BATTELLE ENERGY ALLIANCE, LLC

GENERAL PROVISIONS FOR

PROFESSIONAL/CONSULTING SERVICES

COST REIMBURSABLE

BEA FORM
PROC-208
(Rev. 09-08)

INTRODUCTION:

The terms and conditions of these General Provisions and those set forth in the Purchase Order or Subcontract (terms used interchangeably) apply notwithstanding any different or additional terms and conditions which may be submitted or proposed by Subcontractor, and Contractor objects to, and shall not be bound by, any such additional or different terms and conditions. Subcontractor must determine what provisions should be inserted in its lower-tier subcontracts and purchase orders to implement the obligations of Subcontractor. By entering into this Subcontract, Subcontractor recognizes these obligations and agrees to implement them in its lower-tier subcontracts and purchase orders.

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

Certain Federal Acquisition Regulation (FAR) and Department of Energy Acquisition Regulation (DEAR) clauses and articles are incorporated herein by reference as if set forth in their entirety. For such articles incorporated by reference, the following definitions apply:

"Contractor" means Subcontractor.

"Subcontractor" means Subcontractor's Lower-tier Subcontractor.

"Contract" means this Purchase Order or Subcontract.

"Contracting Officer" means Contractor's Procurement Agent.

"Government" means Contractor.

"DOE" means the U.S. Department of Energy.

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SECTION A

SECTION A APPLIES REGARDLESS OF PRICE

ARTICLE NO.

A.1 GENERAL

1. This Subcontract, which term shall be deemed to include related plans, drawings, specifications, and other documents, contains the entire agreement and understanding between the parties as to the subject matter of this Subcontract, and merges and supersedes all prior agreements, understandings, commitments, representations, writings, and discussions between them. Neither of the parties will be bound by any prior obligations, conditions, warranties, or representations with respect to the subject matter of this Subcontract. The parties agree that recourse may not be had to alleged prior dealings, usage of trade, course of dealing, or course of performance to explain or supplement the express terms of this Subcontract.

2. The failure of either party to enforce at any time any of the provisions of this Subcontract, or to require at any time performance by the other party of any of such provisions, shall in no way be construed to be a waiver of such provision, nor in any way to affect the validity of this Subcontract or any parts thereof, or the right of either party thereafter to enforce each and every provision.

3. The headings used in this Subcontract are not to be construed as modifying, limiting or expanding in any way the scope or extent of the provisions in this Subcontract, unless otherwise indicated.

4. All references herein to the Department of Energy Acquisition Regulation (DEAR) or Federal Acquisition Regulation (FAR) are those in effect on the date of this Subcontract.

5. Subcontractor shall perform all work pursuant to this Subcontract as an independent Contractor. Subcontractor shall not subcontract all or substantially all of the Work without the prior written approval of Contractor, except for purchases of standard commercial articles or raw materials on which Subcontractor shall perform further work. If any part of the work is subcontracted, Subcontractor is responsible for having that subcontracted work comply with the terms of this Subcontract.

6. No act or order of Contractor shall be deemed to be an exercise of supervision or control of performance hereunder. No provision of this Subcontract and no action taken by Contractor under this Subcontract shall be construed to make or constitute the Contractor as the employer or joint employer of any of the employees of Subcontractor or any of its Lower-tier Subcontractors.

7. Unless otherwise specifically approved by the Contractor, all equipment, materials, or products, including those components, parts, and materials which are permanently installed into systems, subsystems, and/or assemblies, shall be new and of the grade/type specified by this Subcontract. No mixed manufacturers' or manufacturing production lots will be accepted. All workmanship shall be performed in a skillful and workmanlike manner consistent with the specifications, drawings, stated requirements, and other applicable criteria of this Subcontract.

8. If this Subcontract is a BEA Quality Significant acquisition, then the Contractor, the Government and its designees shall have access at all reasonable times to the Subcontractor's and Lower-tier Subcontractors' facilities and records for surveillance, inspection, or audit.

A.2 INCORPORATED BY REFERENCE

1.	**FAR 52.215-10**	**Price Reduction for Defective Cost or Pricing Data**
2.	**FAR 52.215-11**	**Price Reduction for Defective Cost or Pricing Data Modifications**
3.	**FAR 52.222-21**	**Prohibition of Segregated Facilities**
4.	**FAR 52.222-26**	**Equal Opportunity**
5.	**FAR 52.222-35**	**Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era and Other Eligible Veterans (DEC2001)**
6.	**FAR 52.222-36**	**Affirmative Action for Workers with Disabilities >$10,000**
7.	**FAR 52.225-13**	**Restrictions of Certain Foreign Purchases**
8.	FAR 52.225-3	Buy American Act – Free Trade Agreements – Israeli Trade Act (DOE Deviation) (FEB 2008)
9.	FAR 52.225-5	Trade Agreements (DOE Deviation) (FEB 2008)
10.	DEAR 952.204-71	Sensitive Foreign Nations Controls
11.	**FAR 52.247-64**	**Preference for Privately Owned U.S. - Flag Commercial Vessels**
12.	**DEAR 970.5232-3**	**Accounts, Records, and Inspection with Alternate II**
13.	**DEAR 952.250-70**	**Nuclear Hazards Indemnity Agreement:** **This clause applies in any Subcontract which may involve the risk of public liability, as that term is defined in the Atomic Energy Act of 1954 as amended (Act) and as further described in DEAR 952.250-70. However, this clause does not apply to Subcontracts in which the Subcontractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under subsection 170b of the Act or NRC agreements of indemnification under subsection 170c or k of the Act for the activities under this Subcontract. (For purposes of this clause "Government" shall mean Government or Contractor.)**
14.	**DEAR 970.5229-1**	**Taxes State and Local Taxes:** **This clause applies except for the last sentence of subparagraph (b) and the first sentence of subparagraph (c) of the clause. (For purposes of this clause "Government" shall mean Government, not the Contractor.)**
15.	**DEAR 952.247-70**	**Foreign Travel**
16.	**DEAR 970.5245-1**	**Property Alternate 1 (Dec 2000)**
17.	**FAR 52.203-12**	**Limitations on Payments to Influence Certain Federal Transactions (Byrd Amendment) (>$100,000)**
18.	**DEAR 952.204-77**	**Computer Security (AUG 2006)**

