

TERMS & CONDITIONS

For DOE Orders Issued Under Financial Assistance Awards To "For-Profit" Entities

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A. GENERAL PROVISIONS

A-1 Definitions: As used throughout this document, the following terms shall have the meanings set forth below:

- a) "Buyer" means GENERAL ATOMICS.
- b) "Seller" or "Recipient" means the person, firm, or corporation executing this Order with the Buyer and who will furnish the work or services provided for herein.
- c) "Award", "Financial Assistance Award", "Contract", "Agreement", means "Order", this contractual instrument, including changes, of which these terms and conditions are a part thereof.
- d) Except as otherwise provided in this Order, the term "subcontracts" includes purchase orders under this Order, but does not include Seller's employment relationships.
- e) All references to "works," "supplies," or "articles" shall include "services," if this Order, wholly or in part, provides for the furnishing of services.

A-2 Independent Contractor: Seller is, and shall be deemed to be, an independent contractor and not an agent or employee of Buyer.

A-3 Packing and Shipment: Deliveries shall be made as specified, without additional charge for boxing, crating, carting, or storage unless otherwise specified. Goods shall be suitably packaged to secure the lowest transportation costs and in accordance with the requirements of common carriers and be packaged to ensure against damage from weather or transportation. Buyer's Order number and symbols must be plainly marked on all invoices, packages, bills of lading and shipping orders. Packing lists shall accompany each shipment. Buyer's count or weight shall be final and conclusive on shipments not accompanied by packing lists.

A-4 Inspection: Buyer shall be permitted to inspect Seller's manufacture, fabrication, and testing. For these purposes, Seller shall provide, upon reasonable advance notice, access to Seller's facilities to enable Buyer and its representatives to perform inspections and to determine Seller's orderly, timely, and satisfactory compliance with the requirements of the Order.

Inspections and design or planning reviews performed or not performed by Buyer shall not relieve Seller from responsibility to perform all inspection tests and quality assurance measures nor otherwise to comply with the requirements of this Order.

Any work or item that fails to meet the requirements of the Order may be rejected. If delivered to Buyer or destination, rejected work or items shall be removed promptly by Seller.

A-5 Delivery: *TIME OF DELIVERY UNDER THIS ORDER IS OF THE ESSENCE.* If Seller fails to adhere to the delivery schedule, and Buyer must therefore demand a more expeditious means of transportation than specified in the Order, Seller shall be liable for the difference in such transportation cost. This in no way shall affect Buyer's other rights.

A-6 Warranty: Seller warrants that products ordered to specifications hereunder will conform to the specifications and to any drawings, samples, or other description furnished or adopted by Buyer in connection with this Order. If products are not ordered to such specifications, Seller warrants that they will be fit for the purpose intended. All articles purchased hereunder are warranted to be merchantable, to be of good material and workmanship, and to be free from defect for a period of one year after delivery and acceptance by Buyer. All such warranties and guarantees, if any, shall survive inspection or test, acceptance, and payment. All statutory warranties shall apply. Warranties shall run to Buyer, its successors, assigns, and customers.

Seller further warrants that all work and services called for herein shall comply with the requirements of this Order and shall conform to the highest standards applicable to them.

A-7 Special Tools: If prices are stated separately for dies, tools, and/or patterns acquired by Seller for the purpose of filling this Order, such dies, tools, and/or patterns shall be properly identified by Seller as such. When this Order has been completed, such tools shall be disposed of as Buyer may direct.

A-8 Buyer-Furnished Material: Material furnished by Buyer to Seller for use in performance of this Order is bailed to Seller for mutual benefit and Seller will pay for all such materials spoiled or not satisfactorily accounted for.

A-9 Payment: Payment date and cash discount period shall be calculated from the date of Buyer's receipt of an acceptable invoice or Buyer's acceptance of the goods and supporting documentation at destination, whichever last occurs.

If this is a cost reimbursement type of order or if this Order specifies fixed hourly rates for services, a statement of accounts or invoice, in triplicate, shall be sent to Buyer's Accounts Payable Department monthly. Invoices tendered for payment shall show the weekly rate of expenditure by labor classification as well as other costs allowable hereunder. Delays in receiving a statement or invoice, and also errors and omissions on the statement will be considered just cause for deferring payment without losing discount privilege.

A-10 Seller's Obligations for "Not-to-Exceed" Orders: If this Order specifies payments by Buyer as "not-to-exceed" a stipulated amount, then:

a) Seller agrees to perform its obligations hereunder within that limit. If during performance hereunder, Seller's incurred costs equal 75% of the "not-to-exceed" value it shall promptly notify Buyer in writing indicating incurred cost and anticipated cost to complete.

b) Notwithstanding the notification requirements set forth above, if Seller at any time has reason to believe that the total price to Buyer for performance hereunder in the absence of this clause will be greater than the "not-to-exceed" value it shall promptly report the belief to the Buyer.

c) Buyer shall not be obligated to pay Seller more than the "not-to-exceed" value, unless specifically authorized in writing by an authorized representative of Buyer's Purchasing Department.

A-11 Records: If this Order provides for fixed hourly or daily rates for services or if this is a cost reimbursement type of order, Seller agrees to maintain books, records, documents, and other evidence (hereinafter called "records") to the extent and in such detail as necessary to properly reflect all costs of labor, materials, equipment, supplies and service, and other expenses for which reimbursement is claimed. Seller will make available at the office of Seller at all reasonable times during the duration of this Order and until three (3) years after final payment, any of the records for inspection, audit, or reproduction by an authorized representative of Buyer.

A-12 Changes:

a) Buyer may at any time without notice to the sureties, if any, issue written directions requiring additional work within the general scope of this Order, or directing the omission of or variation in work covered by this Order or any amendment thereto. If any such direction results in a material change in the amount or character of the work under this Order, an equitable adjustment in the Order price and other such provisions of this Order as may be affected shall be made and the Order shall be modified in writing accordingly. Any claim by Seller for an adjustment under this clause must be asserted in writing within thirty (30) days from the date of receipt by Seller of the notification of change.

b) Whether made pursuant to this clause or by mutual agreement, changes shall not be binding upon Buyer until agreed to in writing by an authorized member of Buyer's Purchasing Department. The issuance of information, advice, approvals, or instructions by Buyer's technical personnel or other representatives shall be deemed expressions of personal opinions only and shall not affect Buyer's and Seller's rights and obligations hereunder unless the same is in a writing which is signed by an authorized representative of the Buyer's Purchasing Department and which expressly states that it constitutes a modification or change to this Order.

c) Seller shall proceed with prosecution of the work in accordance with any written direction issued under this Clause 12.

A-13 Writings Required:

a) No notice, Order, direction, determination, requirement, consent, approval, or ratification under this Order shall be of any effect unless in writing.

b) No oral statement of any person whomsoever shall in any manner or degree, modify or otherwise affect the terms of this Order.

c) No extra charge of any kind will be allowed unless specifically agreed to in writing by Buyer's authorized Purchasing Representative.

A-14 Non-Waiver: The failure of Buyer to insist, in one or more instances upon strict performance or to exercise any rights shall not waive or relinquish to any extent Buyer's right to assert or rely upon any such terms or rights on any future occasion.

A-15 Disputes: In the event of any dispute arising hereunder between Buyer and Seller, pending resolution of the dispute, Seller shall proceed with performance under this Order.

A-16 Stop Work Order: The Buyer may, at any time, by written order to Seller, require Seller to stop all or part of the work called for by this Order for a period of ninety (90) days after the Order is issued to Seller. Within ninety (90) days after a "Stop Work Order" is delivered to Seller, or within any extension of the period to which the parties have agreed, Buyer shall either: (1) cancel the "Stop Work Order" and direct Seller to resume work, in which event Seller shall receive an equitable adjustment, provided a claim for such an adjustment shall be submitted by Seller within thirty (30) days after the end of the period of work stoppage; or (2) terminate the work and this Order or part thereof.

A-17 Force Majeure: Neither Seller nor Buyer shall be liable for any failure or delay in performing its obligations hereunder, or for any loss or damage resulting therefrom, due to: (1) acts of God, war, riot, embargos, acts of civil or military authorities, fire, flood, accidents, strikes, epidemics, or unusually severe weather affecting either party; (2) causes beyond their control and which are not foreseeable or causes beyond the reasonable control of their subcontractors which are not foreseeable.

