



Terms and Conditions and Flowdown Provisions for the Acquisition of Non-Commercial Items Funded Under U.S. Government Department of Energy Financial Assistance Awards

ARTICLE I – SPECIAL PROVISIONS	2
1. Definitions	2
2. Acceptance	2
3. Independent Contractor	2
4. Packing and Shipment	2
5. Inspection	3
6. Quality Control	3
7. Delivery	3
8. Title and Risk of Loss	3
9. Warranty	3
10. Special Tools	4
11. Buyer-Furnished Property and Material	4
12. Payment	4
13. Diminished Manufacturing Sources	4
14. Writing Required	4
15. Records	4
16. Proprietary Information	4
17. Advertising, Use of Name	5
18. Compliance with Laws	5
19. Indemnity and Precautions	5
20. Insurance	6
21. Taxes	7
22. Export Controls	8
23. Assignments and Subcontracts	8
24. Communications	9
25. Conflict of Interest	9
26. Disputes	9
27. Applicable Laws	11
28. Non Waiver	11
29. Order of Precedence	11
30. Notice	11
31. Headings	11
32. Severability	11
33. Entire Agreement	11
ARTICLE II – GENERAL PROVISIONS	12

ARTICLE I – SPECIAL PROVISIONS

1. DEFINITIONS. As used throughout this Article I – Special Provisions of these terms and conditions, the following terms shall have the meanings set forth below.

“Buyer” means GENERAL ATOMICS or GA.

“Buyer’s Authorized Representative” means an authorized representative of Buyer’s Purchasing Department.

“CFR” means Code of Federal Regulations.

“DEAR” means Department of Energy Acquisition Regulation, issued as Chapter 9 of Title 48, Code of Federal Regulations.

“FAR” means the Federal Acquisition Regulation, issued as Chapter 1 of Title 48, Code of Federal Regulations.

“Government” means the Government of the United States of America or any department, agency or instrumentality thereof, and any successor thereof.

“Government Dispute” means a dispute between the Parties which implicates the conduct and potential liability of the Government.

“Order” means the purchase order or subcontract issued by Buyer to Seller to which these terms and conditions are affixed.

“Party” means each of Buyer and Seller.

“Prime Contract” means the contract between Buyer and the Government.

“Seller” means the person, firm, or corporation trust, joint venture, association, company, partnership, limited liability company or government (including any agency or political subdivision thereof) executing the Order with Buyer and who will furnish the supplies or services provided for in the Order.

“Special Tools” has the meaning set forth in Clause 10.

Except as otherwise provided in these terms and conditions, the term “subcontract” includes purchase orders issued by Seller under the Order, but does not include Seller’s employment relationships.

All references to “work,” “works,” “supplies,” “articles,” “products,” or “items” shall include “services,” if the Order, wholly or in part, provides for the furnishing of services.

2. ACCEPTANCE. Any one of the following methods will constitute acceptance by Seller of the Order (including these terms and conditions and any additional terms and conditions listed on the Order, all of which are

hereby deemed to be part of the Order and incorporated into the Order by reference):

- (a) acknowledgement in writing;
- (b) commencement of performance by Seller; or
- (c) delivery in whole or in part of the items or services called for under the Order.

Seller’s acceptance of the Order creates a binding contract between Buyer and Seller, which shall be governed by the provisions of the Order. No condition stated by Seller in its acknowledgement of the Order, quotation or any other document provided by Seller shall be binding upon Buyer if in conflict or inconsistent with, or in addition to the terms and conditions of the Order, unless expressly accepted in writing by Buyer’s Authorized Representative. The rights and obligations described in these terms and conditions shall survive completion and final payment of the Order.

3. INDEPENDENT CONTRACTOR. Seller is, and shall be deemed to be, an independent contractor and not an agent or employee of Buyer either expressly or impliedly. The Order shall not constitute, create, give effect to, or imply a joint venture, pooling arrangement, partnership, formal business organization or any type of permanent relationship of any kind beyond the specific purposes stated in the Order. Nothing in the Order shall grant to either Party the right to make commitments of any kind for, or on behalf of, the other Party.

Buyer will rely on Seller’s expertise and management of each of Seller’s employees to perform the work or provide the services under the Order. Seller represents and warrants that: (a) Seller will exclusively control and direct the work of its employees, who shall be free from the control and direction of Buyer in connection with the performance of the work or provision of the services; and (b) Seller is customarily engaged in an independently established trade, occupation, or business of the same nature as the work to be performed or the services to be provided under the Order.

4. 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, 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 showing materials. Buyer’s count or weight shall be final and conclusive on shipments not accompanied by packing lists.

- 5. INSPECTION.** Buyer shall be permitted to inspect Seller's manufacture, fabrication and testing facilities. For these purposes, and upon reasonable advance notice, Seller shall provide access to Seller's facilities to enable Buyer, its representatives, and/or Buyer's cognizant government customer, 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 the Order.

Any work or item which fails to meet the Order requirements may be rejected. If delivered to Buyer's destination, rejected work or items shall be removed promptly by Seller at Seller's expense.

- 6. QUALITY CONTROL.** Seller shall establish and maintain a quality management system in accordance with ISO 9001:2015 (or a more current revision) for the goods or services purchased under the Order. Seller shall permit Buyer to review procedures, practices, processes and related documents to determine such acceptability.

Seller shall have a continuing obligation to promptly notify Buyer of any known or reasonably suspected violation of or deviation from Seller's approved inspection/quality control system and to advise Buyer of the quantity and specific identity of any goods delivered to Buyer that may be affected.

- 7. DELIVERY. TIME OF DELIVERY UNDER THE ORDER IS OF THE ESSENCE.** If Seller fails to adhere to the delivery schedule set forth in the Order, 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 affects any other rights and remedies available to Buyer related to such delivery.

Unless otherwise noted on the Order, the date of delivery shall mean the date the item is to be delivered at Buyer's facility or, if the Order is for services, the date the services (or phased thereof) are to be completed.

Buyer's needs are for the quantities specified within the Order. Items delivered in excess of the quantities ordered result in substantial administrative expense to Buyer. Therefore, articles delivered under the Order in excess of the quantity specified may be retained by Buyer at no

additional cost. Buyer is under no obligation to notify Seller of any over shipments.

In the event of any anticipated or actual delay in delivery, Seller shall promptly (i) notify Buyer's Authorized Representative in writing of the reasons for the delay and the actions being taken to overcome or minimize the delay, and (ii) provide Buyer with a written recovery schedule.

