, or otherwise recover, the full amount of the contingent fee.

12.2 Organizational Conflicts of Interest

12.2.1 This Section applies when the Contract involves any Work or effort, a principal purpose of which is to provide advisory and assistance services [as addressed in 48 C.F.R. §952.209-72, illustrated in 48 C.F.R. §9.508 and defined in 48 C.F.R. §2.101]. Such services may include assistance in preparing program plans; evaluation, monitoring or review of the Contractor's activities or proposals submitted by prospective subcontractors; and preparation of preliminary designs, specifications, or statements of work.

- 12.2.2 The purpose of this Section is to ensure that the Subcontractor is not biased because of its financial, contractual, organizational, or other interests that relate to the Work under this Contract, and does not obtain any unfair competitive advantage over other parties by virtue of its performance of this Contract.
- 12.2.3 The restrictions described herein shall apply to performance or participation by the Subcontractor and any of its affiliates or their successors in interest (hereinafter collectively referred to as the “Subcontractor”) in the activities covered by this Section as a prime subcontractor, lower-tier subcontractor, cosponsor, joint venture, consultant, or in any similar capacity. For the purpose of this Section, affiliation occurs when a business concern is controlled by or has the power to control another or when a third party has the power to control both.
- 12.2.4 Unless so permitted in writing by the Contractor, (i) Subcontractor shall be ineligible to participate in any capacity in the Contractor’s subcontracts or proposals therefore (solicited and unsolicited), that stem directly from the Subcontractor’s performance of Work under this Contract for a period of one year after the completion of this Contract. and, (ii), the Subcontractor shall not perform any advisory and assistance services Work under this Contract on any of its products or services or the products or services of another firm, if the Subcontractor is, or has been substantially involved in their development or marketing. Nothing in this paragraph shall preclude the Subcontractor from competing for follow on subcontracts for advisory and assistance services.
- 12.2.5 If, under this Contract, the Subcontractor prepares a complete, or essentially complete, statement of work or specifications to be used in competitive acquisitions, the Subcontractor shall be ineligible to perform, or participate in any capacity, in any contractual effort that is based on such statement of work or specifications. The Subcontractor shall not incorporate its products or services in such statement of work or specifications, unless so directed in writing by the Contractor, in which case the restriction in this paragraph shall not apply.
- 12.2.6 Nothing in this Section shall preclude the Subcontractor from offering or selling its standard commercial items to the Government.
- 12.2.7 If the Subcontractor, in the performance of this Contract, obtains access to information, such as contractor plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (5 U.S.C. §552a), or data that have not been released or otherwise made available to the public, the Subcontractor agrees that, without prior written approval of the Contractor, it shall not use such information for any private purpose unless the information has been released or otherwise made available to the public; compete for Work for the Contractor, based on such information for a period of six months after either the completion of this Contract or until such information is released or otherwise made available to the public, whichever is first; submit an unsolicited proposal to the Government, which is based on such information, until one year after such information is released or otherwise made available to the public; and release such information unless such information has previously been released or otherwise made available to the public by DOE or the Contractor.
- 12.2.8 The Subcontractor also agrees that to the extent it receives or is given access to proprietary data, data protected by the Privacy Act of 1974 (5 U.S.C. §552a), or other confidential or privileged technical, business, or financial information under this Contract, it shall treat such information in accordance with any restrictions imposed on such information.
- 12.2.9 The Subcontractor may use technical data it first produces under this Contract for its private purposes consistent with this Section and the patent, rights in data, and security provisions of this Contract.

- 12.2.10 The Subcontractor agrees that, if changes, including additions, to the facts disclosed by it prior to award of this Contract, occur during the performance of this Contract, it shall make an immediate and full disclosure of such changes in writing to the Contractor. Such disclosure may include a description of any action that the Subcontractor has taken or proposes to take to avoid, neutralize, or mitigate any resulting conflict of interest. The Contractor may, however, terminate this Contract for convenience, if it deems such termination to be in the best interest of the Government.
- 12.2.11 In the event that the Subcontractor was aware of facts required to be disclosed (per 48 C.F.R 952.209-8), or the existence of an actual or potential organizational conflict of interest and did not disclose such facts or such conflict of interest to the Contractor, the Contractor may terminate this Contract for default.
- 12.2.12 For breach of any of the foregoing restrictions or for nondisclosure or misrepresentation of any facts required to be disclosed concerning this Contract, including the existence of an actual or potential organizational conflict of interest at the time of or after award, the Contractor may terminate this Contract for default, disqualify the Subcontractor from subsequent related contractual efforts, and pursue such other remedies as may be permitted by law or this Contract.
- 12.2.13 Requests for waiver under this Section shall be directed in writing to the Contractor and shall include a full description of the requested waiver and the reasons in support thereof. If it is determined to be in the best interests of the Government and the Contractor, the Contractor shall grant such a waiver in writing.