A-18 Termination for Convenience: Buyer may, at its option, terminate this Order, in whole or in part, for Buyer's convenience, by written, fax, e-mail or telegraphic notice to Seller. Upon termination hereunder, Seller shall (1) forthwith stop work under this Order on the terminated portion thereof and place no further orders or lower-tier subcontracts hereunder, (2) terminate or, if so directed by Buyer, assign to Buyer, orders or subcontracts outstanding hereunder, and (3) take any necessary action to protect property in Seller's possession in which Buyer has or may acquire an interest, and direct subcontractors to do the same. Within three (3) months after receipt of such notice or termination, Seller will prepare and submit to Buyer in writing its claim for reimbursement of costs resulting from the termination. Such claim shall include termination costs, if any, from lower-tier subcontractors and, is to be in accordance with the requirements of Buyer hereinafter set forth. If the parties cannot agree within a reasonable time upon the amount of fair compensation to Seller for Seller's performance of the terminated Order, Buyer will pay Seller, without duplication:

a) The Order price for articles that have been completed and delivered to Buyer or otherwise disposed of as Buyer may direct. In the event the Order price includes packaging and transportation costs and the completed articles have not been packaged and transported at the time of termination, an equitable adjustment will be made to the Order price for such articles.

b) The actual costs incurred by Seller prior to termination which are properly allocable or apportionable, under good commercial accounting practices consistent with Seller's usual accounting procedures, to the terminated portion of this Order other than articles whose price is paid under subparagraph (a), except that when the Order provides for progress payments, settlement of Seller's costs shall be on the basis of actual progress made through the termination date. Notwithstanding the provisions of this subparagraph (b) and subparagraph (d) below, if this Order provides for fixed hourly rates, Buyer shall pay Seller without duplication the hourly rates fixed in the Order times the number of hours actually expended in conformity with the provisions of this Order.

c) Reasonable expenses actually incurred by Seller in settling Seller's terminated orders and subcontracts hereunder, as approved by Buyer, and in protecting property in which Buyer has or may have an interest.

d) Such allowance for profit on the work performed as may be reasonable and allocable under the circumstances; provided, however, that if it appears that Seller would have incurred a loss if the Order had not been terminated, no profit shall be allowed and Buyer's payments pursuant to subparagraph (b) above will be reduced by the proportionate amount of such loss as the terminated portion of the Order relates to the entire Order.

Payments under this clause, including all payments made under this Order prior to the termination, shall in no event exceed the aggregate price specified in this Order. Seller will transfer title to and deliver on Buyer's instructions any property the cost of which is reimbursed under (b) above or with Buyer's approval, may retain the same at an agreed price or sell at any approved price and credit or pay the

amount so agreed or received as Buyer directs. Buyer may audit all elements of any termination claim including all elements of claims submitted under any orders and subcontracts that Seller has terminated in accordance with this clause.

In no event will Seller or its subcontractors or suppliers be entitled to reimbursement for any cost incurred subsequent to the effective date of termination except for those allowed by subparagraph (c) above, nor shall Seller or its subcontractors or suppliers be allowed to recover any cost incurred prior to termination unless such cost was allocated to this Order in accordance with usual and customary accounting procedures applicable in the absence of termination of orders. Specifically, but not exclusively, no recovery will be allowed of any amounts representing anticipatory profits, unabsorbed administrative expenses, or other overhead costs, or continuing costs.

A-19 Termination for Default:

a) Buyer may terminate all or any part of this Order if Seller breaches any of the terms hereof including warranties or fails to make progress so as to endanger performance of this Order in accordance with its terms. Termination hereunder shall be effected by written notice to Seller.

b) In the event Buyer terminates this Order in whole or in part as provided hereinabove, Buyer may procure, upon such terms and in such manner as Buyer deems appropriate, supplies or services similar to those so terminated, and Seller shall be liable to Buyer for any excess costs for such similar supplies or services, provided that Seller shall continue the performance of this Order to the extent not terminated under the provisions of this clause.

c) Except with respect to defaults of subcontractors at any tier, Seller shall not be liable for excess costs if the failure to perform the Order arises out of causes beyond the control and without the fault or negligence of Seller. If the failure to perform is caused by the default of a subcontractor at any tier, and if such default arises out of causes beyond the control of both Seller and the subcontractor, and without the fault or negligence of either of them, Seller shall not be liable for any excess costs for failure to perform, unless the supplies or services to be furnished by the subcontractor were obtainable from other sources in sufficient time to permit the Seller to meet the required delivery schedule.

d) If this Order is terminated for default, Buyer may require Seller to transfer to Buyer title and possession in the manner and to the extent directed by Buyer of (1) any completed items, and (2) such partially completed supplies and materials, parts, tools, dies, jigs, fixtures, plans, drawings, information, and contract rights (hereinafter called "manufacturing materials") as Seller has specifically produced or acquired for the performance of such part of this Order as has been terminated; and Seller shall, upon direction of Buyer, protect and preserve property in possession of Seller in which Buyer has an interest. Payment for completed items delivered to and accepted by Buyer shall be at the Order price. Payment for manufacturing materials delivered to and accepted by Buyer and for the protection and preservation of property shall be in the amount agreed upon by Seller and Buyer. Buyer may withhold from amounts otherwise due Seller for such completed supplies or manufacturing materials, such sum as Buyer determines to be necessary to protect Buyer against loss because of outstanding liens or claims of former lien holders.

e) If, after notice of termination of this Order under the provisions of this clause, it is determined for any reason that Seller was not in default under the provisions of this clause, or that the default was excusable under the provisions of this clause, the rights and obligations of the parties shall be the same as if the notice of termination had been issued pursuant to the Termination for Convenience clause.

f) The rights and remedies of Buyer provided in this clause shall not be exclusive and are in addition to any others provided by law or this Order.

A-20 Proprietary Information:

a) Seller shall not, during the term of this Order, and for a period of five (5) years thereafter, divulge to anyone other than Buyer (or such other persons as Buyer designates in writing), or, except in the performance of this Order, make use of information or knowledge relating to details of Buyer's business or that of its subsidiaries, suppliers, or customers, of any other confidential or proprietary information of Buyer or its subsidiaries, suppliers, or customers which Seller shall have obtained because of this Order. Seller shall take all reasonable measures to protect such confidential or proprietary information, which measures shall be at least equal to those with which Seller protects its own confidential or proprietary

information. All proprietary rights embodied in designs, tools, patterns, drawings, information data, and equipment supplied by Buyer under this Order are reserved to Buyer and their use is restricted to the work to be performed hereunder. Seller agrees to retain in confidence and return to Buyer on completion of the Order all designs, drawings, specifications, and technical information of every kind belonging to Buyer and furnished to Seller in connection with this Order.

Notwithstanding the foregoing, Seller shall have no obligation with respect to any confidential or proprietary information which (1) was written record in Seller's files prior to its first receipt from Buyer (2) is at the date hereof, or at any time hereafter becomes a matter of public knowledge or literature by means other than the act, omission, or fault of Seller (3) is at any time lawfully received by Seller from a third person under circumstances permitting its disclosure.

b) No private data or proprietary designs, ideas, or information of Seller are to be provided to Buyer. Buyer accepts no obligation of confidence to Seller with respect to ideas, data, information, or designs divulged by Seller or equipment, operations, or designs witnessed by Buyer at Seller's plant. However, this provision shall not constitute any form of license hereunder if there is a validly issued patent in effect. Seller authorizes Buyer to reproduce Seller's copyrighted material, at no cost to Buyer, for the purpose of including such material in documents provided to Buyer's customers, or prospective customers, in the normal course of Buyer's business. In the absence of further written agreement duly signed by both parties to this Order, all information which passes from Seller to Buyer shall be treated as non-confidential, including material provided in written form and marked by the originator as being confidential or private.

A-21 Indemnity: Seller agrees to indemnify Buyer against any liability, including costs and expenses, for (1) any asserted trademark, copyright, or patent infringement arising from the manufacture, use, or sale of any articles furnished to Buyer under this Order, except where such articles are in accordance with Buyer's detailed design or specification and Seller gives prompt notice to Buyer of such claims which come to Seller's attention, (2) any breach of any warranty of Seller hereunder, and (3) any damages caused to Buyer by third parties, resulting from the manufacture, use or sale of articles furnished by Seller hereunder.

A-22 Taxes: Unless Buyer furnishes a valid exemption certificate, Buyer will bear all sales, use, value added or similar taxes now or hereafter properly imposed in respect to this transaction.

Seller agrees to notify the Buyer promptly of any proposed or contemplated assessment of additional taxes to be borne by Buyer under paragraph 1 of this clause, as the result of any audit or other tax review by an applicable governmental agency, prior to payment of such proposed additional taxes. Buyer's obligation to pay such additional tax is subject to such notification permitting Buyer to review the findings of the alleged tax increase prior to Seller's payment.