A.3 DEFINITIONS

As used throughout this Subcontract, except in articles incorporated by reference and where otherwise indicated, the following definitions apply:

The terms “Subcontractor” and “Seller” shall mean the business entity contracted to provide the materials, supplies or services covered by this Subcontract;

The term “Contractor” shall mean Battelle Energy Alliance, LLC (BEA), or its duly authorized representative or representatives;

The term “Lower-tier Subcontractor” means any party entering into an agreement with the Subcontractor or any other party who has entered into a contract with the Subcontractor, for the furnishing of supplies or services required for performance of this Subcontract;

The term “Government” shall mean the United States of America or any duly authorized representative thereof;

The term “DOE” means the U.S. Department of Energy;

The term "Contracting Officer" or "Subcontract Administrator (SA)" or “Procurement Agent (PA)” means the duly authorized representative of Contractor who will administer this Subcontract.

“INL” means Idaho National Laboratory

“Work” means performance by the Subcontractor pursuant to the requirements, terms, and conditions of this subcontract.

A.4 CHANGES

1. The Contractor may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this Subcontract in any one or more of the following:

   a) Description of services to be performed.

   b) Time of performance (i.e., hours of the day, days of the week, etc.).

   c) Place of performance of the services.

2. If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this Subcontract, whether or not changed by the order, or otherwise affects any other terms and conditions of this Subcontract, the Contractor shall make an equitable adjustment in the –

   a) Estimated cost, delivery or completion schedule, or both;

   b) Amount of any fixed fee; and

   c) Other affected terms and shall modify the Subcontract accordingly.

3. The Subcontractor must assert its right to an adjustment under this Article within 30 days from the date of receipt of the written order. However, if the Contractor decides that the facts justify it, the Contractor may receive and act upon a proposal submitted before final payment of the Subcontract.

4. Failure to agree to any adjustment shall be a dispute under the Disputes Article. However, nothing in this Article shall excuse the Subcontractor from proceeding with the Subcontract as changed.

5. Notwithstanding the terms and conditions of foregoing paragraphs 1. and 2., the estimated cost of this Subcontract and, if this Subcontract is incrementally funded, the funds allotted for the performance of this Subcontract, shall not be increased or considered to be increased except by specific written modification of this Subcontract indicating the new total estimated cost and, if this Subcontract is incrementally funded, the new amount allotted to the Subcontract. Until this modification is made, the Subcontractor shall not be obligated to continue performance or incur costs beyond the

point established in the Limitation of Cost or Limitation of Funds provisions of this Subcontract.

A.5 APPROVALS

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

A.6 INSPECTION

1. Subcontractor shall perform, or have performed, all inspections and tests necessary to substantiate that services furnished under this Subcontract conform to Subcontract requirements, including any applicable technical requirements for specified manufacturers' parts.

2. Subcontractor shall provide and maintain an inspection system acceptable to Contractor that covers the required services. As part of the system, Subcontractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to Contractor during Subcontract performance and for as long afterwards as this Subcontract requires. Contractor may perform reviews and evaluations reasonably necessary to ascertain compliance with this Paragraph. These reviews and evaluations shall be conducted in a manner that will not unduly delay the Work. The right of review, whether exercised or not, does not relieve Subcontractor of its obligations under this Subcontract. If Contractor performs a review or evaluation, on the premises of Subcontractor, or its Lower-tier Subcontractor(s), Subcontractor shall furnish, and shall require its Lower-tier Subcontractors to furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient performance thereof. When services are not ready at the time specified by Subcontractor for review or evaluation, Contractor may charge to Subcontractor the additional cost to Contractor related to the review or evaluation.

3. If any of the services do not conform to the Subcontract requirements, Contractor may require Subcontractor to reperform the services, in conformance to Subcontract requirements, at no increase in the price of this Subcontract. When the defects in services cannot be corrected by reperformance, Contractor may (i) require Subcontractor to take necessary action to ensure that future performance conforms to Subcontract requirements and (ii) reduce the order price to reflect the reduced value of the services performed.

4. If Subcontractor fails to reperform nonconforming services promptly in conformance to Subcontract requirements or to take the necessary action to ensure future performance of services conforms to Subcontract requirements, Contractor may (i) by Subcontract or otherwise, perform the services and charge the cost to Subcontractor; (ii) terminate this Subcontract for default; or (iii) make an equitable price reduction.

5. Rejection of nonconforming work will be made as promptly as practicable. Contractor's failure to review or evaluate the work shall neither relieve Subcontractor from responsibility for performance in accordance with the Subcontract requirements nor impose liability upon the Contractor.

6. Contractor's review or evaluation of the services does not in any way relieve the Subcontractor from its contractual obligations or from any other liability that the Subcontractor may incur as a result of nonconformance; nor does such review or evaluation constitute an acceptance of nonconforming services not discovered.

A.7 ASSIGNMENT

1. Neither this Subcontract nor any interest herein nor claim hereunder shall be assigned or transferred by the Subcontractor, except as expressly authorized in writing by the

Contractor. This Subcontract may be assigned by the Contractor to the U.S. DOE or to DOE's designee(s).

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

A.8 GRATUITIES

The Government and the Contractor prohibit their employees from using their official position for personal financial gain and from accepting any personal advantage from anyone under circumstances which might reasonably be interpreted as an attempt to influence the recipients in the conduct of their official duties. Therefore, Subcontractor or its employees shall not, under circumstances which might reasonably be interpreted as an attempt to influence the recipients in the conduct of their duties, extend any gratuity or special favor to employees of the Government or the Contractor and shall not accept any gratuity or special favor from individuals or organizations with whom Subcontractor is doing business, or proposing to do business, in accomplishing work under this Subcontract.

A.9 PERMITS AND LICENSES

Subcontractor shall procure all necessary permits or licenses and abide by all applicable laws, regulations, and ordinances of the United States and of the state, territory, and political subdivision in which the work under this Subcontract is performed.