12.3 Anti-Kickback Procedures

12.3.1 Definitions applicable in this Section 12.3:

- 12.3.1.1 *Kickback.* Any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind that is provided, directly or indirectly, to any Prime Contractor, Prime Contractor employee, Subcontractor, or Subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a Prime Contract, or in connection with a subcontract relating to a Prime Contract.
- 12.3.1.2 *Person.* A corporation, partnership, business association of any kind, trust, joint stock company, or individual.
- 12.3.1.3 *Prime Contract.* A contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.
- 12.3.1.4 *Prime Contractor.* A person who has entered into a Prime Contract with the United States.
- 12.3.1.5 *Prime Contractor employee.* Any officer, partner, employee, or agent of a Prime Contractor.
- 12.3.1.6 *Subcontract.* A contract or contractual action entered into by a Prime Contractor or subcontractor at any tier, for the purpose of obtaining supplies, materials, equipment, or services of any kind under a Prime Contract.
- 12.3.1.7 *Subcontractor.* Any person, other than the Prime Contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a Prime Contract or a lower-tier subcontract entered in connection with such Prime Contract, and includes any person who offers to furnish or furnishes general supplies to the Prime Contractor or a higher-tier subcontractor.
- 12.3.1.8 *Subcontractor employee.* Any officer, partner, employee, or agent of a subcontractor.

12.3.2 Procedures

- 12.3.2.1 The Anti-Kickback Act of 1986 (41 U.S.C. §§51–58) (the Act), prohibits any person from providing or attempting to provide or offering to provide any kickback; soliciting, accepting, or attempting to accept any kickback; or including, directly or indirectly, the amount of any kickback in the Contract price charged by a Subcontractor to a Prime Contractor or higher-tier subcontractor.
- 12.3.2.2 When the Subcontractor has reasonable grounds to believe that a violation described in Paragraph 12.3.2.1 may have occurred, the Subcontractor shall promptly report, in writing, the possible violation. Such reports shall be made to the Contractor and to the Inspector General of DOE or the U.S. Department of Justice.
- 12.3.2.3 The Subcontractor shall cooperate fully with any federal agency investigating a possible violation described in Paragraph 12.3.2.1.
- 12.3.2.4 The Contractor may withhold from sums owed to the Subcontractor the amount of the kickback, which may be paid to the Government.
- 12.3.2.5 The Subcontractor agrees to incorporate the substance of this Section, including this paragraph, in all lower-tier subcontracts under this Contract priced greater than \$150,000.

12.4 Restrictions on Subcontractor Sales to the Government

- 12.4.1 Except as provided in Sub-section 12.4.2, the Subcontractor shall not enter into any agreement with an actual or prospective lower-tier subcontractor, nor otherwise act in any manner, that has or may have the effect of restricting sales by such lower-tier subcontractor directly to the Government of any item or process (including computer software) made or furnished by the lower-tier subcontractor for this Contract or under any follow-production order.
- 12.4.2 The prohibition in Sub-section 12.4.1 does not preclude the Subcontractor from asserting rights that are otherwise authorized by law or regulation.
- 12.4.3 The Subcontractor agrees to incorporate the substance of this section, in all lower-tier subcontracts under this Contract priced greater than \$250,000.

13. SECTIONS THAT APPLY WHEN CONTRACT PRICE/VALUE IS GREATER THAN \$500,000

13.1 Displaced Employee Hiring Preference

13.1.1 Definitions

- 13.1.1.1 *Eligible employee.* A current or former employee of a Contractor or Subcontractor employed at a DOE Defense Nuclear Facility
 - 1) whose position of employment has been, or will be, involuntarily terminated (except if terminated for cause),
 - 2) who has also met the eligibility criteria contained in the DOE guidance for Contractor work force restructuring, as may be amended or supplemented from time to time, and
 - 3) who is qualified for a particular job vacancy at the time the particular position is available.

13.1.2 Procedures

- 13.1.2.1 Consistent with the DOE guidance for Contractor work force restructuring, as may be amended or supplemented from time to time, the Subcontractor agrees that it will provide a preference in hiring to an eligible employee, to the extent practicable, for Work performed under this Contract.
- 13.1.2.2 The requirements of this Section shall be included in lower-tier subcontracts at any tier (except for subcontracts for commercial items pursuant to 41 U.S.C. §403), expected to exceed \$500,000.

14. SECTIONS THAT APPLY WHEN CONTRACT PRICE/VALUE IS GREATER THAN \$750,000

14.1 Small Business and Small Disadvantaged Business Subcontracting Plan

14.1.1 Definitions

- 14.1.1.1 *Commercial product.* 1) A product in regular production that is sold in substantial quantities to the general public and/or industry at established catalog or market prices.
2) A product that, in the opinion of the Contractor, differs only insignificantly from the Subcontractor's commercial product.
- 14.1.1.2 *Subcontract.* Any agreement (other than one involving an employer employee relationship) entered into by the Subcontractor calling for supplies or services required for performance of this Contract.