Seller further agrees to take all steps, on account of Buyer, necessary to secure the refund of any taxes borne by Buyer under paragraph 1 of this clause, when such taxes paid by Buyer in whole or in part are subsequently deemed inapplicable.

A-23 Property Insurance: Seller shall secure and maintain for the benefit of Buyer, insurance against any loss or damage of all property in which Buyer has an interest hereunder.

A-24 Advertising: Seller shall not, without first obtaining the written consent of Buyer, in any manner advertise or publish the fact that Seller has furnished or contracted to furnish to Buyer the articles herein ordered.

A-25 Assignment: Seller will not assign or transfer this Order, in whole or in part, nor any payments due or to become due hereunder, without the prior written consent of the Buyer. In the event written consent is granted, Seller shall promptly supply Buyer two copies of any such assignment. Payment to an assignee of any claim hereunder shall be subject to set-off or recoupment for any present or future claims which Buyer may have against Seller.

A-26 Subcontracting: Seller will obtain Buyer's approval before subcontracting this Order or any substantial portion thereof. The purchase of raw materials or standard commercial articles is not a subcontract within the meaning of this article.

A-27 Precautions, Indemnity, and Insurance: Seller will defend Buyer at Seller's expense from any suit or action, criminal or civil, arising out of Seller's performance, or that of its officers, directors, employees or agents.

Seller will procure and carry:

a) Automobile liability insurance protecting the Seller from automobile bodily injury, property damage liability with limits of at least \$1,000,000 per person, \$1,000,000 per occurrence for bodily injury, and \$1,000,000 per occurrence for property damage.

b) A broad form comprehensive general liability insurance policy which includes property damage, and contractual and products liability endorsement with limits no lower than \$1,000,000. Such policy shall be on an Occurrence Form.

c) Professional liability coverage with a limit no less than \$1,000,000, if this Order is for Engineering or other Professional Service,

d) Such insurance of employees as may be required by any Workers' Compensation act or other law, regulation or ordinance that may apply in the circumstances and shall, at Buyer's request, furnish certificates of such insurance to Buyer.

For (a) and (b) above, such policies shall name Buyer as additional insured when requested by Buyer.

At Buyer's request, Seller shall furnish to Buyer certificates of insurance setting forth the amount(s) of coverage, policy number(s) and date(s) of expiration for insurance maintained by Seller and, if further requested by Buyer, such certificates will provide that Buyer shall receive thirty (30) days' prior written notification from the insurer of any termination or reduction in the amount or scope of coverages. Seller's purchase of appropriate insurance coverage or the furnishing of certificates of insurance shall not release Seller of its obligations or liabilities under this order. In the event of Seller's breach of this provision, Buyer shall have the right to cancel the undelivered portion of any goods or services covered by this Order and shall not be required to make further payments except for conforming goods delivered or services rendered prior to cancellation.

If Seller's work under this Order involves operations by Seller on Buyer's premises, Seller agrees to take all proper precautions in its operations against the occurrence of injury to any person or damage to property, and to be responsible for and to hold Buyer harmless from all loss and any claim by reason of injury, including death, to any person or damage to property in connection with such work, and from all fines, penalties, or loss incurred by reason of failure to comply with this clause.

A-28 Assignment of Personnel: If this order contains a key personnel clause and the designated employee of Seller becomes temporarily unavailable to perform services under this Order, a replacement for that individual with comparable abilities and qualifications shall be promptly assigned. Within five (5) days after such an assignment, Seller shall furnish Buyer with a resume for the replacement personnel.

A-29 Applicable Law: This Order and any dispute arising hereunder shall be governed by the substantive and procedural laws of the State of California, except, however, that California's Choice of Law provisions shall not apply.

A-30 Attorney Fees: If it is necessary for either party to obtain legal representation to enforce any part of this Order, the non-prevailing party agrees to bear the court costs and the attorney fees of the prevailing party.

A-31 Precedence: Conflicting provisions hereof, if any, shall prevail in the following descending order of precedence: (1) typed provisions on the face of the purchase order, (2) Buyer's purchase order attachments, including these terms and conditions, (3) other specifications or documents incorporated by reference, (4) Seller's proposal or other documents only when specifically referenced on the Order. In the event of any conflicting provisions, the Seller shall promptly notify Buyer thereof.

A-32 Entire Agreement: These terms and those on the face of the Order in which this form is referenced and any specifications or drawings incorporated constitute the entire agreement of the parties and supersede all previous oral or written representations, agreements, and commitments.

A-33 Certification: (This clause shall apply only if this Order is a blanket order procurement.)

If the prices for supplies or services purchased under this Order are not specifically incorporated or set forth on the face of the Order, then Seller agrees that Buyer shall be entitled to commercial discounts generally made available to Seller's customers, and warrants that the net prices of items purchased under this agreement shall be no more than the prices charged to Seller's other most favored customers for like items in similar quantities when all other aspects of the transaction are the same.

A-34 Reporting of Defects and Noncompliance: If this Order or any specification or drawing attached to this Order indicates that this procurement is for a basic component, or design for a basic component, or for materials, supplies, or hardware, which will be used in a nuclear reactor, facility or activity licensed by the Nuclear Regulatory Commission (NRC), the provisions of 10 CFR 21 shall apply to this Order and are hereby incorporated by reference with the same force and effect as if fully recited herein.

In the event this Order or the specifications or drawings attached hereto fail to specify the use of the items covered by this Order as set forth above, and the Seller has knowledge that any item covered by this Order will, in fact, be used in an NRC-licensed nuclear reactor, facility or activity, the provisions of 10 CFR 21 shall apply and are hereby incorporated by reference with the same force and effect as if fully recited herein.

B. ADDITIONAL PROJECT SPECIFIC TERMS AND CONDITIONS

B-1 Notice Regarding the Purchase of American-Made Equipment and Products – Sense of Congress

It is the sense of the Congress that, to the greatest extent practicable, all equipment and products purchased with funds made available under this Order should be American-made.

B-2 Notice Regarding Unallowable Costs and Lobbying Activities (Modified)

Sellers are cautioned to carefully review the allowable cost and other provisions applicable to expenditures under their particular Order. If funds are spent for purposes or in amounts inconsistent with the allowable cost or any other provisions governing expenditures in the Order, the Buyer and/or the Government may pursue a number of remedies against the Seller, including in appropriate circumstances, recovery of such funds, termination of the Order, suspension or debarment of the Seller from future Orders, and criminal prosecution for false statements.

Particular care should be taken by the Seller to comply with the provisions prohibiting the expenditure of funds for lobbying and related activities. Funds may be used to describe and promote the understanding of scientific and technical aspects of specific energy technologies, but not to encourage or support political activities such as the collection and dissemination of information related to potential, planned or pending legislation.

B-3 Appropriations Act Restrictions (Modified)

Energy and Water Development Appropriations Act: Lobbying Restriction (Energy and Water Act)

The Seller agrees that none of the funds obligated on this Order shall be expended, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before Congress, other than to communicate to Member of Congress as described in 18 U.S.C. 1913. This restriction is in addition to those prescribed elsewhere in statute and regulation.

B-4 Foreign Visits and Assignments

Visits and assignment by foreign nationals to the DIII-D facility shall be conducted in accordance with the requirements contained in DOE N 142.1 and DOE- P 142.1, Unclassified Foreign Visits and Assignments Program, or any subsequent version of the Order in effect at the time of award.

B-5 Publications/Presentations

Technical papers generated under this Order intended for publication in technical journals, academic or professional publications, and conference or symposia proceedings should be reviewed by the Buyer or the Buyer's designated representative for formal publication release. Data to be released in to public/international databases must be similarly reviewed. Such formal release is not required for abstracts of papers submitted to evaluation committees for possible acceptance of a subsequent paper and presentations which are not published in technical journals, academic or professional publications, and conference or symposia proceedings, provided they do not contain patentable information or other sensitive technical data and an information copy is provided to the Buyer or the Buyer's designated representative.