- 8. TITLE AND RISK OF LOSS.** Title shall pass to Buyer at the specified destination. Acceptance and passage of title shall not impair the right of Buyer to inspect and reject any item.

Seller shall assume and bear the risk of any loss of, or damage to, the supplies covered hereby until delivered at the specified destination.

Seller shall bear all risks as the rejected items after notice of rejection.

- 9. WARRANTY.** Notwithstanding any inspection and acceptance by Buyer of goods furnished under the Order, all goods furnished under the Order will be free from defects in material or workmanship and will conform to all requirements of the Order.

Seller warrants that goods 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 the Order. If goods are not ordered to such specifications, Seller warrants that they will be fit for the purpose intended.

All goods 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 (1) year after delivery and acceptance by Buyer, or the manufacturer's warranty period, whichever is longer.

All such warranties and guarantees, if any, shall survive inspection or test, acceptance, and payment. All statutory warranties shall apply and Buyer shall additionally have the benefit of any longer manufacturers' warranty periods applicable thereto. Warranties shall run to Buyer, its successors, assigns, and customers.

Seller further warrants that all work and services furnished hereunder shall comply with the requirements of the Order and shall conform to the highest industry standards applicable to them, and that Seller will comply with all applicable laws concerning the provision of work and services, including as related to any workers retained by Seller to provide the services under the Order.

10. SPECIAL TOOLS. If prices are stated separately for dies, tools and/or patterns acquired by Seller for the purpose of filling the Order (each a “Special Tool”), such Special Tool shall be properly identified by the Seller as such. Title shall pass to Buyer upon payment for the Special Tool.

If Buyer provides a Special Tool to Seller for the manufacture of supplies under an Order, then Seller will hold such Special Tool in good condition, normal wear and tear excepted, and hand over such Special Tool to Buyer as applicable, at the completion of the Order unless Buyer directs Seller in writing to dispose of such Special Tool.

11. BUYER-FURNISHED PROPERTY AND MATERIAL. Property and material furnished by Buyer to Seller for use in performance of the Order is to be held by Seller for the Parties’ mutual benefit, and if such property and material is damaged or not satisfactorily accounted for, Seller will pay for all such property and material. Seller shall not use such property or material other than in the performance of the Order.

Seller shall properly mark, maintain an inventory of, and keep segregated or identifiable all of Buyer’s property and material. Seller shall secure and maintain, for the benefit of Buyer, insurance against any loss or damage of all property and material furnished by Buyer to Seller for use in performance of the Order. Coverage will be provided on an all risk basis and value will be at replacement cost.

12. PAYMENT. Unless otherwise provided in the Order, payment terms are net thirty (30) calendar days from either the date of Buyer’s receipt of an acceptable invoice or Buyer’s acceptance of the goods and supporting documentation at destination, whichever occurs last. Seller shall issue a separate invoice for each shipment to the address specified in the Order, which invoice shall include Buyer’s Order number and line item number for each item shipped.

Buyer shall be entitled at all times to set-off any amount owing at any time from Seller to Buyer (or any of its affiliated entities) against any amount payable by Buyer (or any of its affiliated entities) against any amount payable by Buyer (or any of its affiliated entities) to Seller. Seller’s acceptance of payment from Buyer shall constitute a waiver of all claims by Seller against Buyer with respect to the work, items or services to which such payment applies.

13. DIMINISHED MANUFACTURING SOURCES. The Parties recognize that component suppliers at times discontinue or reduce manufacture of components. In the event a component is no longer to be stocked or manufactured as part of Seller’s regular product line, Seller shall notify Buyer’s Authorized Representative in writing of any pending future action as soon as Seller has made such decision and no later than one hundred eighty (180) days in advance, whichever comes first.

14. WRITING REQUIRED.

- (a) No notice, order, direction, determination, requirement, consent, approval, or ratification under the Order shall be of any effect unless provided in writing.
- (b) No oral statement of any person whosoever shall in any manner or degree, modify or otherwise affect the terms of the Order.
- (c) No extra charge of any kind, or change in the price or schedule of the Order will be allowed unless specifically agreed to in writing by Buyer’s Authorized Representative.

15. RECORDS. Seller agrees that its manufacturing facilities, or such part of any manufacturing plant as may be engaged in the performance of the Order, and its related books, documents, papers and records shall at all reasonable times be subject to examination and audit by any person designated by Buyer. Such books and records shall be maintained by Seller for a period of five (5) years after final payment is made under the Order, unless Seller is obligated to keep such records for a longer period of time by law or by agreement with Buyer.

16. PROPRIETARY INFORMATION.

- (a) Each party agrees to hold in confidence all drawings, diagrams, specifications and other information furnished by the other party and identified as confidential or proprietary (“Confidential Information”) and to use such Confidential Information only for the purpose furnished. Each party further agrees that no party shall reproduce, distribute or disclose the other party’s Confidential Information to a third party without first obtaining the other party’s written consent; provided, however, notwithstanding anything to the contrary in the Non-Disclosure Agreement (“NDA”) (as applicable and as defined below), Buyer is authorized to reproduce, distribute and disclose Seller’s Confidential Information to Buyer’s customers (or prospective customers), subcontractors, suppliers and other third parties in connection with using any of the work or other deliverables furnished under this Order. Each party shall take

all reasonable measures to protect the other party's Confidential Information, which measures shall be at least equal to those with which such party protects its own confidential or proprietary information. All proprietary rights embodied in designs, tools, patterns, drawings, information data, and equipment supplied by Buyer under the Order are reserved to Buyer, and the use by Seller is restricted to the work to be performed under the Order. 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, including all digital and hard copies thereof, and furnished to Seller in connection with the Order.

- (b) Notwithstanding the foregoing subclause 16(a), neither party shall have an obligation with respect to any Confidential Information which the party receiving such Confidential Information can demonstrate:
- (i) was in such party's rightful possession free of any obligation of confidence prior to its first receipt from other party,
 - (ii) is publicly known through no fault of the receiving party,
 - (iii) is obtained from a third person who had a right to disclose it, or
 - (iv) was independently developed without access to any confidential or proprietary information of the other party.
- (c) Seller grants Buyer an irrevocable, non-exclusive, royalty free, and worldwide license to utilize any Seller deliverables under the Order, including any technical data or computer software provided to Buyer by Seller for Buyer's use in performing its obligations under its higher-tier contract with its customer, including but not limited to the right to make modifications, create derivative works, integrate into Buyer's deliverables or to deliver to Buyer's customers, and in general to use Seller's deliverables, technical data and computer software to work with Buyer's other contractors in performing Buyer's obligations under its higher-tier contract. Nothing herein conveys any ownership interest in Seller's intellectual property to Buyer.
- (d) In the absence of further written agreement duly signed by both Parties to the Order, such as an NDA, 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 proprietary, provided however; that data, designs, ideas, or other information of Seller asserted to be proprietary by Seller that is necessary for the performance of the Order shall be disclosed and protected in accordance with the applicable CFR contained in Article II of these terms and conditions; provided, however, that Clause 26 of these terms and conditions shall govern any Disputes.