14.1.2 Procedures

- 14.1.2.1 The Subcontractor shall include this Section 14.1 in all subcontracts that offer further subcontracting opportunities, and require all lower-tier subcontractors (except small business concerns) who receive subcontracts in excess of \$750,000 (\$1,500,000 for construction of any public facility) or the threshold prescribed by FAR 52.219-9 in effect as of the date of this Contract, to adopt a plan similar to the plan agreed to by the Subcontractor.
- 14.1.2.2 The Subcontractor shall:
- 14.1.2.2.1 Cooperate in any studies or surveys as may be required.
 - 14.1.2.2.2 Submit periodic reports, to allow the Contractor to determine the extent of compliance with the subcontracting plan.
 - 14.1.2.2.3 Submit semiannual subcontracting reports current as of the last day of March and of September and a subcontracting report at the completion of this Contract, in accordance with the requirements of the DOE internet based Electronic Subcontract Reporting System.
 - 14.1.2.2.4 Ensure that its lower-tier subcontractors agree to submit subcontracting reports in accordance with Paragraph 14.1.2.2.3. Subcontracting reports required by Paragraph 14.1.2.2.3 and this paragraph shall be submitted within 30 days following the end of each reporting period.
- 14.1.2.3 The Subcontractor shall perform the following functions:
- 14.1.2.3.1 Assist small business and small disadvantaged business concerns by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation by such concerns. Where the Subcontractor's lists of potential small and small disadvantaged lower-tier subcontractors are excessively long, reasonable effort shall be made to give all such business concerns an opportunity to compete over a period of time.
 - 14.1.2.3.2 Provide adequate and timely consideration of the potential of small business and small disadvantaged business concerns in all "make or buy" decisions.
 - 14.1.2.3.3 Counsel and discuss lower-tier subcontracting opportunities with representatives of small and small disadvantaged business firms.
 - 14.1.2.3.4 Provide notice to lower-tier subcontractors concerning penalties for misrepresentation of business status as small business or small disadvantaged business for the purpose of obtaining a lower-tier subcontract that is to be included as part or all of a goal contained in the subcontracting plan.

14.1.2.4 The failure of the Subcontractor or a lower-tier subcontractor to comply in good faith with Section 14.1 or the Subcontractor's approved subcontracting plan required by this Section, shall be a material breach of this Contract.

14.2 Liability for Increased Cost or Interest Applicable when Contract Price/Value is Greater Than \$2,000,000

The Subcontractor is liable to the Government for any increased cost or interest resulting from the Subcontractor's failure to comply with FAR 52.230-2 or FAR 52.230-6. The Contract price is subject to adjustment by the Contractor for increased cost or interest resulting from such noncompliance.

Addendum A

All references, format, and definitions are **ONLY** applicable to Addendum A

A.23 PATENT RIGHTS-SMALL BUSINESS FIRMS OR NONPROFIT ORGANIZATIONS

This Article applies in subcontracts, for experimental, developmental, demonstration or research work to be performed by a small business or domestic nonprofit organization. (In this Article only, “Contracting Officer” means the DOE Contracting Officer and does not refer to any Contractor personnel.)

1. Definitions

- a. “Invention” means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.).
- b. “Made” when used in relation to any invention means the conception or first actual reduction to practice of such invention.
- c. “Nonprofit organization” means a university or other institution of higher education or an organization of the type described in section 501 (c) (3) of the Internal Revenue Code of 1954 (26 U.S.C. 501 (c) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.
- d. “Practical application” means: to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.
- e. “Small business firm” means a small business concern as defined at section 2 of Pub. L. 85-536(15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this article, the size standards for small business concerns involved in Government, procurement and Subcontracting at 13 CFR 121.3-8 and 13 CFR 121.3-12, respectively, will be used.
- f. “Subject invention” means any invention of the Subcontractor conceived or first actually reduced to practice in the performance of work under this Subcontract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d) must also occur during the period of contract performance.
- g. “Agency licensing regulations” and “agency regulations concerning the licensing of Government-owned inventions” mean the Department of Energy patent licensing regulations at 10 CFR Part 781.
- h. “Patent Counsel”, as used in this Article, means the Department Energy Patent Counsel assisting the procuring activity.

2. Allocation of principal rights

The Subcontractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this Article and 35 U.S.C. 203. With respect to any subject invention in which the Subcontractor retains title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on behalf of the United States, the subject invention throughout the world.

3. Invention disclosure, election of title, and filing of patent application by Subcontractor

- a. The Subcontractor will disclose each subject invention to the Department of Energy (DOE) within two (2) months after the inventor discloses it in writing to its personnel responsible for patent matters. The disclosure shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure, the Subcontractor will promptly notify that agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Subcontractor.
- b. The Subcontractor will elect in writing whether or not to retain title to any such invention by notifying DOE and Contractor within two (2) years of disclosure. However, in any case where publication, on sale or public use has initiated the one(1) year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by DOE to a date that is no more than 60 days prior to the end of the statutory period.
- c. The Subcontractor will file its initial patent application on a subject invention to which it elects to retain title within one(1) year after election of title or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The Subcontractor will file patent applications in additional countries or international patent offices within the earlier of 10 months of the corresponding initial patent application or six(6) months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.
- d. Requests for extension of the time for disclosure, election, and filing under subparagraphs 3.a, b and c of this Article may, at the discretion of the DOE, be granted.

4. Conditions when the Government may obtain title

The Subcontractor will convey to DOE, upon written request, title to any subject invention:

- a. If the Subcontractor fails to disclose or elect title to the subject invention within the times specified in Paragraph 3 of this Article, or elects not to retain title; provided, that DOE may only request title within 60 days after learning of the failure of the Subcontractor to disclose or elect within the specified times.
- b. In those countries in which the Subcontractor fails to file applications within the times specified in Paragraph 3 of this Article; provided, however, that if the Subcontractor has filed a patent application in a country after the times specified in Paragraph 3 of this Article, but prior to its receipt of the written request from DOE, the Subcontractor shall continue to retain title in that country.