A.10 PUBLIC RELEASE OF INFORMATION

Information, data, photographs, sketches, and advertising relating to the work under this Subcontract, which Subcontractor desires to release or publish, shall be submitted to the Contractor for approval eight weeks prior to the desired release date. As part of the approval request, Subcontractor shall identify the specific media to be used as well as other pertinent details of the proposed release. All releases, regardless of tier or supplier, must have the prior approval of the Contractor. Subcontractor shall include all provisions of this Article, including this sentence, in all Lower-tier Subcontracts under this Subcontract.

A.11 SUSPENSION OF WORK

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

2. If the performance of all or any part of the Work is, for an unreasonable period of time, suspended, delayed or interrupted (i) by an act of Contractor in the administration of this Subcontract, or (ii) by Contractor's failure to act within the time specified in this Subcontract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this Subcontract (excluding profit) necessarily caused by such suspension, delay or interruption of an unreasonable period of time and this Subcontract modified in writing accordingly. However, no adjustment shall be made under this Article for any suspension, delay, or interruption to the extent

(i) that performance would have been suspended, or delayed or interrupted by any other cause, including the fault or negligence of Subcontractor or (ii) for which an equitable adjustment is provided for or excluded under any other provision of this Subcontract.

3. No claim under this Article shall be allowed (i) for any costs incurred more than 20 days before Subcontractor shall have notified Contractor, in writing, of the act or failure to act, (but this requirement shall not apply to a claim resulting from a suspension order pursuant to Paragraph 1 of this Article), and (ii) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under this Subcontract. No part of any claim under this Article by Subcontractor shall be allowed, if not supported by adequate evidence showing that the cost would not have been incurred, but for a suspension within the meaning of this Article.

A.12 DISPUTES

1. The parties agree that the appropriate forum for resolution of any dispute pertaining to this Subcontract shall be a court of competent jurisdiction as follows:

   a. Subject to paragraph 1.b of this Article, any such litigation shall be brought and prosecuted exclusively in Federal District Court; with venue in the United States District Court for the District of Idaho in Pocatello, Idaho.

   b. Provided, however, that in the event that the requirements for jurisdiction in the Federal District Court for the District of Idaho, in Pocatello, Idaho are not present, such litigation shall be brought exclusively in the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Bonneville, with venue in Idaho Falls, Idaho.

2. Any substantive issue of law in such dispute, claim, or litigation shall be determined in accordance with the body of law applicable to procurement of goods and services by the Federal Government. Nothing in this Article shall grant to the Subcontractor by implication any statutory rights or remedies not expressly set forth in this Subcontract.

3. There shall be no interruption in the prosecution of the work, and the Subcontractor shall proceed diligently with the performance of this Subcontract pending final resolution of any dispute, claim, or litigation arising under or related to this Subcontract between the parties hereto or between the Subcontractor and its Lower-tier Subcontractors or suppliers.

4. The Contract Disputes Act of 1978 (41 U.S.C. Sections 601-613) shall not apply to this Subcontract; however, nothing in this Article shall prohibit Contractor, at its sole discretion, from sponsoring a claim of the Subcontractor for resolution under the provisions of its prime contract with DOE. In the event Contractor sponsors a claim at the request of the Subcontractor, the Subcontractor shall be bound by the decision of the cognizant DOE Contracting Officer to the same extent and in the same manner as the Contractor.

A.13 NOTICE OF LABOR DISPUTES

Whenever an actual or potential labor dispute is delaying or threatening the performance of work, the Subcontractor shall immediately notify the Contractor in writing. Such notice shall include all relevant information concerning the dispute and its background.

A.14 TERMINATION

1. The Contractor may terminate performance of work under this contract in whole or, from time to time, in part, if –

   a. The Contractor determines that a termination is in the Contractor's interest; or

   b. The Subcontractor defaults in performing this Subcontract and fails to cure the default within 10 days (unless extended by the Contractor) after receiving a notice specifying the default. "Default" includes failure to make progress in the work so as to endanger performance.

2. The Contractor shall terminate by delivering to the Subcontractor a Notice of Termination specifying whether termination is for default of the Subcontractor or for convenience of the Contractor, the extent of termination, and the effective date. If, after termination for default, it is determined that the Subcontractor was not in default or that the Contractor's failure to perform or to make progress in performance is due to causes beyond the control and without the fault or negligence of the Contractor as set forth in the Excusable Delays Article, the rights and obligations of the parties will be the same as if the termination was for the convenience of the Contract.

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

   a. Stop work as specified in the notice.

   b. Place no further Subcontracts or orders (referred to as lower-tier subcontracts in this Article), except as necessary to complete the continued portion of this Subcontract.

   c. Terminate all lower-tier Subcontracts to the extent they relate to the work terminated.

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

   e. With approval or ratification to the extent required by the Contractor, settle all outstanding liabilities and termination settlement proposals arising from the termination of lower-tier subcontracts, the cost of which would be reimbursable in whole or in part, under this Subcontract; approval or ratification will be final for purposes of this Article.

   f. Transfer title (if not already transferred) and, as directed by the Contractor, deliver to the Contractor –

      (i) The fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced or acquired for the work terminated;

      (ii) The completed or partially completed plans, drawings, information, and other property that, if this Subcontract had been completed, would be required to be furnished to the Contractor; and

      (iii) The jigs, dies, fixtures, and other special tools and tooling acquired or manufactured for this contract, the cost of which the Subcontractor has been or will be reimbursed under this Subcontract.

   g. Complete performance of the work not terminated.

   h. Take any action that may be necessary, or that the Contractor may direct, for the protection and preservation of the property related to this Subcontract that is in

the possession of the Subcontractor and in which the Contractor has or may acquire an interest.

i. Use its best efforts to sell, as directed or authorized by the Contractor, any property of the types referred to in subparagraph (c)(6) of this Article; provided, however, that the Subcontractor

(i) is not required to extend credit to any purchaser and

(ii) may acquire the property under the conditions prescribed by, and at prices approved by, the Contractor.

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

4. The Subcontractor shall submit complete termination inventory schedules no later than 120 days from the effective date of termination, unless extended in writing by the Contractor upon written request of the Subcontractor within this 120-day period.