- 17. ADVERTISING, USE OF NAME.** 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 goods or services provided for in the Order. Seller agrees that it shall not use Buyer's name or logo, nor any adaptation or variation thereof, in any manner whatsoever (including, but not limited to, website(s), press releases, reference lists, or similar public announcements concerning the Order or projects contemplated by the Order), without Buyer's prior written consent in each instance.

- 18. COMPLIANCE WITH LAWS.** Seller understands and acknowledges that Buyer is committed to compliance with all domestic and foreign laws affecting its business and operations. Seller agrees that in performing its duties under the Order, Seller will conduct itself in strict adherence to all applicable laws, rules and regulations.

19. INDEMNITY AND PRECAUTIONS.

- (a) Seller agrees to defend, indemnify, and hold harmless Buyer against any and all loss, liability, damage, claim, deficiency, action, judgment, interest, penalty, fine, or award, including costs and expenses, for arising out of or resulting from:
- (i) any asserted trademark, copyright, or patent infringement arising from the performance of any work, services or provision of any items or supplies by Seller, or the manufacture, use, distribution, or sale of any articles furnished to Buyer under the 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;
 - (ii) any breach of any warranty of Seller under the Order, including these terms and conditions and any additional contract flowdown provisions that are referenced on or attached to the Order;
 - (iii) any damages incurred by Buyer or any third party as a result of or arising out of any work, services or provision of any items or supplies, or the man-

ufacture, use distribution or sale of articles furnished by Seller under the Order. including in connection with the filing of any mechanics, materialman's or design lien, and

- (iv) any breach by any personnel of Seller of any agreement between Seller and its personnel required under any of the Additional Terms, or of any other document to which Buyer and its affiliates are third-party beneficiaries, including any unauthorized use or disclosure of Buyer's Confidential Information by any such personnel.
- (b) Seller agrees to accept a reduction in the profit or fee of the Order equal to any reduction in the profit or fee of the Prime Contract and to indemnify Buyer for all of Buyer's costs (both direct and indirect) which are incurred as a result of conduct by the Seller or Seller's lower-tier subcontractors in violation of "Restrictions on Obtaining and Disclosing Certain Information" (41 USC 21) (formerly known as the "Procurement Integrity Act"), as implemented in FAR Part 3.104-2.
- (c) Seller agrees to indemnify and save harmless and defend Buyer from and against any and all fines, penalties, offsets, claims, demands, actions, debts, liabilities, judgments, costs and attorney's fees, costs and profit disallowed or reduced by Buyer's customer, arising out of claims on account of, or in any manner predicated upon:
 - (i) submission by Seller or its subcontractors or suppliers at any tier of any alleged or confirmed false statement, false claim, defective pricing data, or unallowable costs;
 - (ii) the alleged or actual violation by Seller or its employees, agents, or suppliers at any tier of any applicable statute, regulation, or other law, including but not limited to, as applicable, the Cost Accounting Standards, the Truth in Negotiations Act, the Procurement Integrity Act, and the Anti-Kickback Act of 1986; and
 - (iii) any breach by Seller of any contractual requirement, including but not limited to, as applicable, FAR 52.203-13, "Code of Business Ethics and Conduct," FAR 52.204-25, "Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment," FAR 52.222-4, "Contract Work Hours and Safety Standards-Overtime

Compensation," and 2 CFR Part 22.216, "Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment."

- (d) If Seller's work under the Order involves operations by Seller on Buyer's premises or at the site of Buyer's customer, 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 19.

Further, Seller shall comply with all the rules and regulations established by Buyer or Buyer's customer, as applicable, for access to and activities in and around premises controlled by Buyer or Buyer's customer. While performing under the Order, Seller shall comply with Buyer's policies, practices and rules regarding security and protection of proprietary information and trade secrets.

20. INSURANCE.

- (a) Seller will defend Buyer at Seller's expense from any suit or action, criminal or civil, arising out of Seller's performance of the Order, or that of its officers, directors, employees or agents. Further, Seller shall determine at its own risk the amounts and kinds of insurance sufficient to insure its obligations and liabilities hereunder, and shall procure and maintain all such insurance during the term of the Order and at its expense. Without prejudice to the foregoing, such insurance shall include at a minimum the following (except as otherwise specified in the Order):
 - (i) Automobile liability insurance protecting Seller from automobile bodily injury, and property damage liability with limits of at least \$1,000,000 per person and \$1,000,000 per occurrence for bodily injury, and \$1,000,000 per occurrence for property damage;
 - (ii) Commercial general liability insurance policy which includes broad form contractual, property damage, product/completed operations, personal injury, premises operations, independent contractors and subcontractors, fire legal liability and professional liability coverage with contractual liability endorsement with limits no lower than \$1,000,000 per occurrence and \$2,000,000 aggregate for personal injury, bodily injury and property damage.

- (iii) If the Order is for engineering or other professional service, professional liability coverage with a limit no less than \$1,000,000 per claim. and
- (iv) 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.

For (i) and (ii) above, such policies shall name Buyer as additional insured when seller performs a service on Buyer's premises or the premises of a third party at Buyer's requested, or as otherwise requested by Buyer.

- (b) 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, 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 coverage. Seller's purchase of appropriate insurance coverage or the furnishing of certificates of insurance shall not release Seller of its obligations or liabilities under the Order.
- (c) If Seller fails to maintain such insurance, Buyer shall have the option, but not the obligation, to arrange for such insurance at Seller's sole cost and expense and without any responsibility on Buyer's part for obtaining the insurance, the solvency of the insurance provider, the adequacy of the coverage, or the collection of claims. In the event of Seller's breach of this provision, Buyer shall have the right to cancel the undelivered portion of any work, goods or services covered by the Order and shall not be required to make further payments except for conforming work, goods delivered or services rendered prior to cancellation.
- (d) If Seller's work under the 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, to comply with Buyer's workplace safety procedures and protocols, 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 20.