- c. In any country in which the Subcontractor 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.

5. Minimum rights to Subcontractor and protection of the Subcontractor right to file.

- a. The Subcontractor will retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Subcontractor fails to disclose the invention within the times specified in Paragraph 3 of this Article. The Subcontractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Subcontractor is a party and includes the right to grant sublicenses of the same scope to the extent the Subcontractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of DOE; except when transferred to the successor of the part of the Subcontractor's business to which the invention pertains.
- b. The Subcontractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR Part 404 and DOE licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the Subcontractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Subcontractor, its licensees, or domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.
- c. Before revocation or modification of the license, DOE will furnish the Subcontractor a written notice of its intention to revoke or modify the license, and the Subcontractor will be allowed 30 days (or such other time as may be authorized by DOE for good cause shown by the Subcontractor) after the notice to show cause why the license should not be revoked or modified. The Subcontractor has the right to appeal, in accordance with applicable regulations in 37 CFR Part 404 and agency regulations concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of the license.

6. Subcontractor action to protect the Government's interest

- a. The Subcontractor agrees to execute or to have executed and promptly deliver to DOE all instruments necessary to:
 - (i) Establish or confirm the rights the Government has throughout the world in those subject inventions to which the Subcontractor elects to retain title; and
 - (ii) Convey title to DOE when requested under Paragraph 4 of this Article and to enable the Government to obtain patent protection throughout the world in that subject invention.
- b. The Subcontractor agrees to 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 a format suggested by the Subcontractor, each subject invention made under this Subcontract in order that the Subcontractor can comply with the disclosure provisions of Paragraph 3 of this Article, 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 subparagraph 3.a of this Article. The

Subcontractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

- c. The Subcontractor will notify DOE and the Contractor of any decision not to 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 period required by the relevant patent office.**
- d. The Subcontractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement, “This invention was made with Government support under (identify the Subcontract) awarded by the United States Department of Energy. The Government has certain rights in the invention.”**

7. Subcontracts

- a. The Subcontractor will include this Article, suitably modified to identify the parties, in all Lower-tier Subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by a small business firm or domestic nonprofit organization. The Lower-tier Subcontractor will retain all rights provided for the Subcontractor in this Article, and the Subcontractor will not, as part of the consideration for awarding a Subcontract, obtain rights in a Lower-tier Subcontractor’s subject invention.**
- b. The Subcontractor shall include in all other Lower-tier Subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work the patent rights article at DEAR 952.227-13.**
- c. In the case of Lower-tier Subcontracts, at any tier, DOE, the Lower-tier Subcontractor, and the Subcontractor agree that the mutual obligations of the parties created by this Article constitute a contract between the Lower-tier Subcontractor and DOE with respect to the matters covered by this Article; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under Paragraph 10 of this Article.**

8. Reporting on utilization of subject inventions

The Subcontractor agrees to submit, on request, periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Subcontractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Subcontractor, and such other data and information as DOE may reasonably specify. The Subcontractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceeding undertaken by that agency in accordance with Paragraph 10 of this Article. As required by 35 U.S.C. 202 (c)(5), DOE agrees it will not disclose such information to persons outside the Government without permission of the Subcontractor.

9. Preference for United States Industry

Notwithstanding any other provision of this Article, the Subcontractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States, unless such person agrees that any product 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 for such an agreement may be waived by DOE upon a showing by the Subcontractor or its 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.

10. March-in-rights

The Subcontractor agrees that, with respect to any subject invention in which it has acquired title, DOE has the right in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the agency to require the Subcontractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and, if the Subcontractor, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that:

- a. Such action is necessary because the Subcontractor 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 such field of use;**
- b. Such action is necessary to alleviate health or safety needs that are not reasonably satisfied by the Subcontractor, assignee, or their licensees;**
- c. Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Subcontractor, assignee, or licensees; or**
- d. Such action is necessary because the agreement required by Paragraph 9 of this Article has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.**

11. Special provisions for subcontracts with nonprofit organizations

If the Subcontractor is a nonprofit organization, it agrees that:

- a. Rights to a subject invention in the United States may not be assigned without the approval of DOE, except where such assignment is made to an organization which has as one of its primary functions the management of inventions; provided, that such assignee will be subject to the same provisions as the Subcontractor;**
- b. The Subcontractor will share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (when DOE deems it appropriate), when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;**
- c. The balance of any royalties or income earned by the Subcontractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions will be utilized for the support of scientific research or education; and**
- d. It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and that it will give a preference to a small business firm when licensing a subject invention, if the Subcontractor determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided, that the Subcontractor is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the Subcontractor. However, the Subcontractor agrees that the Secretary of Commerce may review the Subcontractor's licensing program and decisions regarding small business applicants, and the Subcontractor will negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when that Secretary's review**

discloses that the Subcontractor could take reasonable steps to more effectively implement the requirements of this subparagraph 11.d.