5. After expiration of the plant clearance period as defined in Subpart 49.001 of the Federal Acquisition Regulation, the Subcontractor may submit to the Contractor a list, certified as to quantity and quality, of termination inventory not previously disposed of, excluding items authorized for disposition by the Contractor. The Subcontractor may request the Contractor to remove those items or enter into an agreement for their storage. Within 15 days, the Contractor will accept the items and remove them or enter into a storage agreement. The Contractor may verify the list upon removal of the items, or if stored, within 45 days from submission of the list, and shall correct the list, as necessary, before final settlement.

6. After termination, the Subcontractor shall submit a final termination settlement proposal to the Contractor in the form and with the certification prescribed by the Contractor. The Subcontractor shall submit the proposal promptly, but no later than 1 year from the effective date of termination, unless extended in writing by the Contractor upon written request of the Subcontractor within this 1-year period. However, if the Contractor determines that the facts justify it, a termination settlement proposal may be received and acted on after 1 year or any extension. If the Subcontractor fails to submit the proposal within the time allowed, the Contractor may determine, on the basis of information available, the amount, if any, due the Subcontractor because of the termination and shall pay the amount determined.

7. Subject to paragraph 6. of this Article, the Subcontractor and the Contractor may agree on the whole or any part of the amount to be paid (including an allowance for fee) because of the termination. The Subcontract shall be amended, and the Subcontractor paid the agreed amount.

8. If the Subcontractor and the Contractor fail to agree in whole or in part on the amount of costs and/or fee to be paid because of the termination of work, the Contractor shall determine, on the basis of information available, the amount, if any, due the Subcontractor, and shall pay that amount, which shall include the following:

a. All costs reimbursable under this Subcontract, not previously paid, for the performance of this Subcontract before the effective date of the termination, and those costs that may continue for a reasonable time with the approval of or as directed by the Contractor; however, the Subcontractor shall discontinue those costs as rapidly as practicable.

b. The cost of settling and paying termination settlement proposals under terminated Subcontracts that are properly chargeable to the terminated portion of this Subcontract, if not included in subparagraph 8.a. of this Article.

c. The reasonable costs of settlement of the work terminated, including –

(i) Accounting, legal, clerical, and other expenses reasonably necessary for the preparation of termination settlement proposals and supporting data;

(ii) The termination and settlement of lower-tier Subcontracts (excluding the amounts of such settlements); and

(iii) Storage, transportation, and other costs incurred, reasonably necessary for the preservation, protection, or disposition of the termination inventory. If the termination is for default, no amounts for the preparation of the Subcontractor's termination settlement proposal may be included.

d. A portion of the fee payable under this Subcontract, determined as follows:

(i) If the Subcontract is terminated for the convenience of the Contractor, the settlement shall include a percentage of the fee equal to the percentage of completion of work contemplated under the Subcontract, but excluding effort included in lower-tier Subcontractors' termination proposals, less previous payments for fee.

(ii) If the Subcontract is terminated for default, the total fee payable shall be such proportionate part of the fee as the total number of articles (or amount of services) delivered to and accepted by the Contractor is to the total number of articles (or amount of services) of a like kind required by the Subcontract.

e. If the settlement includes only fee, it will be determined under subparagraph 8.d. of this Article.

9. The cost principles and procedures in Part 31 of the Federal Acquisition Regulation, in effect on the date of this Subcontract, shall govern all costs claimed, agreed to, or determined under this Article.

10. The Subcontractor shall have the right of appeal, under the Disputes Article, from any determination made by the Contractor under paragraph 6., 8. or 12. of this Article, except that if the Subcontractor failed to submit the termination settlement proposal within the time provided in paragraph 6. and failed to request a time extension, there is no right of appeal. If the Contractor has made a determination of the amount due under paragraph 6., 8. or 12. of this Article, the Contractor shall pay the Subcontractor –

a. The amount determined by the Contractor, if there is no right of appeal or if no timely appeal has been taken; or

b. The amount finally determined on an appeal.

11. In arriving at the amount due the Subcontractor under this Article, there shall be deducted –

a. All unliquidated advance or other payments to the Subcontractor, under the terminated portion of this Subcontract;

b. Any claim which the Contractor has against the Subcontractor under this Subcontract; and

c. The agreed price for, or the proceeds of sale of materials, supplies, or other things acquired by the Subcontractor or sold under this Article and not recovered by or credited to the Contractor.

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

13.

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

b. If the total payments exceed the amount finally determined to be due, the Subcontractor shall repay the excess to the Contractor upon demand, together with interest computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2). Interest shall be computed for the period from the date the excess payment is received by the Subcontractor to the date the excess is repaid. Interest shall not be charged on any excess payment due to a reduction in the Subcontractor's termination settlement proposal because of retention or other disposition of termination inventory until 10 days after the date of the retention or disposition, or a later date determined by the Contractor because of the circumstances.

14. The provisions of this Article relating to fee are inapplicable if this Subcontract does not include a fee.

A.15 GOVERNMENT PROPERTY

This Article applies only when the Contractor authorizes use of Government Property for performance of the Subcontract. For all cost reimbursable subcontracts this Article is used in conjunction with DEAR 970-5245-1, Alternate 1 (Dec 2000).

<u>Contractor-Furnished and Subcontractor-Acquired Government Property</u> (i.e., Government Property)

The Contractor shall deliver to the Subcontractor, or the Subcontractor shall acquire, for use in connection with and under the terms of this Subcontract, Government property together with such related data and information as the Subcontractor may request and as may be reasonably required for the intended use of the property.

The delivery or performance dates for this Subcontract are based upon the expectation that Government property suitable for use will be delivered to the Subcontractor, or acquired by the Subcontractor, at the times stated in the schedule or, if not so stated, in sufficient time to enable the Subcontractor to meet the Subcontract delivery or performance dates.

If the property is received by the Subcontractor in a condition not suitable for the intended use, the Subcontractor shall, upon receipt, notify the Contractor, detailing the facts. If the Government Property is Contractor-Furnished, the Contractor will effect any repairs, modification, or replacement required or cause the Subcontractor to have it corrected at the Contractor's expense. If the Government Property is Subcontractor-Acquired, the Subcontractor will effect any repairs, modification, or replacement required at the Subcontractor's expense.