21. TAXES.

- (a) Except as may otherwise be provided herein, Seller's price shall not be adjusted by Seller for, and Seller will bear, all timely and applicable Federal, State and local taxes, duties, tariffs, assessments and other charges (hereinafter referred to as the "Taxes" collectively or the "Tax" individually) now or hereafter properly imposed on Seller in respect to the Order or transaction.
- (b) Seller agrees to notify the Buyer's Authorized Representative promptly of any proposed or contemplated assessment of additional Taxes Seller believes must be borne by the Buyer as the result of an audit or other tax review by a governmental agency, prior to payment of the proposed additional Taxes. Any obligation the Buyer may have to pay the additional Tax is subject to notification permitting the Buyer to review the assessment prior to payment.
- (c) Seller further agrees to take all steps necessary (as requested by the Buyer, on account of the Buyer, and in cooperation with the Buyer) to secure the refund of any Taxes, interest, and penalties borne by the Buyer in connection with the Order or transaction, when such Taxes paid by the Buyer in whole or in part are subsequently deemed inapplicable.
- (d) Buyer and Seller will cooperate in good faith to enable each party to determine its own tax liability and to minimize its liability to the extent reasonably and legally permissible. Each party will provide and make available to the other any exemption certificates (or similar evidence of exemption), any applicable forms, information regarding the Order or transaction, or other information reasonably requested by the other party. Seller will reimburse Buyer for any deficiency relating to applicable Taxes (including any applicable penalties or interest) that are now or hereafter properly imposed on Seller in respect to the Order or transaction.

22. EXPORT CONTROLS.

- (a) The parties acknowledge that information exchanged pursuant to the Order may be subject to U.S. export control laws and regulations. Each party shall comply with all applicable U.S. export control laws and regulations including, but not limited to, the Arms Export Control Act (22 USC 2751- 2794), and the International Traffic in Arms Regulation (ITAR) (22 CFR 120 et seq.), and the Export Administration Act (50 USC app. 2401-2420), including the Export Administration Regulations (EAR) (15 CFR 730-774), and the export control regulations propounded by the United States Department of Energy at 10 CFR Part 810 (collectively hereinafter referred to as "Export

Regulations”), and including the requirement for obtaining any export license, agreement or applicable exemption or exception, if applicable. Without limiting the foregoing, Seller agrees that it will not transfer any export controlled item, data, or services, to include transfer to foreign persons employed by or associated with, or under contract to Seller’s sub-tier supplier or subcontractor, without the authority of an export license, agreement, or applicable exemption or exception.

Seller agrees to notify Buyer’s Authorized Representative if any deliverable under the Order is restricted by export control laws or regulations, unless such export-controlled item originates with Buyer and is incorporated into the deliverable under the Order.

- (b) Seller shall immediately notify Buyer’s Authorized Representative if Seller is, or becomes, listed in any Denied Parties List or if Seller’s export privileges are otherwise denied, suspended or revoked in whole or in part by the Government.
- (c) If Seller is engaged in the business of either exporting from the United States or manufacturing within the United States (whether exporting or not) defense articles or furnishing defense services, Seller represents that it is registered with the Office of Defense Trade Controls, as required by the ITAR, and it maintains an effective export/import compliance program in accordance with the ITAR.
- (d) Where Seller is a signatory under a Buyer export license or export agreement (e.g., TAA, MLA), Seller shall provide prompt notification to Buyer’s Authorized Representative in the event of changed circumstances including, but not limited to, ineligibility, a known violation or potential violation of the ITAR, and the known initiation or existence of a Government investigation, that in Seller’s reasonable judgment could affect the Seller’s performance under the Order.
- (e) In the event that any required approvals, clearances, and/or export or import authorizations cannot be obtained or maintained (or there is an extraordinary, significant delay in obtaining them), Seller shall immediately provide written notification to Buyer’s Authorized Representative.

- (f) Seller will ensure that all U.S. federal government export control requirements are conveyed to all sub-tier suppliers or subcontracts, as applicable.

23. ASSIGNMENTS AND SUBCONTRACTS.

- (a) Seller will not assign or transfer the Order, in whole or in part, nor any payments due or to become due hereunder, without the prior written consent of Buyer. Any purported assignment or delegation in violation of this clause shall be null and void. For purposes of this clause 23, a change of control of Seller is construed as an assignment requiring Buyer’s written consent. No assignment or delegation shall relieve Seller of any of its obligations under the Order.

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 or any of its affiliated entities.

- (b) Seller agrees to obtain Buyer’s approval before subcontracting the Order or any substantial portion thereof; provided that this limitation shall not apply to the purchase of standard commercial supplies or raw material. Seller understands, acknowledges and agrees that its use of subcontractors shall not in any way alter its obligations, representations and warranties made to Buyer, including its obligations to indemnify Buyer as set forth in clause 19 herein, or in any additional contract flow-down provisions referenced on or attached to the Order.

24. COMMUNICATIONS. Buyer shall be solely responsible for all liaison and coordination with Buyer’s customer, including the Government, as it affects the Prime Contract, the Order, and any other related contract or agreement. Seller shall not communicate with Buyer’s customer with respect to any dispute between Seller and Buyer.

25. CONFLICT OF INTEREST. Seller shall exercise reasonable care and diligence during the term of the Order to prevent any action or condition which could result in the appearance of, or an actual, conflict of interest with those of Buyer. This obligation shall include the activities of the employees or agents of Seller and their family members in their interactions with the employees of Buyer and their family members, or Buyer’s customer representatives, vendors, or subcontractors.

Seller warrants that Seller’s performance of work under the Order will not give rise to an organizational conflict of interest, as defined in FAR subpart 9.5 and DEAR Subpart

909.5. If Seller identifies an actual or potential organizational conflict of interest during the performance of the Order, Seller will immediately make full disclosure in writing to the Buyer.

During the term of the Order, Seller agrees to not enter into contracts with the Government either as a prime or as a subcontractor that will give rise to an organizational conflict of interest as a result of Seller's performance of work under the Order. A breach of this clause 25 will authorize Buyer to terminate the Order for default.