C. PATENT, DATA & COPYRIGHT PROVISIONS

Clauses C1-C3 listed below from Part 52 of the Federal Acquisition Regulation (FAR) are incorporated herein by reference, with the same force and effect as if they were set forth herein in full text, and made a part of this Order. The clause text may be accessed at: <http://www.arnet.gov/far/>. In all below listed clauses the term "Contractor" or "Prime Contractor" shall mean "GA", the term "contract" or "schedule" shall mean this Order, and the term Government Contracting Officer" shall mean "Buyer" as applicable; except in those clauses relating to Data and Patent Rights, the term "Government" or "Contracting Officer" shall retain its literal meaning and is not to be construed as Buyer. It is intended that the below as listed herein shall apply to Seller in such manner as is necessary to reflect the position of Seller/Recipient as a subcontractor to Buyer to ensure Seller's/Recipient's obligations to Buyer and to the United States Government and to enable Buyer to meet its obligations under its prime contract. Seller agrees to flow down, as required, applicable FAR clauses to its lower-tier subcontractors. Seller further agrees that all notifications and other communications required by these clauses shall be made through the Buyer, unless the Order specifically provides otherwise.

C-1 FAR 52.227-1, "Authorization and Consent (JUL 1995) - Alternate I (APR 1984)"

C-2 FAR 52.227-2, "Notice and Assistance Regarding Patent and Copyright Infringement (AUG 1996)"

C-3 FAR 52.227-23, "Rights to Proposal Data (Technical) (JUN 1987)"

C.4. INTELLECTUAL PROPERTY (Modified)

10 CFR 600.325 Intellectual Property

(a) Scope. This section sets forth the policies with regard to disposition of rights to data and to inventions conceived or first actually reduced to practice in the course of this Order.

(b) Patents right—small business concerns. In accordance with 35 U.S.C. 202, if the recipient is a small business concern and receives a grant, cooperative agreement, subaward, or contract for research, developmental, or demonstration activities, then, unless there are "exceptional circumstances" as described in 35 U.S.C. 202(e), the award must contain the standard clause in Section G-1 of these Terms and Conditions, entitled "Patents Rights (Small Business Firms and Nonprofit Organizations)" which provides to the recipient the right to elect ownership of inventions made under the award.

(c) Patent rights—other than small business concerns, e.g., large businesses.

(1) *No Patent Waiver*. Except as provided by paragraph (c)(2) of this section, if the recipient is a for-profit organization other than a small business concern, as defined in 35 U.S.C. 201(h) and receives an award or a subaward for research, development, and demonstration activities, then, pursuant to statute, the award must contain the standard clause in Section G-2 of these Terms and Conditions, entitled "Patent

Rights (Large Business Firms)—No Waiver” which provides that DOE owns the patent rights to inventions made under the award.

(2) Patent Waiver Granted. Paragraph (c)(1) of this section does not apply if:

- (i) DOE grants a class waiver for a particular program under 10 CFR part 784;
- (ii) The applicant requests and receives an advance patent waiver under 10 CFR part 784; or
- (iii) A subaward is covered by a waiver granted under the prime award.

(3) Special Provision. Normally, an award will not include a background patent and data provision. However, under special circumstances, in order to provide heightened assurance of commercialization, a provision providing for a right to require licensing of third parties to background inventions, limited rights data and/or restricted computer software, may be included. Inclusion of a background patent and/or a data provision to assure commercialization will be done only with the written concurrence of the DOE program official setting forth the need for such assurance. An award may include the right to license the Government and third party contractors for special Government purposes when future availability of the technology would also benefit the government, e.g., clean-up of DOE facilities. The scope of any such background patent and/or data licensing provision is subject to negotiation.

(d) Rights in data—general rule.

(1) Subject to paragraphs (d)(2) and (3) of this section, and except as otherwise provided by paragraphs (e) and (f) of this section or other law, any award under this subpart must contain the standard clause in Section G-3 of these Terms and Conditions, entitled “Rights in Data—General”.

(2) Normally, an award will not require the delivery of limited rights data or restricted computer software. However, if the contracting officer, in consultation with DOE patent counsel and the DOE program official, determines that delivery of limited rights data or restricted computer software is necessary, the contracting officer, after negotiation with the applicant, may insert in the award the standard clause as modified by Alternates I and/or II set forth in Section G-3 of these Terms and Conditions.

(3) If software is specified for delivery to DOE, or if other special circumstances exist, e.g., DOE specifying “open-source” treatment of software, then the contracting officer, after negotiation with the recipient, may include in the award special provisions requiring the recipient to obtain written approval of the contracting officer prior to asserting copyright in the software, modifying the retained Government license, and/or otherwise altering the copyright provisions.

(f) Rights in data—SBIR/STTR programs. (1) If an applicant receives an award under the SBIR or STTR program, then the contracting officer must insert in the award the standard data clause in the General Terms and Conditions for SBIR Grants, entitled “Rights in Data— SBIR Program”.

(2) The data rights provisions for SBIR/STTR grants are contained in the award terms and conditions for SBIR grants located at <http://e-center.doe.gov> on the Professionals Homepage under Financial Assistance, Regulations and Guidance.

(g) *Authorization and consent.* (1) Work performed by a recipient under a grant is not subject to authorization and consent to the use of a patented invention, and the Government assumes no liability for patent infringement by the recipient under 28 U.S.C. 1498.

(2) Work performed by a recipient under a cooperative agreement is subject to authorization and consent to the use of a patented invention consistent with the principles set forth in 48 CFR 27.201–1.

(3) The contracting officer, in consultation with patent counsel, may also include clauses in the cooperative agreement addressing other patent matters related to authorization and consent, such as patent indemnification of the Government by recipient and notice and assistance regarding patent and copyright infringement. The policies and clauses for these other patent matters will be the same or consistent with those in 48 CFR part 927.

D. TITLE PROVISIONS

D.1 Seller Acquired Property Requirements

“If Seller acquires property under this Order whether fabricated, furnished or purchased then a listing of such property shall be submitted to Buyer within 30 days after August 31 of each year and within 15 days after the Order ends. This report must separately identify items which were fabricated, furnished or purchased under this Order.”

D.2 [] Title Requirements For Cost Reimbursement Orders (*Applicable if checked*)

Notwithstanding any clauses in Subpart D to the contrary, title to all property purchased by the Seller for which the Seller is entitled to be reimbursed as a direct item of cost under this Order shall pass to and vest in the Department of Energy (DOE) upon the vendor's delivery of such property.

Title to all other property, the cost of which is reimbursable to the Seller, shall pass to and vest in the DOE upon:

- Issuance of the property for use in performance of this Order,
- Commencement of processing of the property for use in performance of this Order, or
- Reimbursement of the cost of the property by the DOE, whichever occurs first

D.3 [] Title Requirements For Fixed Priced Orders (*Applicable if checked*)

Title to each item of facilities and special test equipment acquired by the Seller for the Government under this Order shall pass to and vest in the Government when its use in performing this Order commences or when the Government has paid for it, whichever is earlier, whether or not title previously vested in the Government.

- (1) If this Order contains a provision directing the Seller to purchase material for which the Government will reimburse the Seller as a direct item of cost under this Order--
- (i) Title to material purchased from a vendor shall pass to and vest in the Government upon the vendor's delivery of such material; and
 - (ii) Title to all other material shall pass to and vest in the Government upon--
 - (A) Issuance of the material for use in performance of this Order
 - (B) Commencement of processing of the material or its use in performance under this Order; or
 - (C) Reimbursement of the cost of the material by the Government, whichever occurs first.

Title. (1) Title to the property described in this paragraph (d) shall vest in the Government. Vestiture shall be immediately upon the date of this Order, for property acquired or produced before that date. Otherwise, vestiture shall occur when the property is or should have been allocable or properly chargeable to this Order.

- (2) Property, as used in this clause, includes all of the below described items acquired or produced by the Seller that are or should be allocable or properly chargeable to this Order under sound and generally accepted accounting principles and practices.
- (i) Parts, materials, inventories, and work in process;
 - (ii) Special tooling and special test equipment to which the Government is to acquire title under any other clause of this Order;
 - (iii) Nondurable (i.e., noncapital) tools, jigs, dies, fixtures, molds, patterns, taps, gauges, test equipment, and other similar manufacturing aids, title to which would not be obtained as special tooling under subparagraph (ii) above; and
 - (iv) Drawings and technical data, to the extent the Seller or Seller's subcontractors are required to deliver them to the Government by other clauses of this Order.

D.4. [] Title Requirements for Orders Applicable with All Other Financial Assistance Awards (Modified) (*Applicable If Checked*)

Real property and equipment.

(a) *Prior approvals for acquisition with Federal funds.* Recipients may purchase real property or equipment in whole or in part with Federal funds under an award only with the prior approval of the Contracting Officer.

(b) *Title*. Unless a statute specifically authorizes and the award specifies that title to property vests unconditionally in the Recipient, title to real property or equipment vests in the Recipient subject to the conditions that the Recipient:

- (1) Use the real property or equipment for the authorized purposes of the project until funding for the project ceases, or until the property is no longer needed for the purposes of the project;
- (2) Not encumber the property without approval of the Contracting Officer; and
- (3) Use and dispose of the property in accordance with paragraphs (d) and (e) of this section.