If said Contractor-Furnished property is not delivered to the Subcontractor by the required time or times, the Contractor shall, upon the Subcontractor's written request, make a determination of the delay, if any, caused the Subcontractor and shall make an equitable adjustment in accordance with this Subcontract.

<u>Changes in Government Property.</u>

The Contractor may, by written notice:

(i) Decrease the Government property provided or to be provided under this Subcontract; or

(ii) Substitute other Government property for the property to be provided under this Subcontract.

The Subcontractor shall promptly take such action as the Contractor may direct regarding the removal, preparation for shipment, or disposal of the property covered by this notice.

Upon the Subcontractor's written request, the Contractor shall make an equitable adjustment to this Subcontract, if the Contractor has agreed in the schedule to make such property available for performing this Subcontract and there is any:

(i) Decrease or substitution in this property pursuant to subparagraph 2.a. above; or

(ii) Withdrawal of authority to use property, if provided under other subcontract or lease.

<u>Title and Access</u>

Title to Government property shall remain in the Government. All Government property, title to which vests in the Government under this paragraph (collectively referred to as "Government property"), are subject to the provisions of this Article. Title to Government property shall not be affected by its incorporation into or attachment to any property not owned by the Contractor, nor shall Government property become a fixture or lose its identity as personal property by being attached to any real property.

Subcontractor shall use the Government property only in connection with this Subcontract. Subcontractor shall maintain adequate property control records in accordance with sound industrial practice and shall make such records available for Contractor or Government inspection at all reasonable times.

Subcontractor shall provide its property control procedure(s) for Contractor review and approval, upon request from Contractor.

Subcontractor shall comply with any Contractor direction to enable Subcontractor's property control activities to provide compliance as follows: under cost reimbursement Subcontracts, 48 CFR 970.5204-21; under fixed-price contracts, 41 CFR 109-1.5203.

The Contractor and the Government and all its designees shall have access at all reasonable times to the premises in which any Government property is located for the purpose of inspecting the Government property.

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

If this Subcontract contains a provision directing the Contractor to purchase material for which the Contractor will reimburse the Subcontractor as a direct item of cost under this Subcontract:

(i) Title to material purchased shall pass to and vest in the Government upon delivery of such material; and

(ii) Title to all other material shall pass to and vest in the Government upon:

Issuance of the material for use in Subcontract performance;

Commencement of processing of the material or its use in Subcontract performance; or

Reimbursement of the cost of the material by the Contractor, whichever occurs first.

Upon completion of the Work, or the termination of this Subcontract, the Subcontractor shall render an accounting, as prescribed by the Contractor, of all Government Property which had come into the possession or custody of the Subcontractor under this Subcontract.

Risk of Loss

Upon delivery of Government property to Subcontractor, Subcontractor assumes the risk and responsibility for its loss or damage, except:

For reasonable wear and tear;

To the extent property is consumed in performing this Subcontract; or

As otherwise provided for by the provisions of this Subcontract.

Under cost reimbursement Subcontracts, the Subcontractor shall not be reimbursed for, and shall not include as an item of overhead, the cost of insurance or of any reserve covering risk of loss or destruction of, or damage to, Government property, except to the extent that the Contractor may have expressly required the Subcontractor to carry such insurance under another provision of this Subcontract.

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

Final Accounting and Disposition of Contractor-Furnished and Subcontractor-Acquired Government Property

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

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

All communications under this Article shall be in writing.

A.16 COST OR PRICING DATA—MODIFICATIONS

1. This Article applies to the pricing of adjustments to this Subcontract that are expected to exceed the threshold set forth in FAR 15.403-4.

2. If the Subcontractor is not granted an exemption from the requirement to submit cost or pricing data, Subcontractor shall submit cost or pricing data and supporting information in accordance with Table 15-2 of FAR 15.408. Also,

Subcontractor shall submit, following agreement on price and prior to award, a Certificate of Current Cost or Pricing Data as prescribed by FAR 15.406-2.

3. Subcontractor may submit a written request for exemption from submitting cost or pricing data that contains the information described in the following subparagraphs; Contractor may require additional supporting information to the extent necessary to determine whether an exemption should be granted and to determine whether pricing is fair and reasonable:

Identification of the law or regulation establishing the proposed price. If the price is controlled under law by periodic rulings, reviews or similar actions of a governmental body, attach a copy of the controlling document, unless it was previously submitted to the Contractor.

Information on Subcontracts for commercial items:

(i) The original Subcontract was granted an exemption from the submittal of cost or pricing data because the price was based on adequate price competition or prices set by law or regulation or was a Subcontract for the acquisition of a commercial item; or

(ii) If the modification is not exempted by one of the foregoing exceptions, Subcontractor may provide information to establish that the modification would not change this Subcontract from a Subcontract for the acquisition of a commercial item to a Subcontract for the acquisition of an item other than a commercial item.

For a commercial item exemption, the Subcontractor shall provide, at a minimum, information on prices at which the same item or similar items have been previously sold that is adequate for evaluating the reasonableness of the price of the modification, such as:

(i) For catalog items, a copy of or identification of the catalog and its date, or the appropriate pages for the offered items, or a statement that the catalog is on file in the buying office to which the proposal is being submitted. Provide a copy or describe current discount policies and price lists, e.g., wholesale, original equipment manufacturer or reseller. Also, explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in quantities similar to the proposed quantities.

(ii) For market-priced items, the source and date or period of the market quotation or other basis for market price, the base amount, and applicable discounts. In addition, describe the nature of the market.

(iii) For items included on an active Federal Supply Service Multiple Award Schedule contract, proof that an exemption has been granted for the schedule item.

4. The Subcontractor grants the Contractor's and the Government's authorized representative(s) the right to examine, at any time before award, books, records, documents or other directly pertinent records to verify a request for an exemption under this Article and the reasonableness of price. For items priced using catalog or market prices or law or regulation, access does not extend to cost or profit information or other data relevant solely to the Subcontractor's determination of the prices to be offered in the catalog or marketplace.