26. DISPUTES.

Any dispute, claim or controversy, other than a Government dispute, arising out of or in connection with this Order, the Non-Disclosure Agreement ("NDA"), and/or the relationship of Buyer and Seller (each, a "Dispute") shall be subject to the procedures described in this clause 26. Government disputes are governed by paragraph c. below

(a) If a Dispute arises, either party may provide the other party with written notice of such Dispute (the effective date of such notice, the "Dispute Notice Date"). During the thirty (30) days following the Dispute Notice Date, at least one (1) procurement or contracts senior management representative of each party shall meet with the other in good faith, and attempt to resolve the Dispute. If a Dispute arises, Seller shall not suspend performance under the Order while the Dispute is pending. If the Dispute is not resolved within thirty (30) days of the Dispute Notice Date, it will be governed as follows:

(i) If Seller is located in the United States of America, then either party may seek its rights and remedies in a court of competent jurisdiction, provided that for any such litigation (and for recognition or enforcement of any judgment or settlement agreement involving such parties), the parties hereby agree to the exclusive jurisdiction of the United States District Court for the Southern District of California, unless federal jurisdiction would not attach in which case venue shall be in Superior Court of California in San Diego, California. For any such litigation, each party accepts, generally and unconditionally, the jurisdiction and venue of the aforesaid applicable court, and each party knowingly waives any objection thereto.

(ii) If Seller is located outside of the United States of America, then the Dispute, as well as the

determination of the scope or applicability of this agreement to arbitrate, shall be finally decided by arbitration in accordance with the Arbitration Rules of the International Chamber of Commerce Arbitration Rules effective as of the date of the Dispute Notice Date ("ICC Rules"), before a panel of three (3) arbitrators appointed in accordance with the ICC Rules. Subject to any valid requirements of any applicable statute, the arbitration shall be seated in San Diego, California, United States of America, and, except as the arbitrators may direct for good cause shown, the hearings shall be conducted in San Diego, California. Each party hereto may be represented by counsel in any such arbitration. The arbitration shall be conducted in English. Subject to subclause 26(b), the arbitrators shall have the authority to award temporary, preliminary and permanent injunctive and equitable relief in the arbitration (in addition to any monetary relief). The arbitration proceedings, including the award, shall be confidential, and no party will publicize the nature of any dispute or the outcome of any arbitration proceeding except to the extent required by applicable law, provided in such case the party required to make any disclosure informs the other part(ies) of such requirement to allow the other part(ies) to seek a protective order. The arbitrator will issue appropriate protective orders to safeguard each party's confidential information disclosed in the arbitration. The arbitration shall be final and binding upon the parties, and judgment may be entered upon it in any court having jurisdiction.

(b) Notwithstanding the foregoing, if the Dispute could lead to either party suffering irreparable harm (including any Dispute involving the ownership, use, or disclosure of confidential or proprietary information or trade secrets or to enforce restrictive covenants), such party may opt to seek equitable relief, including emergency injunctive relief, at any time, from a court of competent jurisdiction.

(c) Notwithstanding clause 26(a) above, for a Government Dispute, the following applies:

(i) A Government Dispute will be resolved pursuant to the Prime Contract's "Disputes" clause. For any Government Dispute, Seller may submit a detailed claim to Buyer including, for any claim in excess of \$100,000, an appropriate Seller certification that: (a) the claim is made in good faith, (b) the supporting data are accurate to the best of Seller's knowledge and belief, (c) the amount requested accurately reflects the Order adjustment

for which Seller believes the Government is liable, and (d) the certifying official is duly authorized to certify the claim on behalf of Seller. Buyer shall, upon receipt of adequate information from Seller, submit an appropriate corresponding claim to the Government Contracting Officer pursuant to the "Disputes" clause of the Prime Contract.

- (ii) If a decision on a question of fact or law is issued by the Government Contracting Officer under the Prime Contract "Disputes" clause, whether or not based on a claim submitted by Buyer, and the decision relates to the Order, said decision, if binding upon Buyer under the Prime Contract, shall also be binding upon Buyer and Seller with respect to the Order.

However, if Seller is adversely affected by such decision and if Buyer elects not to appeal such decision or bring suit under the "Disputes" clause of the Prime Contract, Buyer shall notify Seller promptly. After receipt of such notice by Buyer, if Seller submits a timely request to Buyer to appeal such decision or bring suit, Buyer shall file an appeal or bring suit.

If Buyer appeals such decision or brings suit, whether at its election or at Seller's request, any decision on such appeal or suit, if binding upon Buyer under the Prime Contract, shall be binding on Buyer and Seller as relates to the Order.

- (iii) To the extent any such appeal or suit is taken or brought by Buyer at Seller's request, and to the extent requested by Buyer, Seller shall prosecute for Buyer the appeal or suit. In such event and to such extent, Seller shall select litigation counsel, which must be experienced in government contracts litigation; and Seller shall pay all costs and expenses of the litigation brought on Seller's behalf, including attorney's fees.

Litigation counsel so selected by Seller will represent Buyer in the suit or appeal, but Buyer agrees that Seller may direct the litigation to the extent related to Seller's claim or interest, subject to the overall supervision of the litigation and ultimate decision-making in the case by Buyer.

Buyer may also select counsel to advise Buyer on, or to monitor, any appeal or suit taken or brought by Buyer at Seller's request, in which event Seller agrees to pay the reasonable costs of such counsel.

Buyer shall reasonably assist Seller in any appeal or suit being directed by Seller pursuant to this paragraph, and Seller shall reimburse Buyer for its costs incurred in assisting Seller.

- (iv) During the pendency of any Government Dispute or any appeal or suit under the Contract Disputes Act, any monies due or becoming due to Seller under the Order that are in question may be withheld by Buyer until the dispute is finally resolved. If, as a result of any decision or judgment which is binding upon Buyer, Buyer is unable to obtain payment or reimbursement from the Government under the Prime Contract for, or is required to refund or credit to the Government any amount with respect to any item of cost or fee for which Buyer has paid or reimbursed Seller, Seller shall, upon demand, promptly repay such amount to Buyer.
- (v) The Parties agree to accept the relief as to a time extension or additional compensation obtained from the Government, if any, as well as all other aspects of the final decision under the Contract Disputes Act following appeal or the expiration of the time for appeal as full and final resolution of any Government Dispute.
- (vi) Buyer's maximum liability to Seller arising from or relating to a Government Dispute or an appeal or suit brought under the Contract Disputes Act shall not exceed the amount of Buyer's actual recovery from the Government.
- (vii) If the Order is issued by Buyer under a subcontract held by Buyer, and if Buyer has the right under such subcontract to appeal a decision made by the Contracting Officer under the prime contract in the name of the prime contractor, and said decision is also related to the Order, this disputes clause shall also apply to Seller to the extent allowable and in a manner consistent with its intent and similar to its application had the Order been issued by Buyer under a Prime Contract with the Government.
- (viii) If any claim of Seller under this clause 26(b) is determined to be based upon gross negligence or intentional misconduct by Seller or its subcontractors, Seller agrees to defend, indemnify, and hold Buyer harmless for any and all liability, loss, cost, or expense resulting therefrom.
- (ix) Nothing said or written in the prosecution of any claim against the Government shall constitute or be regarded as admissions or declarations against interest of either Party in any litigation between Buyer and Seller.
- (x) Pending resolution of any dispute, Seller shall proceed as directed by Buyer in writing.