(c) *Federal interest in real property or equipment offered as cost-share*. A Recipient may offer the full value of real property or equipment that is purchased with Recipient's funds or that is donated by a third party to meet a portion of any required cost sharing or matching, subject to the requirements in §600.313. If a resulting award includes such property as a portion of the Recipient's cost share, the Government has a financial interest in the property, (*i.e.*, a share of the property value equal to the Federal participation in the project). The property is considered as if it had been acquired in part with Federal funds, and is subject to the provisions of paragraphs (b)(1), (b)(2), and (b)(3) of this section and to the provisions of §600.323.

(d) *Insurance*. Recipients must, at a minimum, provide the equivalent insurance coverage for real property and equipment acquired with DOE funds as provided to property owned by the Recipient.

(e) *Use*. If real property or equipment is acquired in whole or in part with Federal funds under an award and the award does not specify that title vests unconditionally in the Recipient, the real property or equipment is subject to the following:

(1) During the time that the real property or equipment is used on the project or program for which it was acquired, the recipient must make it available for use on other projects or programs, if such other use does not interfere with the work on the project or program for which the real property or equipment was originally acquired. Use of the real property or equipment on other projects is subject to the following order of priority:

- (i) Activities sponsored by DOE grants, cooperative agreements, or other assistance awards;
- (ii) Activities sponsored by other Federal agencies' grants, cooperative agreements, or other assistance awards;
- (iii) Activities under Federal procurement contracts or activities not sponsored by any Federal agency. If so used, use charges must be assessed to those activities. For real property or equipment, the use charges must be at rates equivalent to those for which comparable real property or equipment may be leased.

(2) After Federal funding for the project ceases or if the real property or equipment is no longer needed for the purposes of the project, the Recipient may use the real property or equipment for other projects, insofar as:

- (i) There are Federally sponsored projects for which the real property or equipment may be used. If the only use for the real property or equipment is for projects that have no Federal sponsorship, the Recipient must proceed with disposition of the real property or equipment, in accordance with paragraph (f) of this section.
- (ii) The Recipient obtains written approval from the Contracting Officer to do so. The Contracting Officer must ensure that there is a formal change of accountability for the real property or equipment to a currently funded, Federal award.
- (iii) The Recipient's use of the real property or equipment for other projects is in the same order of priority as described in paragraph (e)(1) of this section.

(f) *Disposition*. (1) If an item of real property or equipment is no longer needed for Federally sponsored projects, the Recipient has the following options:

- (i) If the property is equipment with a current per unit fair market value of less than \$5,000, it may be retained, sold, or otherwise disposed of with no further obligation to DOE.
- (ii) If the property that is no longer needed is equipment (rather than real property), the Recipient may wish to replace it with an item that is needed currently for the project by trading in or selling to offset the costs of the replacement equipment, subject to the approval of the Contracting Officer.
- (iii) The Recipient may elect to retain title, without further obligation to the Federal Government, by compensating the Federal Government for that percentage of the current fair market value of the real property or equipment that is attributable to the Federal participation in the project.

(iv) If the Recipient does not elect to retain title to real property or equipment or does not request approval to use equipment as trade-in or offset for replacement equipment, the Recipient must request disposition instructions from the responsible agency.

(2) If a Recipient requests disposition instructions, the Contracting Officer must:

(i) For equipment (but not real property), consult with the DOE Project Director to determine whether the condition and nature of the equipment warrant excess screening within DOE. If screening is warranted, the equipment will be made available for reutilization within DOE through the Energy Asset Disposal System (EADS). If no DOE requirement is identified within a 60-day period, EADS automatically reports the availability of the equipment to the General Services Administration, to determine whether a requirement for the equipment exists in other Federal agencies.

(ii) For either real property or equipment, issue instructions to the Recipient for disposition of the property no later than 150 calendar days after the Recipient's request. The Contracting Officer's options for disposition are to direct the Recipient to:

(A) Transfer title to the real property or equipment to the Federal Government or to an eligible third party provided that, in such cases, the Recipient is entitled to compensation for its attributable percentage of the current fair market value of the real property or equipment, plus any reasonable shipping or interim storage costs incurred.

(B) Sell the real property or equipment and pay the Federal Government for that percentage of the current fair market value of the property that is attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sale proceeds). If the Recipient is authorized or required to sell the real property or equipment, the Recipient must use competitive procedures that result in the highest practicable return.

(3) If the responsible agency fails to issue disposition instructions within 150 calendar days of the Recipient's request, the Recipient must dispose of the real property or equipment through the option described in paragraph (f)(2)(ii)(B) of this section.

Supplies.

(a) Title vests in the Recipient upon acquisition of supplies acquired with Federal funds under an award.

(b) Upon termination or completion of the project or program, the Recipient may retain any unused supplies. If the inventory of unused supplies exceeds \$5,000 in total aggregate value and the items are not needed for any other Federally sponsored project or program, the Recipient may retain the items for use on non-Federal sponsored activities or sell them, but must, in either case, compensate the Federal Government for its share.

E. PROPERTY MANAGEMENT SYSTEM (Modified)

The Seller's property management system must include the following:

(a) Property records must be maintained, to include the following information for property that is Federally owned, equipment that is acquired in whole or in part with Federal funds, or property or equipment that is used as cost sharing or matching:

(1) A description of the property.

(2) Manufacturer's serial number, model number, Federal stock number, national stock number, or any other identification number.

(3) Source of the property, including the Order number.

(4) Whether title vests in the Seller or the Federal Government.

(5) Acquisition date (or date received, if the property was furnished by the Federal Government) and cost.

(6) Information from which one can calculate the percentage of Federal participation in the cost of the property (not applicable to property furnished by the Federal Government).

(7) The location and condition of the property and the date the information was reported.

(8) Ultimate disposition data, including data of disposal and sales price or the method used to determine current fair market value where the Seller compensates the Federal Government for its share.

(b) Federal owned equipment must be marked to indicate Federal ownership.

(c) A physical inventory must be taken and the results reconciled with the property records annually. Any differences between quantities determined by the physical inspection and those shown in the accounting records must be investigated to determine the causes of the difference. The Seller must, in connection with the inventory, verify the existence, current utilization, and continued need for the property.

(d) A control system must be in effect to insure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft of property must be investigated and fully documented. If the property is owned by the Federal Government, the Seller must promptly notify the Buyer who will notify the Federal agency responsible for administering the property.

(e) Adequate maintenance procedures must be implemented to keep the property in good condition.

F. 10 CFR PART 600 FLOW DOWN CONTRACT PROVISIONS

F.1 Equal Employment Opportunity

All contracts must contain a provision requiring compliance with E.O. 11246 (3 CFR, 1964–1965 Comp., p. 339), “Equal Employment Opportunity,” as amended by E.O. 1375 (3 CFR, 1966–1970 Comp., p. 684), “Amending Executive Order 11246 Relating to Equal Employment Opportunity,” and as supplemented by regulations at 41 CFR chapter 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”

F-2 Copeland “Anti- Kickback” Act (18 U.S.C. 874 and 40 U.S.C. 276c) (Modified)

All contracts and subawards in excess of \$2,000 for construction or repair awarded by Recipients and Subrecipients must include a provision for compliance with the Copeland “Anti-Kickback” Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR Part 3, “Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States”). The Act provides that each Contractor or Subrecipient must be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The Recipient must report all suspected or reported violations to the Buyer.

F-3 Contact Work Hours and Safety Standards Act (40 U.S.C. 327–333)

Where applicable, all contracts awarded by Recipients in excess of \$100,000 for construction and other purposes that involve the employment of mechanics or laborers must include a provision for compliance with Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327–333), as supplemented by Department of Labor regulations (29 CFR part 5). Under Section 102 of the Act, each contractor is required to compute the wages of every mechanic and laborer on the basis of a standard workweek of 40 hours. Work in excess of the standard workweek is permissible provided that the worker is compensated at a rate of not less than 1 1/2 times the basic rate of pay for all hours worked in excess of 40 hours in the workweek. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic is required to work in surroundings or under working conditions that

are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

F-4 Rights to Inventions and Data Made Under a Contract or Agreement

Contracts or agreements for the performance of experimental, development, or research work must provide for the rights of the Federal Government and the Recipient in any resulting invention in accordance with 10 CFR 600.325 and Section G — Patent and Data Rights to Subpart D, Part 600.