12. Communications

- a. The Subcontractor shall direct any notification, disclosure, or request to DOE provided for in this Article to the DOE Patent Counsel assisting the procuring activity, with a copy of the communication to the Contracting Officer and the Contractor.**
- b. Each exercise of discretion or decision provided for in this Article, except subparagraph 11.d, is reserved for the DOE Patent Counsel and is not a claim or dispute and is not subject to the Contract Disputes Act of 1978.**
- c. Upon request of the DOE Patent Counsel or the Contracting Officer, the Subcontractor shall provide any or all of the following:**
 - (i) A copy of the patent application, filing date, serial number and title, patent number, and issue date for any subject invention in any country in which the Subcontractor has applied for a patent;**
 - (ii) A report, not more often than annually, summarizing all subject inventions which were disclosed to DOE individually during the reporting period specified; or**
 - (iii) A report, prior to closeout of this Subcontract, listing all subject inventions or stating that there were none.**

Addendum B

All references, format, and definitions are **ONLY** applicable to Addendum B

A.24 PATENT RIGHTS—OTHER THAN SMALL BUSINESS FIRMS OR NONPROFIT ORGANIZATIONS

This Article applies in subcontracts, for experimental, developmental, demonstration or research work to be performed by other than a small business or domestic nonprofit organization. (In this Article only, "Contracting Officer" means the DOE Contracting Officer and does not refer to any Contractor personnel.)

1. Definitions

- a. "Invention" as used in this Article, means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the United States Code or any novel variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.).
- b. "Practical application" as used in this Article, means: to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.
- c. "Subject invention" as used in this Article, means any invention of the Subcontractor conceived or first actually reduced to practice in the course of or under this Subcontract.
- d. "Patent Counsel" as used in this Article, means the Department of Energy Patent Counsel assisting the procuring activity.
- e. "DOE patent waiver regulations" as used in this Article, means the Department of Energy patent waiver regulations at 41 CFR9-9.109- 6 or successor regulations. See 10 CFR part 784.
- f. "Agency licensing regulations" and "applicable agency licensing regulations" as used in this Article, mean the Department of Energy patent licensing regulations at 10 CFR Part 781.
- g. "Made" when used in relation to any invention means the conception or first actual reduction to practice of such invention.

2. Allocations of principal rights

- a. **Assignment to the Government.** The Subcontractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention, except to the extent that rights are retained by the Subcontractor under subparagraph 2.b and Paragraph 4 of this Article.
- b. **Greater rights determinations.**
 - (i) The Subcontractor, or an employee-inventor after consultation with the Subcontractor, may request greater rights than the nonexclusive license and the foreign patent rights provided in Paragraph 4 of this Article on identified inventions in accordance with the DOE patent waiver regulations. A request for a determination of whether the Subcontractor or the employee-inventor is entitled to acquire such greater rights must be submitted to the Patent Counsel with a copy to

the Contracting Officer and the Contractor at the time of the first disclosure of the invention pursuant to subparagraph 5.b of this Article, or not later than eight (8) months thereafter, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Subcontractor. Each determination of greater rights under this contract shall be subject to Paragraph 3 of this Article, unless otherwise provided in the greater rights determination, and to the reservations and conditions deemed to be appropriate by the Secretary of Energy or designee.

- (ii) Within two (2) months after the filing of a patent application, the Subcontractor 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, promptly upon issuance of a patent, provide the patent number and issue date for any subject invention in any country for which the Subcontractor has been granted title or the right to file and prosecute on behalf of the United States by the Department of Energy.
- (iii) Not less than 30 days before the expiration of the response period for any action required by the Patent and Trademark Office, Subcontractor or inventor must notify the Patent Counsel and the Contractor of any decision not to continue prosecution of the application.
- (iv) Upon request, the Subcontractor shall furnish the Government an irrevocable power to inspect and make copies of the patent application file.

3. Minimum rights acquired by the Government

- a. With respect to each subject invention to which the Department of Energy grants the Subcontractor principal or exclusive rights, the Subcontractor agrees as follows:
 - (i) The Subcontractor hereby grants to the Government a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced each subject invention throughout the world by or on behalf of the Government of the United States (including any Government agency).
 - (ii) The Subcontractor agrees that with respect to any subject invention in which DOE has granted it title, DOE has the right, in accordance with the procedures in the DOE patent waiver regulations (10 CFR part 784), to require the Subcontractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Subcontractor, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if it determines that: (1) such action is necessary because the Subcontractor 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 such field of use; (2) such action is necessary to alleviate health or safety needs, which are not reasonably satisfied by the Subcontractor, assignee, or their licensees; (3) such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or (4) such action is necessary because the agreement required by Paragraph 9 of this Article has neither been obtained nor waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.
 - (iii) The Subcontractor agrees to submit, on request, periodic reports, no more frequently than annually, on the utilization of a subject invention or on efforts at

obtaining such utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Subcontractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Subcontractor, and such other data and information as DOE may reasonably specify. The Subcontractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceedings undertaken by that agency in accordance with subparagraph 3.a(ii) of this Article. To the extent data or information supplied under this section is considered by the Subcontractor, its licensee, or assignee to be privileged and confidential and is so marked, the Department of Energy agrees that, to the extent permitted by law, it will not disclose such information to persons outside the Government.