- (xi) The rights and obligations of this clause 26 shall survive completion of and final payment under the Order.

27. APPLICABLE LAWS. The Order and any dispute arising hereunder shall be governed by the substantive law of federal procurement and, to the extent there is no applicable federal procurement law, the substantive and procedural laws of the State of California, except, however, that California's choice of law provisions shall not apply. The 1980 U.N. Convention on Contracts for the International Sale of Goods shall not apply to any sales transactions governed by these terms and conditions.

28. 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.

29. ORDER OF PRECEDENCE. In the event of an inconsistency between provisions of the Order, the inconsistency shall be resolved by giving precedence in the following order:

- (a) The typed provisions on the face of the Order,
- (b) Any additional contract flowdown provisions, provided through an Addendum or other similar document, that are incorporated by referenced or attached to the Order, and any other Buyer Order attachments (excluding these terms and conditions);
- (c) Article I - Special Provisions of these terms and conditions;
- (d) Other specifications or documents incorporated by referenced in the Order;
- (e) Article II - General Provisions of these terms and conditions; and
- (f) Other attachments to, or referenced in, the Order.

In the event of any conflicting provisions, Seller shall promptly notify Buyer thereof.

30. NOTICES. All notices and other communications hereunder shall be in writing and shall be deemed to have been given upon receipt of hand delivery, registered mail, return receipt requested, national overnight courier service, or facsimile transmission with

confirmation receipt followed by delivery by a nationally recognized overnight courier (receipt requested). All notices hereunder shall be delivered to the address or facsimile number of the applicable party set forth on the Order.

31. HEADINGS. The division of these terms and conditions into Articles and clauses, and the insertion of headings, are for convenience of reference only and shall not affect the construction or interpretation of these terms and conditions. The terms "these terms and conditions," "hereof," "hereunder," and similar expressions in these terms and conditions refer to these terms and conditions and not to any particular Article, clause, or other portion and include any terms and conditions supplemental hereto. Unless something in the subject matter or context is inconsistent therewith, references herein to Articles and clauses are to Articles and clauses of these terms and conditions.

32. SEVERABILITY. If any aspect of any of these terms and conditions is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the Order shall not be affected, and the rights and obligations of the Parties are to be construed and enforced as if the Order did not contain such term.

33. ENTIRE AGREEMENT. The Order including Article I - Special Provisions, Article II – 2 CFR Part 200 General Provisions, Article III – 2 CFR Part 910 General Provisions, of these terms and conditions, and the other attachments to, or referenced in the Order, constitute the complete and exclusive agreement between Buyer and Seller and supersede all previous negotiations, discussions, communications, representations, agreements, arrangements or understandings, whether written or oral between the Parties related to the subject matter of the Order. No agreement or understanding varying or extending the terms or conditions of the Order will be binding on Buyer unless executed in writing by Buyer's Authorized Representative.

ARTICLE II – 2 CFR PART 200 Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards

The clauses in 2 CFR (Code of Federal Regulations) Part 200 entitled “Grants and Agreements, Subtitle A – Office of Management and Budget Guidance for Grants and Agreements, Chapter II, Office of Management and Budget Guidance” provided below, and in effect on the date of the Order, are each incorporated by this reference and made a part of the Order when the condition(s) for applicability is/are met. In all such clauses, the term “Recipient,” “Subrecipient” or “Contractor” shall mean “Seller,” and the term “Contract,” “Subaward” or “Award” shall mean the “Order.” The term “Contracting Officer” or equivalent phrases shall mean “Buyer,” except that in those clauses conferring patent and data rights to the Government, the term “Government” or “Contracting Officer” shall retain its literal meaning and is not to be construed as “Buyer.”

It is intended that the clauses in 2 CFR Part 200 provided below shall apply to Seller and its lower-tier subcontractors in such a manner necessary to reflect the position of Seller as a subcontractor to Buyer, to ensure Seller’s obligations to Buyer and to the U.S. Government, and to enable Buyer to meet its obligations under its Financial Assistance Awards funded by the U.S. Government.

Subpart A – Acronyms and Definitions:

Clause	Description	Applicability	
		For-Profit	Not For-Profit
200.0 - 200.99	Acronyms and Definitions	Yes	Yes

Subpart B – General Provisions:

Clause	Description	Applicability	
		For-Profit	Not For-Profit
200.100 - 200.113	General Provisions	Yes	Yes

Subpart C – Pre-Federal Award Requirements and Contents of Federal Awards:

Clause	Description	Applicability	
		For-Profit	Not For-Profit
200.200 - 200.213	Pre-Federal Award Requirements and Contents of Federal Awards	Yes	Yes
200.216	Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment	Yes	Yes

Subpart D – Post Federal Award Requirements:

Clause	Description	Applicability	
		For-Profit	Not For-Profit
200.300 - 200.345	Post Federal Award Requirements	Yes	Yes

Subpart E – Cost Principles:

Clause	Description	Applicability	
		For-Profit	Not For-Profit
200.400 - 200.475	Cost Principles	No	Yes

Subpart F – Audit Requirements:

Clause	Description	Applicability	
		For-Profit	Not For-Profit
200.500 - 200.520	Audit Requirements	No	Yes

Appendices:

Clause	Description	Applicability	
		For-Profit	Not For-Profit
Appendix XI	Compliance Supplement	Yes	Yes
Appendix II	Contract Provisions for Non-Federal Entity Contracts Under Federal Awards	Yes	Yes
	(In full text below)		

Appendix II to 2 CFR Part 200—Contract Provisions for Non-Federal Entity Contracts Under Federal Awards

In addition to other provisions required by the Federal agency or non-Federal entity, all contracts made by the non-Federal entity under the Federal award must contain provisions covering the following, as applicable.

(A) Contracts for more than the simplified acquisition threshold currently set at \$350,000, which is the inflation adjusted amount determined by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) as authorized by 41 U.S.C. 1908, must address administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as appropriate.

(B) All contracts in excess of \$10,000 must address termination for cause and for convenience by the non-Federal entity including the manner by which it will be effected and the basis for settlement.