F-5 Clean Air Act (42 U.S.C. 7401 et seq.) and the Federal Water Pollution Control Act (33 U.S.C. 1251 et seq.), as amended.

Contracts and subawards of amounts in excess of \$100,000 must contain a provision that requires the Recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (41 U.S.C. 7401 et seq.) and the Federal Water Pollution control act as amended (33 U.S.C. 1251 et seq.). Violations must be reported to the responsible DOE Contracting Officer and the Regional Office of the Environmental Protection Agency (EPA).

F-6 Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)

Contractors who apply or bid for an award of \$100,000 or more must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C.1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the Recipient.

F-7 Debarment and Suspension (E.O.s 12549 and 12689)

Contract awards that exceed the simplified acquisition threshold and certain other contract awards must not be made to parties listed on nonprocurement portion of the General Services Administration's Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs in accordance with E.O.s 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235), "Debarment and Suspension." This list contains the names of parties debarred, suspended, or otherwise excluded by agencies, and contractors declared ineligible under statutory or regulatory authority other than E.O. 12549. Contractors with awards that exceed the small purchase threshold must provide the required certification regarding its exclusion status and that of its principals.

F-8 Davis-Bacon Act (40 U.S.C. 276a)

As a general rule, it is unlikely that the Davis- Bacon Act, which among other things requires payment of prevailing wages on projects for the construction of public works, would apply to financial assistance awards. However, the presence of certain factors (e.g., requirement of particular program statues; title to a construction facility resting in the Government) might necessitate a closer analysis of the award, to determine if the Davis-Bacon Act would apply in the particular factual situation presented. [FR Doc. 03-21172 Filed 8-20-03; 8:45 am] BILLING CODE 6450-01-P

G. PATENT AND DATA PROVISIONS

G-1 Patent Rights (Small Business Firms and Nonprofit Organizations)

(a) Definitions

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 that is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321 et seq.).

Made when used in relation to any invention means the conception or first actual reduction to practice of such invention.

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.

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.

Small business firm means a small business concern as defined at section 2 of Public Law 85-536 (16 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3 through 121.8 and 13 CFR 121.3 through 121.12, respectively, will be used.

Subject invention means any invention of the Recipient conceived or first actually reduced to practice in the performance of work under this award, 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 award performance.

(b) Allocation of Principal Rights

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

(c) Invention Disclosure, Election of Title and Filing of Patent Applications by Recipient

(1) The Recipient will disclose each subject invention to DOE within two months after the inventor discloses it in writing to Recipient personnel responsible for the administration of patent matters. The disclosure to DOE shall be in the form of a written report and shall identify the award 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 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 to DOE, the Recipient will promptly notify DOE of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Recipient.

(2) The Recipient will elect in writing whether or not to retain title to any such invention by notifying DOE within two years of disclosure to DOE. However, in any case where publication, on sale, or public use has initiated the one-year statutory period wherein valid patent protection can still be obtained in the U.S., the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Recipient will file its initial patent application on an invention to which it elects to retain title within one 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 U.S. after a publication, on sale, or public use. The Recipient will file patent applications in additional countries or international patent offices within either ten months of the corresponding initial patent application, or six months from the date when permission is granted by the

Commissioner of Patents and Trademarks to file foreign patent applications when such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure to DOE, election, and filing under subparagraphs (c)(1), (2), and (3) of this clause may, at the discretion of DOE, be granted.

(d) Conditions When the Government May Obtain Title

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

(1) If the Recipient fails to disclose or elect the subject invention within the times specified in paragraph (c) of this patent rights clause, or elects not to retain title; provided that DOE may only request title within 60 days after learning of the failure of the Recipient to disclose or elect within the specified times;

(2) In those countries in which the Recipient fails to file patent applications within the times specified in paragraph (c) of this Patent Rights clause; provided, however, that if the Recipient has filed a patent application in a country after the times specified in paragraph (c) of this Patent Rights clause, but prior to its receipt of the written request of DOE, the Recipient shall continue to retain title in that country; or

(3) In any country in which the Recipient decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in a reexamination or opposition proceeding on, a patent on a subject invention.

(e) Minimum Rights to Recipient and Protection of the Recipient Right To File

(1) The Recipient will retain a non-exclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Recipient fails to disclose the subject invention within the times specified in paragraph (c) of this Patent Rights clause. The Recipient's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Recipient is a party and includes the right to grant sublicenses of the same scope of the extent the Recipient was legally obligated to do so at the time the award was awarded. The license is transferable only with the approval of DOE except when transferred to the successor of that part of the Recipient's business to which the invention pertains.

(2) The Recipient'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 at 37 CFR part 404 and the agency's licensing regulation, if any. This license will not be revoked in that field of use or the geographical areas in which the Recipient 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 discretion of the funding Federal agency to the extent the Recipient, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, the funding Federal agency will furnish the Recipient a written notice of its intention to revoke or modify the license, and the Recipient will be allowed thirty days (or such other time as may be authorized by DOE for good cause shown by the Recipient) after the notice to show cause why the license should not be revoked or modified. The Recipient has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and the agency's licensing regulations, if any, concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of its license.

(f) Recipient Action To Protect Government's Interest

(1) The Recipient 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 for which the Recipient retains title; and

(ii) Convey title to DOE when requested under paragraph (d) of this Patent Rights clause, and to enable the government to obtain patent protection throughout the world in that subject invention.

(2) The Recipient agrees to require, by written agreement, its employees, other than clerical and non-technical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Recipient each subject invention made under this award in order that the Recipient can comply with the disclosure provisions of paragraph (c) of this Patent Rights clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. The disclosure format should require, as a minimum, the information requested by paragraph (c)(1) of this Patent Rights clause. The Recipient shall instruct such employees through the 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.

(3) The Recipient will notify DOE of any decision not to continue 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.

(4) The Recipient agrees to include, within the specification of any U.S. patent application and any patent issuing thereon covering a subject invention, the following statement: "This invention was made with Government support under (identify the award) awarded by (identify DOE). The Government has certain rights in this invention."

(g) Subaward/Contract

(1) The Recipient will include this Patent Rights clause, suitably modified to identify the parties, in all subawards/contracts, regardless of tier, for experimental, developmental or research work to be performed by a small business firm or nonprofit organization. The subrecipient/contractor will retain all rights provided for the Recipient in this Patent Rights clause, and the Recipient will not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractors' subject inventions.

(2) The Recipient will include in all other subawards/contracts, regardless of tier, for experimental, developmental or research work, the patent rights clause required by 10 CFR 600.325(c).

(3) In the case of subawards/contracts at any tier, DOE, the Recipient, and the subrecipient/contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subrecipient/contractor and DOE with respect to those matters covered by the clause.

(h) Reporting on Utilization of Subject Inventions

The Recipient 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 Recipient 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 Recipient and such other data and information as DOE may reasonably specify. The Recipient also agrees to provide additional reports in connection with any march-in proceeding undertaken by DOE in accordance with paragraph (j) of this Patent Rights clause. As required by 35 U.S.C. 202(c)(5), DOE agrees it will not disclose such information to persons outside the Government without the permission of the Recipient.

(i) Preference for United States Industry.

Notwithstanding any other provision of this Patent Rights clause, the Recipient agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the U.S. unless such person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the U.S. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the Recipient 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 U.S. or that under the circumstances domestic manufacture is not commercially feasible.

(j) March-in-Rights

The Recipient agrees that with respect to any subject invention in which it has acquired title, DOE has the right in accordance with procedures at 37 CFR 401.6 and any supplemental regulations of the Agency to require the Recipient, an assignee or exclusive licensee of a subject invention to grant a non-exclusive, 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 Recipient, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that:

(1) Such action is necessary because the Recipient 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 Recipient, 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 Recipient, assignee, or licensee; or

(4) Such action is necessary because the agreement required by paragraph (i) of this Patent Rights clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the U.S. is in breach of such agreement.

(k) Special Provisions for Awards With Nonprofit Organizations

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

(1) Rights to a subject invention in the U.S. 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 Recipient;

(2) The Recipient 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;

(3) The balance of any royalties or income earned by the Recipient 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 or engineering research or education; and

(4) 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 preference to a small business firm if the Recipient determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided that the Recipient 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 Recipient. However, the Recipient agrees that the Secretary of Commerce may review the Recipient's licensing program and decisions regarding small business applicants, and the Recipient will negotiate changes to its licensing policies, procedures or practices with the Secretary when the Secretary's review discloses that the Recipient could take reasonable steps to implement more effectively the requirements of this paragraph (k)(4).