A.17 WARRANTY

1. Subcontractor warrants that the services shall reflect the highest standards of professional knowledge and judgment, shall be free from defects, and shall be in compliance with all requirements of this Subcontract, until one year from the completion

of the services. Subcontractor shall correct any nonconformity with this warranty at its sole expense, as directed by Contractor, by promptly (i) re-performing the nonconforming services or (ii) paying to Contractor a portion of the Subcontract price as is equitable under the circumstances.

2. If Subcontractor fails to perform its obligations promptly under this Article, Contractor may perform, or have performed, such obligations and Subcontractor shall pay Contractor all charges occasioned thereby.

3. The warranty with respect to re-performed services shall be the same as the warranty provided for in Paragraphs 1 and 2 of this Article. The warranty for other than replacement supplies or services shall continue until the expiration of the original period plus a period equal to the time elapsed between the discovery of the nonconformity and its correction.

4. This Article shall apply notwithstanding inspection, acceptance, or any other provision of this Subcontract, and shall not limit any other of Contractor's rights and remedies.

A.18 INTELLECTUAL PROPERTY INDEMNITY

1. Subcontractor shall indemnify the Government and Contractor and their officers, agents, and employees against liability, including costs, for infringement of any copyright or United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy order under 35 U.S.C. 181) arising out of the manufacture or delivery of supplies, the performance of services, or the construction, alteration, modification, services or repair of real property (hereinafter referred to as "construction work") under this Subcontract, or out of the use or disposal by or for the account of the Government or Contractor of such, supplies or construction work.

2. This indemnity shall not apply unless Subcontractor shall have been informed as soon as practicable by the Government or Contractor of the suit or action alleging such infringement, and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in its defense. Further, this indemnity shall not apply to: (i) an infringement resulting from compliance with specific written instructions of Contractor directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of this Subcontract not normally used by Subcontractor; (ii) an infringement resulting from addition to or change in, supplies furnished or construction work performed that was made subsequent to delivery or performance or; (iii) a claimed infringement that is unreasonably settled without the consent of Subcontractor, unless required by final decree of a court of competent jurisdiction.

A.19 AUTHORIZATION AND CONSENT

1. The Government hereby gives its authorization and consent (without prejudice to any rights of indemnification) for all use and manufacture in the performance of this Subcontract, or any part hereof, or any amendment hereto, or any Lower-tier Subcontract hereunder, of any invention described in, and covered by, a patent of the United States, and that is:

   a. Embodied in the structure or composition of any goods, the delivery of which is accepted by the Contractor or the Government under this Subcontract, or

   b. Utilized in the machinery, tools, or methods, the use of which necessarily results from compliance by the Subcontractor or the using Lower-tier Subcontractor with specifications or written provisions now or hereafter forming a part of this Subcontract, or specific written instructions given by the Contractor directing the manner of performance.

2. he entire liability to the Government and the Contractor for infringement of a patent of the United States shall be determined solely by the provisions of the indemnity clause, if any, included in this Subcontract or any Lower-tier Subcontract hereunder, and the Contractor and the Government assume liability for all other infringement to the extent of the authorization and consent granted in this Article.

A.20 RIGHTS TO PROPOSAL DATA

Except for the technical data contained on those pages of Subcontractor's proposal which are specifically identified in this Subcontract with specific reference to this Article and asserted by Subcontractor as being proprietary data, it is agreed that, as a condition of the award of this Subcontract and not withstanding the provisions of any notice appearing on the proposal or elsewhere, Contractor and the Government shall have the right to use, duplicate, disclose and have others do so, for any purpose whatsoever, the technical data contained in the proposal upon which this Subcontract is based.

A.21 RIGHTS IN DATA

1. <u>Definitions</u>

a. Computer databases, as used in this Article, 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.

b. Computer Software, as used in this Article, means:

(i) computer programs that are data comprising a series of instructions, rules routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(ii) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer databases.

c. Data, as used in this Article, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. For the purposes of this Article, the term does not include data incidental to the administration of this Subcontract, such as financial, administrative, cost and pricing, or management information.

d. Form, fit, and function data, as used in this Article, 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.

e. Limited rights data, as used in this Article, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice, if included in this Article.

f. Restricted computer software, as used in this Article, 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 any such computer software. The Government's rights to use, duplicate, or disclose

restricted computer software are as set forth in the Restricted Rights Notice, if included in this Article.

g. Technical data, as used in this Article, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer database.

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

2. <u>Allocation of rights</u>

a. Except as provided in Paragraph 3 of this Article regarding copyright, the Government shall have unlimited rights in:

(i) Data first produced in the performance of this Subcontract;

(ii) Form, fit, and function data delivered under this Subcontract;

(iii) Data delivered under this Subcontract (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 Subcontract; and

(iv) All other data delivered under this Subcontract, unless provided otherwise for limited rights data or restricted computer software in accordance with Paragraph 7 of this Article.

b. The Subcontractor shall have the right to:

(i) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Subcontractor in the performance of this Subcontract, unless provided otherwise in Paragraph 4 of this Article;

(ii) Protect from unauthorized disclosure and use those data that are limited rights data or restricted computer software to the extent provided in Paragraph 7 of this Article;

(iii) Substantiate use of, add or correct limited rights, restricted rights, or copyright notices and to take other appropriate action, in accordance with Paragraphs 5 and 6 of this Article; and

(iv) Establish claim to copyright subsisting in data first produced in the performance of this Subcontract to the extent provided in subparagraph 3.a of this Article.