(C) Reserved

(D) Davis-Bacon Act, as amended (40 U.S.C. 3141-3148). When required by Federal program legislation, all prime construction contracts in excess of \$2,000 awarded by non-Federal entities must include a provision for compliance with the Davis-Bacon Act (40 U.S.C. 3141-3144, and 3146-3148) as supplemented by Department of Labor regulations (29 CFR Part 5, “Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction”). In accordance with the statute, contractors must be required to pay wages to laborers and mechanics at a rate not less than the prevailing wages specified in a wage determination made by the Secretary of Labor. In addition, contractors must be required to pay wages not less than once a week. The non-Federal entity must place a copy of the current prevailing wage determination issued by the Department of Labor in each solicitation. The decision to award a contract or subcontract must be conditioned upon the acceptance of the wage determination. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency. The contracts must also include a provision for compliance with the Copeland “Anti-Kickback” Act (40 U.S.C. 3145), 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 or she is otherwise entitled. The non-Federal entity must report all suspected or reported violations to the Federal awarding agency.

(E) Contract Work Hours and Safety Standards Act (40 U.S.C. 3701-3708). Where applicable, all contracts awarded

by the non-Federal entity in excess of \$100,000 that involve the employment of mechanics or laborers must include a provision for compliance with 40 U.S.C. 3702 and 3704, as supplemented by Department of Labor regulations (29 CFR Part 5). Under 40 U.S.C. 3702 of the Act, each contractor must be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than one and a half times the basic rate of pay for all hours worked in excess of 40 hours in the work week. The requirements of 40 U.S.C. 3704 are applicable to construction work and provide that no laborer or mechanic must be required to work in surroundings or under working conditions which 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) Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of “funding agreement” under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.

(G) Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended—Contracts and subgrants of amounts in excess of \$150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

(H) Debarment and Suspension (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the government wide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p.

189) and 12689 (3 CFR part 1989 Comp., p. 235), “Debarment and Suspension.” SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

(I) Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors that apply or bid for an award exceeding \$100,000 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 non-Federal award.

(J) See §200.322 Procurement of recovered materials.

(K) See §200.216 Prohibition on certain telecommunications and video surveillance equipment or services.

(L) See §200.322 Domestic preferences for procurements.

ARTICLE III – 2 CFR PART 910 GENERAL PROVISIONS

The clauses in 2 CFR (Code of Federal Regulations) Part 910 entitled “Grants and Agreements, Subtitle B – Federal Agency Regulations for Grants and Agreements, Chapter IX, Department of Energy” provided below and in effect on the date of the Order are each incorporated by this reference and made a part of the Order when the condition(s) for applicability is/are met. In all such clauses, the term “Recipient,” “Subrecipient” or “Contractor” shall mean “Seller,” and the term “Contract,” “Subaward” or “Award” shall mean the “Order.” The term “Contracting Officer” or equivalent phrases shall mean “Buyer,” except that in those clauses conferring patent and data rights to the Government, the term “Government” or “Contracting Officer” shall retain its literal meaning and is not to be construed as “Buyer.”

It is intended that the clauses in 2 CFR Part 910 provided below shall apply to Seller and its lower-tier subcontractors in such a manner necessary to reflect the position of Seller as a subcontractor to Buyer to ensure Seller’s obligations to Buyer and to the U.S. Government, and to enable Buyer to meet its obligations under its Financial Assistance Awards funded by the U.S. Government.

Subpart B – General Provisions:

Clause	Description	Applicability	
		For-Profit	Not For-Profit
910.120 – 910.132	General Provisions	Yes	Yes

Subpart D – Post Award Federal Requirements for For-Profit Entities:

Clause	Description	Applicability	
		For-Profit	Not For-Profit
910.350 – 910.372	Post Award Federal Requirements for For-Profit Entities	Yes	No
Appendix A to Subpart D	Patent and Data Provisions	Yes	Yes
	(In full text below)		

Subpart E – Cost Principles:

Clause	Description	Applicability	
		For-Profit	Not For-Profit
910.401	Application to M&O’s	Yes	Yes

Subpart F – Audit Requirements for For-Profit Entities:

Clause	Description	Applicability	
		For-Profit	Not For-Profit
910.500 – 910.521	Audit Requirements for For-Profit Entities	Yes	No

2 CFR Part 910 Appendix A to Subpart D—Patent and Data Provisions

1. Patent Rights (Small Business Firms and Nonprofit Organizations)
2. Patent Rights (Large Business Firms)—No Waiver
3. Rights in Data—General
4. Rights in Data—Programs Covered Under Special Protected Data Statutes

1. Patent Rights (Small Business Firms and Nonprofit Organizations)

(a) Definitions

Invention means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321 et seq.).

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

Nonprofit organization is defined in 2 CFR 200.70.

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 2 CFR 910.362(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 the DOE Patent Counsel address listed in the Award Document.

(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)

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 which is or may be patentable or otherwise protectable under title 35 of the United States Code or any novel variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.).

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 and 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)(50); 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 nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the 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.

(5) 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 which 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 which the Government may have with respect to subject inventions.

(End of clause)

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 data bases.

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 data base.

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 paragraph (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 paragraph (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 paragraph (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 paragraph (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 paragraph (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 paragraph (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 paragraph (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 paragraphs (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 data base 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 any time 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 which 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 2 CFR 910.362(d) (1), the following Alternate I and/or II may be inserted in the clause in the award instrument.

Alternate I:

(g)(2) Notwithstanding paragraph (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 paragraph (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 or which it was acquired is inoperative;

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

(4) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software are made subject to the same restricted rights;

(5) Disclosed to and reproduced for use by support service Recipients in accordance with paragraph (b)(1) through (4) of this clause, provided the Government makes such disclosure or reproduction subject to these restricted rights; and

(6) Used or copied for use in or transferred to a replacement computer.

(c) Notwithstanding the foregoing, if this computer software is published copyrighted computer software, it is licensed to the Government, without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause.

(d) Any other rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated, in, or incorporated in, the agreement.

(e) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)



(ii) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

Restricted Rights Notice

Use, reproduction, or disclosure is subject to restrictions set forth in agreement No. _____ (and subaward/contract _____, If appropriate) with _____ (name of Recipient and subrecipient/contractor).

(End of notice)

(iii) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, it will be presumed to be published copyrighted computer software licensed to the government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause, unless the Recipient includes the following statement with such copyright notice: "Unpublished—rights reserved under the Copyright Laws of the United States."

(End of clause)

4. Rights in Data—Programs Covered Under Special Data Statutes

(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 data bases.

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 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 confidential or privileged; or is published copyrighted computer software; including modifications of such computer software.