(l) Communications

All communications required by this Patent Rights clause should be sent to

Robert J. Fisher
Intellectual Property Law Division
U.S. DOE Chicago Operations Office
9800 So. Cass Ave.
Argonne, IL 60439-4899

(m) Electronic Filing

Unless otherwise Specified in the award, the information identified in paragraphs (f)(2) and (f)(3) may be electronically filed.

[End of clause]

G-2 Patent Rights (Large Business Firms)—No Waiver

(a) Definitions

DOE patent waiver regulations, as used in this clause, means the Department of Energy patent waiver regulations in effect on the date of award. See 10 CFR part 784.

Invention, as used in this clause, means any invention or discovery that is or may be patentable of 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.).

Patent Counsel, as used in this clause, means the Department of Energy Patent Counsel assisting the awarding activity.

Subject invention, as used in this clause, means any invention of the Recipient conceived or first actually reduced to practice in the course of or under this agreement.

(b) Allocations of Principal Rights

(1) Assignment to the Government. The Recipient 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 Recipient under subparagraph (b)(2) and paragraph (d) of this clause.

(2) Greater rights determinations. The Recipient, or an employee-inventor after consultation with the Recipient, may request greater rights than the nonexclusive license on the foreign patent rights provided in paragraph (d) of this clause on identified inventions in accordance with the DOE patent waiver regulation. Each determination of greater rights under this agreement shall be subject to paragraph (c) of this clause, 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.

(c) Minimum Rights Acquired by the Government

With respect to each subject invention to which the Department of Energy grants the Recipient principal or exclusive rights, the Recipient agrees to grant 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); "march-in rights" as set forth in 37 CFR 401.14(a)(J)); preference for U.S. industry as set forth in 37 CFR 401.14(a)(I); periodic reports upon request, no more frequently than annually, on the utilization or intent of utilization of a subject invention in a manner consistent with 35 U.S.C. 202(c)(5); and such Government rights in any instrument transferring rights in a subject invention.

(d) Minimum Rights to the Recipient

(1) The Recipient 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 Recipient fails to disclose the subject invention within the times specified in subparagraph (e)(2) of this clause. The Recipient's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Recipient is a part and includes the right to grant sublicenses of the same scope to the extent the Recipient was legally obligated to do so at the time the agreement was awarded. The license is transferable only with the approval of DOE except when transferred to the successor of that part of the Recipient's business to which the invention pertains.

(2) The Recipient 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 minimum rights acquired by the Government similar to paragraph (c) of this clause. Such request must be made in

writing to the Patent Counsel as part of the disclosure required by subparagraph (e)(2) of this clause, with a copy to the DOE Contracting Officer. DOE approval, if given, will be based on a determination that this would best serve the national interest.

(e) Invention Identification, Disclosures, and Reports

(1) The Recipient shall establish and maintain active and effective procedures to assure that subject inventions are promptly identified and disclosed to Recipient personnel responsible for patent matters within 6 months of conception and/or first actual reduction to practice, whichever occurs first in the performance of work under this agreement. 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 Recipient shall furnish the Contracting Officer a description of such procedures for evaluation and for determination as to their effectiveness.

(2) The Recipient shall disclose each subject invention to the DOE Patent Counsel with a copy to the Contracting Officer within 2 months after the inventor discloses it in writing to Recipient personnel responsible for patent matters or, if earlier, within 6 months after the Recipient 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 Recipient. The disclosure to DOE shall be in the form of a written report and shall identify the agreement 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 Recipient shall promptly notify Patent Counsel of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Recipient. The report should also include any request for a greater rights determination in accordance with subparagraph (b)(2) of this clause. 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 Recipient contends in writing at the time the invention is disclosed that it was not so made.

(3) The Recipient shall furnish the Contracting Officer a final report, within 3 months after completion of the work listing all subject inventions or containing a statement that there were no such inventions, and listing all subawards/contracts at any tier containing a patent rights clause or containing a statement that there were no such subawards/contracts.

(4) The Recipient agrees to require, by written agreement, its employees, other than clerical and non-technical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Recipient each subject invention made under subaward/contract in order that the Recipient can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph (e)(2) of this clause.

(1) The Recipient 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 clause.

(f) Examination of Records Relating to Inventions

(1) The Contracting Officer or any authorized representative shall, until 3 years after final payment under this agreement, have the right to examine any books (including laboratory notebooks), records, and documents of the Recipient relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this agreement to determine whether—

(i) Any such inventions are subject inventions;

(ii) The Recipient has established and maintains the procedures required by subparagraphs (e)(1) and (4) of this clause;

(iii) The Recipient and its inventors have complied with the procedures.

(2) If the Contracting Officer learns of an unreported Recipient invention that the Contracting Officer believes may be a subject invention, the Recipient may be required to disclose the invention to DOE for a determination of ownership rights.

(3) Any examination of records under this paragraph will be subject to appropriate conditions to protect the confidentiality of the information involved.

(g) Subaward/Contract

(1) The Recipient shall include the clause PATENT RIGHTS (SMALL BUSINESS FIRMS AND NONPROFIT ORGANIZATIONS) (suitably modified to identify the parties) in all subawards/contracts, 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 subaward/contract is subject to an Exceptional Circumstances Determination by DOE. In all other subawards/contracts, regardless of tier, for experimental, developmental, demonstration, or research work, the Recipient shall include this clause (suitably modified to identify the parties), or an alternate clause as directed by the Contracting Officer. The Recipient shall not, as part of the consideration for awarding the subaward/contract, obtain rights in the subrecipient's/contractor's subject inventions.

(2) In the event of a refusal by a prospective subrecipient/contractor to accept such a clause the Recipient:

(i) Shall promptly submit a written notice to the Contracting Officer setting forth the subrecipient/contractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Shall not proceed with such subaward/contract without the written authorization of the Contracting Officer.

(3) In the case of subawards/contracts at any tier, DOE, the subrecipient/contractor, and Recipient agree that the mutual obligations of the parties created by this clause constitute a contract between the subrecipient/contractor and DOE with respect to those matters covered by this clause.

(4) The Recipient shall promptly notify the Contracting Officer in writing upon the award of any subaward/contract at any tier containing a patent rights clause by identifying the subrecipient/contractor, the applicable patent rights clause, the work to be performed under the subaward/contract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Recipient shall furnish a copy of such subaward/contract, and, no more frequently than annually, a listing of the subawards/contracts that have been awarded.

(5) The Recipient shall identify all subject inventions of a subrecipient/contractor of which it acquires knowledge in the performance of this agreement and shall notify the Patent Counsel, with a copy to the contracting officer, promptly upon identification of the inventions.

(h) Atomic Energy

(1) 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 agreement.

(2) Except as otherwise authorized in writing by the Contracting Officer, the Recipient will obtain patent agreements to effectuate the provisions of subparagraph (h)(1) of this clause from all persons who perform any part of the work under this agreement, except nontechnical personnel, such as clerical employees and manual laborers.

(i) Publication

It is recognized that during the course of the work under this agreement, the Recipient 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 agreement. In order that public disclosure of such information will not adversely affect the patent interests of DOE or the Recipient, patent approval for release of publication shall be secured from Patent Counsel prior to any such release or publication.

(j) Forfeiture of Rights in Unreported Subject Inventions

(1) The Recipient 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 Recipient fails to report to Patent Counsel within six months after the time the Recipient:

- (i) Files or causes to be filed a United States or foreign patent application thereon; or
- (ii) Submits the final report required by subparagraph (e)(3) of this clause, whichever is later.

(2) However, the Recipient shall not forfeit rights in a subject invention if, within the time specified in subparagraph (e)(2) of this clause, the Recipient:

(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 the agreement and delivers the decision to Patent Counsel, with a copy to the Contracting Officer, or

(ii) Contending that the invention is not a subject invention, the Recipient nevertheless discloses the invention and all facts pertinent to this contention to the Patent Counsel, with a copy of the Contracting Officer; or

(iii) Establishes that the failure to disclose did not result from the Recipient's fault or negligence.

(3) 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 clause of this agreement), the Recipient 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 (j) shall be in addition to and shall not supersede other rights and remedies that the Government may have with respect to subject inventions.

(End of clause)

G-3 Rights in Data—General

(a) Definitions

Computer Data Bases, as used in this clause, means 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.

Computer software, as used in this clause, means (i) computer programs which 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 (ii) 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.

Data, as used in this clause, means 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 information incidental to administration, such as financial, administrative, cost or pricing, or management information.

Form, fit, and function data, as used in this clause, means 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.