3. <u>Copyright</u>

a. Data first produced in the performance of this Subcontract. Unless provided otherwise in Paragraph 4 of this Article, the Subcontractor may establish, without prior approval of the Contractor or Department of Energy (DOE), claim to copyright subsisting in scientific and technical articles based on or containing data first produced in the performance of this Subcontract and published in academic, technical or professional journals, symposia proceedings or similar works. The prior, expressly written permission of the DOE Contracting Officer, through the Contractor, is

required to establish claim to copyright subsisting in all other data first produced in the performance of this Subcontract. When claim to copyright is made, the Subcontractor shall affix the applicable copyright notices of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including subcontract number) to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software the Subcontractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Subcontractor grants to the Government and others acting in its behalf, a paid-up nonexclusive, irrevocable worldwide license in such copyrighted computer software to reproduce, prepare derivative works, and perform publicly and display publicly by or on behalf of the Government.

b. Data not first produced in the performance of this Subcontract. The Subcontractor shall not, without prior written permission of the DOE Contracting Officer, through the Contractor, incorporate in data delivered under this Subcontract any data not first produced in the performance of this Subcontract and which contains the copyright notice of 17 U.S.C. 401 or 402, unless the Subcontractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in subparagraph 3.a of this Article; provided, however, that if such data are computer software the Government shall acquire a copyright license as set forth in Paragraph 7 of this Article, or as otherwise may be provided in a collateral agreement incorporated in or made part of this Subcontract.

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

4. <u>Release, publication, and use of data</u>

a. The Subcontractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Subcontractor in the performance of this Subcontract, 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 4 of this Article or expressly set forth in this Subcontract.

b. The Subcontractor agrees that to the extent it receives or is given access to data necessary for the performance of this Subcontract which contain restrictive markings, the Subcontractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the DOE Contracting Officer, through the Contractor.

c. The Subcontractor agrees not to assert copyright in computer software first produced in the performance of this Subcontract without prior written permission of the DOE Patent Counsel assisting the subcontracting activity. When such permission is granted, the Patent Counsel shall specify appropriate terms, conditions and submission requirements to assure utilization, dissemination, and commercialization of the data. The Subcontractor, when requested, shall promptly deliver to Patent Counsel a duly executed and approved instrument fully confirmatory of all rights to which the Government is entitled.

5. <u>Unauthorized marking of data</u>

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

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

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

(iii) If the Subcontractor provides written justification to substantiate the propriety of the markings within the period set in subparagraph 5.a.(i) of this Article, the Contractor, in coordination with DOE, shall consider such written justification and determine whether or not the markings are to be cancelled or ignored. If the DOE Contracting Officer determines that the markings are authorized, the Subcontractor shall be notified in writing. If the Contractor determines, with concurrence of the DOE Contracting Officer, that the markings are not authorized, the Contractor shall furnish the Subcontractor a written determination, which determination shall become the final decision regarding the appropriateness of the markings, unless the Subcontractor files suit in a court of competent jurisdiction within 90 days of receipt of the Contractor's decision. The Contractor and DOE shall continue to abide by the markings under this subparagraph 5.a.(iii) until final resolution of the matter either by the Contractor's determination becoming final (in which instance the Government and the Contractor shall thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.

b. The time limits in the procedures set forth in subparagraph 5.a of this Article 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.

c. This Paragraph 5 does not apply if this Subcontract is for a major system or for support of a major system by a civilian agency other than NASA and the U.S. Coast Guard agency subject to the provisions of Title In of the Federal Property and Administrative services Act of 1949.

d. Except to the extent the Contractor's action occurs as the result of the final disposition of the matter by a court competent jurisdiction, the Subcontractor is not precluded by this Paragraph 5 from bringing a claim pursuant to the Disputes Article of this Subcontract, as applicable, that

may arise as the result of the Contractor removing or ignoring authorized markings on data delivered under this Subcontract.

6. <u>Omitted or incorrect marking</u>

a. Data delivered to the Contractor without either the limited rights or restricted rights notice as authorized by Paragraph 7 of this Article, or the copyright notice required by Paragraph 3 of this Article, shall be deemed to have been furnished with unlimited rights, and the Government and Contractor assume no liability for the disclosure, use, or reproduction of such data. However, to the extent the data has not been disclosed without restriction outside the Government, the Subcontractor may request, within six (6) months (or a longer time approved by the Contractor for good cause shown) after delivery of such data, permission to have notices placed on qualifying data at the Subcontractor's expense, and the Contractor, in coordination with DOE, may agree to do so if the Subcontractor:

(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 and the Contractor have no liability with respect to the disclosure, use, or reproduction of any such data made prior to the addition of the notice or resulting from the omission of the notice.

b. The Contractor, in coordination with DOE, may also:

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

(ii) Correct any incorrect notices.

7. <u>Protection of limited rights data and restricted computer software</u>

a. When data other than that listed in subparagraphs 2.a. (i), (ii), and (iii) of this Article are specified to be delivered under this Subcontract and qualify as either limited rights data or restricted computer software, if the Subcontractor desires to continue protection of such data, the Subcontractor shall withhold such data and not furnish them to the Contractor under this Subcontract. As a condition to this withholding, the Subcontractor shall identify the data being withheld and furnish form, fit, and function data in lieu thereof. Limited rights data that are formatted as a computer database for delivery to the Contractor are to be treated as limited rights data and not restricted computer software.

b. Notwithstanding subsection 7.a of this Article, the contract may identify and specify the delivery of limited rights data, or Contractor's Subcontract Administrator may require by written request the delivery of limited rights data that has been withheld or would otherwise be withholdable. If delivery of such data is so required, the Subcontractor may affix the following "Limited Rights Notice" to the data and the Contractor will thereafter treat the data, subject to the provisions of sections 5 and 6 of this Article, in accordance with such Notice:

LIMITED RIGHTS NOTICE

a. These data are submitted with limited rights under Contract No. _____ between _____ (Subcontractor) and Battelle Energy Alliance, LLC (Contractor), acting in its capacity

as a Management and Operating Contractor to the U.S. Department of Energy at the Idaho National Laboratory. These data may be reproduced and used by the Government and Contractor with the express limitation that they will not, without written permission of the Subcontractor, be used for purposes of manufacture nor disclosed outside the Government or Contractor; except that the Government or Contractor may disclose these data outside the Government or Contractor for the following purposes, if any; provided the Government or Contractor make such disclosure subject to prohibition against further use and disclosure:

(1) use (except for manufacture) by support services contractors or subcontractors within the scope of their contracts or subcontracts;

(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 or subcontractors participating in the Government's program of which this Contract is a part for information or use (except for manufacture) in connection with the work performed under their contracts or subcontracts and under the restriction that the "limited rights data" be retained in confidence and not be further disclosed;

(4) this "limited rights data" may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the "limited rights data" be retained in confidence and not be further disclosed;

(5) release to a foreign government, or instrumentality thereof, as the interests of the United Stated Government may require, for information or evaluation, or for emergency repair or overhaul work by such government.