Protected data, as used in this clause, means technical data or commercial or financial data first produced in the performance of the award which, if it had been obtained from and first produced by a non-federal party, would be a trade secret or commercial or financial information that is privileged or confidential under the meaning of 5 U.S.C. 552(b) (4) and which data is marked as being protected data by a party to the award.

Protected rights, as used in this clause, mean the rights in protected data set forth in the Protected Rights Notice of paragraph (g) of this clause.

Technical data, as used in this clause, means that data 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 data base.

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 whatsoever, and to have or permit others to do so.

(b) Allocation of Rights

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

(i) Data specifically identified in this agreement as data to be delivered without restriction;

(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 protected data in accordance with paragraph (g) of this clause or for limited rights data or restricted computer software in accordance with paragraph (h) of this clause.

(2) The Recipient shall have the right to—

(i) Protect rights in protected data delivered under this agreement in the manner and to the extent provided in paragraph (g) of this clause;

(ii) Withhold from delivery those data which are limited rights data or restricted computer software to the extent provided in paragraph (h) of this clause;

(iii) Substantiate use of, add, or correct protected rights or copyrights notices and to take other appropriate action, in accordance with paragraph (e) 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 paragraph (c)(1) of this clause.

(c) Copyright

(1) Data first produced in the performance of this agreement. Except as otherwise specifically provided in this agreement, the Recipient may establish, without the prior approval of the Contracting Officer, claim to copyright subsisting in any data first produced in the performance of this agreement. If claim to copyright is made, the Recipient shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment 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 to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government, for all such data.

(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 that are not first produced in the performance of this agreement and that contain 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 paragraph (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 paragraph (h)(3) of this clause if included in this agreement or as otherwise may be provided in a collateral agreement incorporated or made a 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 Receipt 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 contract, 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 contract.

(2) The Recipient agrees that to the extent it receives or is given access to data necessary for the performance of this agreement 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 paragraph (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 subdivision (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 subdivision (e)(1)(iii) until final resolution of the matter either by the Contracting Officer's determination become 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 paragraph (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) Rights to Protected Data

(1) The Recipient may, with the concurrence of DOE, claim and mark as protected data, any data first produced in the performance of this award that would have been treated as a trade secret if developed at private expense. Any such claimed "protected data" will be clearly marked with the following Protected Rights Notice, and will be treated in accordance with such Notice, subject to the provisions of paragraphs (e) and (f) of this clause.

Protected Rights Notice

These protected data were produced under agreement no. _____ with the U.S. Department of Energy and may not be published, disseminated, or disclosed to others outside the Government until (Note:) The period of protection of such data is fully negotiable, but cannot exceed the applicable statutorily authorized maximum), unless express written authorization is obtained from the recipient. Upon expiration of the period of protection set forth in this Notice, the Government shall have unlimited rights in this data. This Notice shall be marked on any reproduction of this data, in whole or in part.

(End of notice)

(2) Any such marked Protected Data may be disclosed under obligations of confidentiality for the following purposes:

- (a) For evaluation purposes under the restriction that the "Protected Data" be retained in confidence and not be further disclosed; or
- (b) To subcontractors or other team members performing work under the Government's (insert name of program or other applicable activity) program of which this award is a part, for information or use in connection with the work performed under their activity, and under the restriction that the Protected Data be retained in confidence and not be further disclosed.

(3) The obligations of confidentiality and restrictions on publication and dissemination shall end for any Protected Data.

- (a) At the end of the protected period;
- (b) If the data becomes publicly known or available from other sources without a breach of the obligation of confidentiality with respect to the Protected Data;
- (c) If the same data is independently developed by someone who did not have access to the Protected Data and such data is made available without obligations of confidentiality; or
- (d) If the Recipient disseminates or authorizes another to disseminate such data without obligations of confidentiality.

(4) However, the Recipient agrees that the following types of data are not considered to be protected and shall be provided to the Government when required by this award without any claim that the data are Protected Data. The parties agree that notwithstanding the following lists of types of data, nothing precludes the Government from seeking delivery of additional data in accordance with this award, or from making publicly available additional non-protected data, nor does the following list constitute any admission by the Government that technical data not on the list is Protected Data. (Note: It is expected that this paragraph will



specify certain types of mutually agreed upon data that will be available to the public and will not be asserted by the recipient/contractor as limited rights or protected data).

(5) The Government's sole obligation with respect to any protected data shall be as set forth in this paragraph (g).

(h) Protection of Limited Rights Data

When data other than that listed in paragraphs (b)(1)(i), (ii), and (iii) of this clause are specified to be delivered under this agreement and such data qualify as either limited rights data or restricted computer software, the Recipient, if the Recipient desires to continue protection of such data, 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.

(i) 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 subaward/contract award without further authorization.

(j) Additional Data Requirements

In addition to the data specified elsewhere in this agreement to be delivered, the Contracting Officer may, at any time 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 which 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.

(k) The Recipient agrees, except as may be otherwise specified in this agreement 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 contract, inspect at the Recipient's facility any data withheld pursuant to paragraph (h) 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 2 CFR 910.362(e)(2), the following Alternate I and/or II may be inserted in the clause in the award instrument.

Alternate I

(h)(2) Notwithstanding paragraph (h)(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

(h)(3)(i) Notwithstanding paragraph (h)(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 (d) and (e) 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 (c) of this Notice or as otherwise expressly stated in the agreement.
- (b) This computer software may be—
- (1) Used or copied 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 copies for use in a backup computer if any computer for which it was acquired is inoperative
 - (3) Reproduced for safekeeping (archives) or backup purposes;
 - (4) Modified, adapted, or combined with other computer software, provided that the modified, combined, or adapted portions of the derivative software are made subject to the same restricted rights;
 - (5) Disclosed to and reproduced for use by Federal support service Contractors in accordance with paragraphs (b)(1) through (4) of this clause, provided the Government makes such disclosure or reproduction subject to these restricted rights; and
 - (6) Used or copies for use in or transferred to a replacement computer.
- (c) Notwithstanding the foregoing, if this computer software is published copyrighted computer software, it is licensed to the Government, without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause.
- (d) Any other rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated in, or incorporated in, the agreement.
- (e) This Notice shall be marked on any reproduction of this computer software, in whole or in part.



(End of notice)

~End~

(ii) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

Restricted Rights Notice:

Use, reproduction, or disclosure is subject to restrictions set forth in Agreement No. _____ (and subaward/contract _____, if appropriate) with (name of Recipient and subrecipient/contractor).

(iii) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, it will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause, unless the Recipient includes the following statement with such copyright notice: "Unpublished—rights reserved under the Copyright Laws of the United States"

(End of notice)