Limited rights, as used in this clause, means the rights of the Government in limited rights data as set forth in the Limited Rights Notice of subparagraph (g)(2) if included in this clause.

Limited rights data, as used in this clause, means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

Restricted computer software, as used in this clause, means 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 such computer software.

Restricted rights, as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice of subparagraph (g)(3) if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract, including minor modifications of such computer software.

Technical data, as used in this clause, means data (other than computer software) which 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.

Unlimited rights, as used in this clause, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

(b) Allocations of Rights

(1) Except as provided in paragraph (c) of this clause regarding copyright, the Government shall have unlimited rights in—

- (i) Data first produced in the performance of this agreement;
- (ii) Form, fit, and function data delivered under this agreement;
- (iii) Data delivered under this agreement (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 agreement; and
- (iv) All other data delivered under this agreement unless provided otherwise for limited rights data or restricted computer software in accordance with paragraph (g) of this clause.

(2) The Recipient shall have the right to—

- (i) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Recipient in the performance of this agreement, unless provided otherwise in paragraph (d) of this clause;
- (ii) Protect from unauthorized disclosure and use those data which are limited rights data or restricted computer software to the extent provided in paragraph (g) of this clause;
- (iii) Substantiate use of, add or correct limited rights, restricted rights, or copyright notices and to take over appropriate action, in accordance with paragraphs (e) and (f) of this clause; and
- (iv) Establish claim to copyright subsisting in data first produced in the performance of this agreement to the extent provided in subparagraph (c)(1) of this clause.

(c) Copyright

(1) Data first produced in the performance of this agreement. Unless provided otherwise in paragraph (d) of this clause, the Recipient may establish, without prior approval of the Contracting Officer, claim to copyright subsisting in data first produced in the performance of this agreement. When claim to copyright is made, the Recipient shall affix the applicable copyright notices of 17 U.S.C. 401 or 402 and acknowledgement of Government sponsorship (including agreement 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 such copyrighted data, including computer software, the Recipient 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.

(2) Data not first produced in the performance of this agreement. The Recipient shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this agreement any data not first produced in the performance of this agreement and which contains the copyright notice of 17 U.S.C. 401 or 402, unless the Recipient identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph (c)(1) of this clause; provided, however, that if such data are computer software the Government shall acquire a copyright license as set forth in subparagraph (g)(3) of this clause if included in this agreement or as otherwise may be provided in a collateral agreement incorporated in or made part of this agreement.

(3) Removal of copyright notices. The Government agrees not to remove any copyright notices placed on data pursuant to this paragraph (c), and to include such notices on all reproductions of the data.

(d) Release, Publication and Use of Data

(1) The Recipient shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Recipient in the performance of this agreement, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided in this paragraph of this clause or expressly set forth in this agreement.

(2) The Recipient agrees that to the extent it receives or is given access to data necessary for the performance of this award, which contain restrictive markings, the Recipient shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the Contracting Officer.

(e) Unauthorized Marking of Data

(1) Notwithstanding any other provisions of this agreement concerning inspection or acceptance, if any data delivered under this agreement are marked with the notices specified in subparagraph (g)(2) or (g)(3) of this clause and use of such is not authorized by this clause, or if such data bears any other restrictive or limiting markings not authorized by this agreement, the Contracting Officer may at any time either return the data to the Recipient or cancel or ignore the markings. However, the following procedures shall apply prior to canceling or ignoring the markings.

(i) The Contracting Officer shall make written inquiry to the Recipient affording the Recipient 30 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;

(ii) If the Recipient 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 Contracting Officer for good cause shown), the Government 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.

(iii) If the Recipient provides written justification to substantiate the propriety of the markings within the period set in subparagraph (e)(1)(i) of this clause, the Contracting Officer shall consider such written justification and determine whether or not the markings are to be cancelled or ignored. If the Contracting Officer determines that the markings are authorized, the Recipient shall be so notified in writing. If the Contracting Officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the Contracting Officer shall furnish the Recipient a written determination, which determination shall become the final agency decision regarding the appropriateness of the markings unless the Recipient files suit in a court of competent jurisdiction within 90 days of receipt of the Contracting Officer's decision. The Government shall continue to abide by the markings under this subparagraph (e)(1)(iii) until final resolution of the matter either by the Contracting Officer's determination becoming final (in which instance the Government 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.

(2) The time limits in the procedures set forth in subparagraph (e)(1) of this clause 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.

(f) Omitted or Incorrect Markings

(1) Data delivered to the Government without either the limited rights or restricted rights notice as authorized by paragraph (g) of this clause, or the copyright notice required by paragraph (c) of this clause, shall be deemed to have been furnished with unlimited rights, and the Government assumes 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 Recipient may request, within 6 months (or a longer time approved by the Contracting Officer for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Recipient's expense, and the Contracting Officer may agree to do so if the Recipient:

- (i) Identifies the data to which the omitted notice is to be applied;
- (ii) Demonstrates that the omission of the notice was inadvertent;
- (iii) Establishes that the use of the proposed notice is authorized; and
- (iv) Acknowledges that the Government has 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.

(2) The Contracting Officer may also:

- (i) Permit correction at the Recipient's expense of incorrect notices if the Recipient identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized, or

- (ii) Correct any incorrect notices.

(g) Protection of Limited Rights Data and Restricted Computer Software

When data other than that listed in subparagraphs (b)(1)(i), (ii), and (iii) of this clause are specified to be delivered under this agreement and qualify as either limited rights data or restricted computer software, if the Recipient desires to continue protection of such data, the Recipient shall withhold such data and not furnish them to the Government under this agreement. As a condition to this withholding, the Recipient 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 Government are to be treated as limited rights data and not restricted computer software.

(h) Subaward/Contract

The Recipient has the responsibility to obtain from its subrecipients/contractors all data and rights therein necessary to fulfill the Recipient's obligations to the Government under this agreement. If a subrecipient/contractor refuses to accept terms affording the Government such rights, the Recipient shall promptly bring such refusal to the attention of the Contracting Officer and not proceed with the subaward/contract award without further authorization.

(i) Additional Data Requirements

In addition to the data specified elsewhere in this agreement to be delivered, the Contracting Officer may, at anytime during agreement performance or within a period of 3 years after acceptance of all items to be delivered under this agreement, order any data first produced or specifically used in the performance of this agreement. This clause is applicable to all data ordered under this subparagraph. Nothing contained in this subparagraph shall require the Recipient to deliver any data the withholding of which is authorized by this clause, or data that are specifically identified in this agreement as not subject to this clause. When data are to be delivered under this subparagraph, the Recipient will be compensated for converting the data into the prescribed form, for reproduction, and for delivery.

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

As prescribed in 600.325(d)(1), the following Alternate I and/or II may be inserted in the clause in the award instrument.

Alternate I:

- (g)(2) Notwithstanding subparagraph (g)(1) of this clause, the agreement may identify and specify the delivery of limited rights data, or the Contracting Officer 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 Recipient may affix the following "Limited Rights Notice" to the data and the Government will thereafter treat the data, in accordance with such Notice:

LIMITED RIGHTS NOTICE

(a) These data are submitted with limited rights under Government agreement No. ____ (and subaward/contract No. ____, if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Recipient, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose these data outside the Government for the following purposes, if any, provided that the Government makes such disclosure subject to prohibition against further use and disclosure:

(1) Use (except for manufacture) by Federal support services contractors within the scope of their contracts;

(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 to other contractors participating in the Government's program of which this Recipient is a part for information or use (except for manufacture) in connection with the work performed under their awards 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; and

(5) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government. This Notice shall be marked on any reproduction of this data in whole or in part.

(b) This Notice shall be marked on any reproduction of these data, in whole or in part.

(End of notice)

Alternate II:

(g)(3)(i) Notwithstanding subparagraph (g)(1) of this clause, the agreement may identify and specify the delivery of restricted computer software, or the Contracting Officer may require by written request the delivery of restricted computer software that has been withheld or would otherwise be withholdable. If delivery of such computer software is so required, the Recipient may affix the following "Restricted Rights Notice" to the computer software and the Government will thereafter treat the computer software, subject to paragraphs (e) and (f) of this clause, in accordance with the Notice.

RESTRICTED RIGHTS NOTICE

(a) This computer software is submitted with restricted rights under Government Agreement No. ____ (and subaward/contract ____, if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this Notice or as otherwise expressly stated in the agreement.

(b) This computer software may be—

(1) Used or copies for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used or copied for use in a backup computer if any computer for which it was acquired is inoperative;

(3) Reproduced for safekeeping (archives) or backup purposes;

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