- (iv) The Subcontractor agrees, when licensing a subject invention, to arrange to avoid royalty charges on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government, to refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government, and to provide for such refund in any instrument transferring rights in the invention to any party.
 - (v) The Subcontractor agrees to provide for the Government's paid-up license pursuant to subparagraph 3.a(i) of this Article in any instrument transferring rights in a subject invention and to provide for the granting of licenses as required by subparagraph 3.a(ii) of this Article, and for the reporting of utilization information as required by subparagraph 3.a(iii) of this Article, whenever the instrument transfers principal or exclusive rights in a subject invention.
- b. Nothing contained in this Paragraph 3 shall be deemed to grant to the Government any rights with respect to any invention other than a subject invention.

4. Minimum rights to the Subcontractor

- a. The Subcontractor is hereby granted a revocable, nonexclusive, royalty-free 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 Subcontractor fails to disclose the subject invention within the times specified in subparagraph 5.b of this Article. The Subcontractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Subcontractor is a part and includes the right to grant sublicenses of the same scope to the extent the Subcontractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of DOE except when transferred to the successor of that part of the Subcontractor's business to which the invention pertains.
- b. The Subcontractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in 37 CFR Part 404 and agency licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the Subcontractor has achieved practical applications and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.
- c. Before revocation or modification of the license, DOE will furnish the Subcontractor a written notice of its intention to revoke or modify the license, and the Subcontractor will be

allowed 30 days (or such other time as may be authorized by DOE for good cause shown by the Subcontractor) after the notice to show cause why the license should not be revoked or modified. The Subcontractor has the right to appeal, in accordance with applicable agency licensing regulations and 37 CFR Part 404 concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of its license.

- d. The Subcontractor may request the right to acquire patent rights to a subject invention in any foreign country where the Government has elected not to secure such rights, subject to the conditions in subparagraphs 4.d.(i) through 4.d.(vii) of this Article. Such request must be made in writing to the Patent Counsel as part of the disclosure required by subparagraph 5.b of this Article, with a copy to the DOE Contracting Officer and the Contractor. DOE approval, if given, will be based on a determination that this would best serve the national interest.
- (i) The recipient of such rights, when specifically requested by DOE, and three years after issuance of a foreign patent disclosing the subject invention, shall furnish DOE a report stating:
- The commercial use that is being made, or is intended to be made, of said invention; and
 - The steps taken to bring the invention to the point of practical application or to make the invention available for licensing.
- (ii) The Government shall retain at least an irrevocable, nonexclusive, paid-up license to make, use, and sell the invention throughout the world by, or on behalf of, the Government (including any Government agency) and States and domestic municipal governments, unless the Secretary of Energy or designee determines that it would not be in the public interest to acquire the license for the States and domestic municipal governments.
- (iii) If noted elsewhere in this Subcontract as a condition of the grant of an advance waiver of the Government's title to inventions under this subcontract, or, if no advance waiver was granted but a waiver of the Government's title to an identified invention is granted pursuant to subparagraph 2.b of this Article upon a determination by the Secretary of Energy that it is in the Government's best interest, this license shall include the right of the Government to sublicense foreign governments pursuant to any existing or future treaty or agreement with such foreign governments.
- (iv) Subject to the rights granted in subparagraphs 4.a, b and c of this Article, the Secretary of Energy or designee shall have the right to terminate the foreign patent rights granted in this subparagraph 4.d in whole or in part, unless the recipient of such rights demonstrates to the satisfaction of the Secretary of Energy or designee that effective steps necessary to accomplish substantial utilization of the invention have been taken or within a reasonable time will be taken.
- (v) Subject to the rights granted in subparagraphs 4.a, b and c of this Article, the Secretary of Energy or designee shall have the right, commencing four years after foreign patent rights are accorded under this subparagraph 4.d to require the granting of a nonexclusive or partially exclusive license to a responsible applicant or applicants, upon terms reasonable under the circumstances, and in appropriate circumstances to terminate said foreign patent rights in whole or in part, following a hearing upon notice thereof to the public, upon a petition by an interested person justifying such hearing:

- If the Secretary of Energy or designee determines, upon review of such material as he deems relevant, and after the recipient of such rights or other interested person has had the opportunity to provide such relevant and material information as the Secretary or designee may require, that such foreign patent rights have tended substantially to lessen competition or to result in undue market concentration in any section of the United States in any line of commerce to which the technology relates; or
 - Unless the recipient of such rights demonstrates to the satisfaction of the Secretary of Energy or designee at such hearing that the recipient has taken effective steps, or within a reasonable time thereafter is expected to take such steps, necessary to accomplish substantial utilization of the invention.
- (vi) If the Subcontractor is to file a foreign patent application on a subject invention, the Government agrees, upon written request, to use its best efforts to withhold publication of such invention disclosures for such period of time as specified by Patent Counsel, but in no event shall the Government or its employees be liable for any publication thereof.
- (vii) Subject to the license specified in subparagraphs 4.a, b, and c of this Article, the Subcontractor or inventor agrees to convey to the Government, upon request, the entire right, title, and interest in any foreign country in which the Subcontractor or inventor fails to have a patent application filed in a timely manner or decides not to continue prosecution or to pay any maintenance fees covering the invention. To avoid forfeiture of the patent application or patent, the Subcontractor or inventor shall, not less than 60 days before the expiration period for any action required by any patent office, notify the Patent Counsel, with copy to Contractor, of such failure or decision, and deliver to the Patent Counsel, the executed instruments necessary for the conveyance specified in this paragraph.

5. Invention identification, disclosures, and reports

- a. The Subcontractor shall establish and maintain active and effective procedures to assure that subject inventions are promptly identified and disclosed to Subcontractor personnel responsible for patent matters within six (6) months of conception and/or first actual reduction to practice, whichever occurs first in the performance of work under its contract. These 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 that the procedures for identifying and disclosing the inventions are followed. Upon request, the Subcontractor shall furnish the Contracting Officer a description of such procedures for evaluation and for determination as to their effectiveness.
- b. The Subcontractor shall disclose each subject invention to the DOE Patent Counsel with a copy to the Contracting Officer and Contractor, within two (2) months after the inventor discloses it in writing to Subcontractor personnel responsible for patent matters or, if earlier, within six (6) months after the Subcontractor becomes aware that a subject invention has been made, but in any event before any on sale, public use, or publication of such invention known to the Subcontractor. The disclosure shall be in the form of a written report and shall identify the subcontract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale, or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to DOE, the Subcontractor shall promptly notify Patent Counsel, with copy to the

Contractor, of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Subcontractor. The report should also include any request for a greater rights determination in accordance with subparagraph 2.b of this Article. When an invention is disclosed to DOE under this paragraph, it shall be deemed to have been made in the manner specified in Sections (a)(1) and (a)(2) of 42 U.S.C. 5908, unless the Contractor contends in writing at the time the invention is disclosed that was not so made.

- c. The Subcontractor shall furnish the Contracting Officer, with a copy to the Contractor, the following:
- (i) Interim reports every 12 months (or such longer period as may be specified by the Contracting Officer) from the date of this Subcontract, listing all subject inventions during that period, and including a statement that all subject inventions have been disclosed (or that there are not such inventions), and that such disclosure has been made in accordance with the procedures required by subparagraph 5.a of this Article.
 - (ii) A final report, within three (3) months after completion of the work, listing all subject inventions or containing a statement that there were no such inventions, and listing all Lower-tier Subcontracts at any tier containing a patent rights article or containing a statement that there were no such Lower-tier Subcontracts.
- d. The Subcontractor agrees to 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 a format suggested by the Subcontractor, each subject invention made under this Subcontract, in order that the Subcontractor can comply with the disclosure provisions of Paragraph 3 of this Article, 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 subparagraph 5.b of this Article.
- e. The Subcontractor agrees, subject to FAR 27.302(j), 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 Article.

6. Examination of records relating to inventions.

- a. The Contracting Officer or any authorized representative shall, until three (3) years after final payment under this Subcontract, have the right to examine any books (including laboratory notebooks), records, and documents of the Subcontractor relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this Subcontract to determine whether:
- (i) Any such inventions are subject inventions;
 - (ii) The Subcontractor has established and maintains the procedures required by subparagraphs 5.a and d of this Article; and
 - (iii) The Contractor and its inventors have complied with the procedures.
- b. If the Contracting Officer learns of an unreported Subcontractor invention that the Contracting Officer believes may be a subject invention, the Subcontractor may be required to disclose the invention to DOE for a determination of ownership rights.

- c. Any examination of records under this paragraph will be subject to appropriate conditions to protect the confidentiality of the information involved.

7. Withholding of payment

- a. Any time before final payment under this Subcontract, the Contractor may, withhold payment until a reserve not exceeding \$50,000 or 5% of the amount of this Subcontract, whichever is less, shall have been set aside if, in the Contractor's opinion, the Subcontractor fails to:
- (i) Convey to the Government, using a DOE-approved form, the title and/or rights of the Government in each subject invention as required by this Article;
 - (ii) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to subparagraph 5.a of this Article;
 - (iii) Disclose any subject invention pursuant to subparagraph 5.b of this Article;
 - (iv) Deliver acceptable interim reports pursuant to subparagraph 5.c(i) of this Article;
or
 - (v) Provide the information regarding subcontracts pursuant to subparagraph 8.d of this Article.
- b. Such reserve or balance shall be withheld until the Contractor has determined that the Subcontractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this Article.
- c. Final payment under this Subcontract shall not be made before the Subcontractor delivers to the Contractor or DOE Contracting Officer all disclosures of subject inventions required by subparagraph 5.b of this Article, and an acceptable final report pursuant to subparagraph 5.c(ii) of this Article, and the Patent Counsel has issued a patent clearance certification.
- d. The Contractor may decrease or increase the sums withheld up to the maximum authorized above. No amount shall be withheld under this paragraph while the amount specified by this paragraph is being withheld under other provisions of this Subcontract. The withholding of any amount or the subsequent payment thereof shall not be construed as a waiver of any Contractor rights under this Subcontract.

8. Subcontracts

- a. The Subcontractor shall include the article at 48 CFR 952.227-11 (suitably modified to identify the parties) in all its Lower-tier Subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work to be performed by a small business firm or domestic nonprofit organization, except where the work of the Lower-tier Subcontract is subject to an Exceptional Circumstances Determination by DOE. In all other Lower-tier Subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work, the Subcontractor shall include this Article (suitably modified to identify the parties). The Subcontractor shall not, as part of the consideration for awarding a Lower-tier Subcontract, obtain rights in its Lower-tier Subcontractor's subject inventions.
- b. In the event of a refusal by a prospective Lower-tier Subcontractor to accept such an article, the Subcontractor:

- (i) Shall promptly submit a written notice to the Contracting Officer setting forth the Lower-tier Subcontractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and
 - (ii) Shall not proceed with such Lower-tier Subcontract without the written authorization of the Contracting Officer.
- c. In the case of Lower-tier Subcontracts at any tier, DOE, the Subcontractor, and Contractor agree that the mutual obligations of the parties created by this Article constitute a contract between the Lower-tier Subcontractor(s) and DOE with respect to those matters covered by this Article.
- d. The Subcontractor shall promptly notify the Contracting Officer in writing upon the award of any Lower-tier Subcontract at any tier containing a patent rights article by identifying the Lower-tier Subcontractor, the applicable patent rights article, the work to be performed under the Lower-tier Subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Subcontractor shall furnish a copy of such Lower-tier Subcontract, and, no more frequently than annually, a listing of the Lower-tier Subcontracts that have been awarded.
- e. The Subcontractor shall identify all subject inventions of a Lower-tier Subcontractor of which it acquires knowledge in the performance of this Subcontract and shall notify the Patent Counsel, with a copy to the Contracting Officer, promptly upon identification of the inventions.

9. Preference for United States Industry

Unless provided otherwise, no Subcontractor that receives title to any subject invention and no assignee of any such Subcontractor shall grant to any person the exclusive right to use or sell any subject invention in the United States, unless such person agrees that any products embodying the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement may be waived by the Government upon a showing by the Subcontractor 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.

10. Atomic energy

- a. No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted with respect to any invention or discovery made or conceived in the course of, or under, this Subcontract.
- b. Except as otherwise authorized in writing by the Contracting Officer, the Subcontractor will obtain patent agreements to effectuate the provisions of subparagraph 5.a of this Article from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.

11. Background Patents

- a. Background Patent means a domestic patent covering an invention or discovery which is not a subject invention and which is owned or controlled by the Subcontractor at any time through the completion of this Subcontract:
 - (i) Which the Subcontractor, but not the Government, has the right to license to others without obligation to pay royalties thereon; and

- (ii) Infringement of which cannot reasonably be avoided upon the practice of any specific process, method, machine, manufacture, or composition of matter (including relatively minor modifications thereof) which is a subject of the research, development, or demonstration work performed under this Subcontract.
- b. The Subcontractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive license under any background patent for purposes of practicing a subject of this Subcontract by or for the Government in research, development, and demonstration work only.
- c. The Subcontractor also agrees that upon written application by DOE, it will grant to responsible parties, for purposes of practicing a subject of this Subcontract, nonexclusive licenses under any background patent on terms that are reasonable under the circumstances. If, however, the Subcontractor believes that exclusive rights are necessary to achieve expeditious commercial development or utilization, then a request may be made to DOE by the Subcontractor for DOE approval of such licensing.
- d. Notwithstanding subparagraph 11.c of this Article, the Subcontractor shall not be obligated to license any background patent if the Subcontractor demonstrates to the satisfaction of the Secretary of Energy or designee that:
 - (i) A competitive alternative to the subject matter covered by said background patent is commercially available or readily introducible from one or more other sources; or
 - (ii) The Subcontractor or its licensees are supplying the subject matter covered by said background patent in sufficient quantity and at reasonable prices to satisfy market needs, or have taken effective steps or within a reasonable time are expected to take effective steps to so supply the subject matter.

12. Publication

It is recognized that during the course of the work under this contract, the Subcontractor or its employees may from time to time desire to release or publish information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this Subcontract. In order that public disclosure of such information will not adversely affect the patent interests of DOE, the Contractor, or the Subcontractor, patent approval for release of publication shall be secured from Patent Counsel prior to any such release or publication.

13. Forfeiture of rights in unreported subject inventions

- a. The Subcontractor shall forfeit and assign to the Government, at the request of the Secretary of Energy or designee, all rights in any subject invention which the Subcontractor fails to report to Patent Counsel within six months after the time the Subcontractor:
 - (i) Files or causes to be filed a United States or foreign patent application thereon; or
 - (ii) Submits the final report required by subparagraph 5.c.(ii) of this Article, whichever is later.
- b. However, the Subcontractor shall not forfeit rights in a subject invention if, within the time specified in subparagraph 13.a of this Article, the Subcontractor:
 - (i) Prepares a written decision based upon a review of the record that the invention was neither conceived nor first actually reduced to practice in the course of, or under, this Subcontract and delivers the decision to Patent Counsel, with a copy to the Contracting Officer and the Contractor; or

- (ii) Contending that the invention is not a subject invention, the Subcontractor nevertheless discloses the invention and all facts pertinent to this contention to the Patent Contracting Officer or Counsel, with a copy to the Contracting Officer and the Contractor; or**
 - (iii) Establishes that the failure to disclose did not result from the Subcontractor's fault or negligence.**
 - c. Pending written assignment of the patent application and patents on a subject invention determined by the Secretary of Energy or designee to be forfeited (such determination to be a final decision under the Disputes Article of this Subcontract), the Subcontractor shall be deemed to hold the invention and the patent applications and patents pertaining thereto in trust for the Government. The forfeiture provision of this Paragraph 13 shall be in addition to and shall not supersede other rights and remedies which the Government may have with respect to subject inventions.**