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

8. <u>Subcontracting</u>

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

9. <u>Relationship to patents</u>

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

10. <u>Inspection</u>

The Subcontractor agrees, except as may be otherwise specified in this Subcontract for specific data items listed as not subject to this paragraph, that the DOE Contracting Officer or an authorized representative may, up to three (3) years after acceptance of all items to be delivered under this Subcontract, inspect at

Subcontractor's facility any data withheld pursuant to Paragraph 7 of this Article for purposes of verifying Subcontractor's assertion pertaining to the limited rights or restricted rights status of the data or for evaluating work performance. Where the Subcontractor whose data are to be inspected demonstrates to the DOE Contracting Officer that there would be a possible conflict of interest if the inspection were made by a particular representative, the DOE Contracting Officer shall designate an alternate inspector.

A.22 ADDITIONAL TECHNICAL DATA REQUIREMENTS

In addition to the technical data specified elsewhere in this Subcontract to be delivered, the Contractor may at any time during this Subcontract performance or within one year after final payment call for Subcontractor to deliver any technical data first produced or specifically used in the performance of this Subcontract, except technical data pertaining to items of standard commercial design.

The provisions of the Rights in Data Article included in this Subcontract are applicable to all technical data called for under this Additional Technical Data Requirements Article. Accordingly, nothing contained in this Article shall require Subcontractor to actually deliver any technical data, the delivery of which is excused by the Article entitled Rights in Data.

When technical data are to be delivered under this Article, Subcontractor will be compensated for appropriate costs for converting such data into the prescribed form for reproduction and for delivery.

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

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

1. <u>Definitions</u>

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

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

c. "Nonprofit organization" means a university or other institution of higher education or an organization of the type described in section 501 (c) (3) of the Internal Revenue Code of 1954 (26 U.S.C. 501 (c) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

d. "Practical application" means: to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

e. "Small business firm" means a small business concern as defined at section 2 of Pub. L. 85-536(15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this article, the size standards for small business concerns involved in Government, procurement and Subcontracting at 13 CFR 121.3-8 and 13 CFR 121.3-12, respectively, will be used.

f. **"Subject invention" means any invention of the Subcontractor conceived or first actually reduced to practice in the performance of work under this Subcontract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d) must also occur during the period of contract performance.**

g. **"Agency licensing regulations" and "agency regulations concerning the licensing of Government-owned inventions" mean the Department of Energy patent licensing regulations at 10 CFR Part 781.**

h. **"Patent Counsel", as used in this Article, means the Department Energy Patent Counsel assisting the procuring activity.**

2. **<u>Allocation of principal rights</u>**

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

3. **<u>Invention disclosure, election of title, and filing of patent application by Subcontractor</u>**

a. **The Subcontractor will disclose each subject invention to the Department of Energy (DOE) within two (2) months after the inventor discloses it in writing to its personnel responsible for patent matters. The disclosure shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure, the Subcontractor will promptly notify that agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Subcontractor.**

b. **The Subcontractor will elect in writing whether or not to retain title to any such invention by notifying DOE and Contractor within two(2) years of disclosure. However, in any case where publication, on sale or public use has initiated the one(1) year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by DOE to a date that is no more than 60 days prior to the end of the statutory period.**

c. **The Subcontractor will file its initial patent application on a subject invention to which it elects to retain title within one(1) year after election of title or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The Subcontractor will file patent applications in additional countries or international patent offices within the earlier of 10 months of the corresponding initial patent application or six(6) months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.**

d. **Requests for extension of the time for disclosure, election, and filing under subparagraphs 3.a, b and c of this Article may, at the discretion of the DOE, be granted.**

4. **<u>Conditions when the Government may obtain title</u>**

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

a. **If the Subcontractor fails to disclose or elect title to the subject invention within the times specified in Paragraph 3 of this Article, or elects not to retain title; provided, that DOE may only request title within 60 days after learning of the failure of the Subcontractor to disclose or elect within the specified times.**

b. **In those countries in which the Subcontractor fails to file applications within the times specified in Paragraph 3 of this Article; provided, however, that if the Subcontractor has filed a patent application in a country after the times specified in Paragraph 3 of this Article, but prior to its receipt of the written request from DOE, the Subcontractor shall continue to retain title in that country.**

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

5. **<u>Minimum rights to Subcontractor and protection of the Subcontractor right to file.</u>**

a. **The Subcontractor will retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Subcontractor fails to disclose the invention within the times specified in Paragraph 3 of this Article. The Subcontractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Subcontractor is a party and includes the right to grant sublicenses of the same scope to the extent the Subcontractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of DOE; except when transferred to the successor of the part of the Subcontractor's business to which the invention pertains.**

b. **The Subcontractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR Part 404 and DOE licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the Subcontractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Subcontractor, its licensees, or domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.**

c. **Before revocation or modification of the license, DOE will furnish the Subcontractor a written notice of its intention to revoke or modify the license, and the Subcontractor will be allowed 30 days (or such other time as may be authorized by DOE for good cause shown by the Subcontractor) after the notice to show cause why the license should not be revoked or modified. The Subcontractor has the right to appeal, in accordance with applicable regulations in 37 CFR Part 404 and agency regulations**

concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of the license.

6. <u>Subcontractor action to protect the Government's interest</u>

a. The Subcontractor agrees to execute or to have executed and promptly deliver to DOE all instruments necessary to:

(i) Establish or confirm the rights the Government has throughout the world in those subject inventions to which the Subcontractor elects to retain title; and

(ii) Convey title to DOE when requested under Paragraph 4 of this Article and to enable the Government to obtain patent protection throughout the world in that subject invention.

b. The Subcontractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly, in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Subcontractor, each subject invention made under this Subcontract in order that the Subcontractor can comply with the disclosure provisions of Paragraph 3 of this Article, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph 3.a of this Article. The Subcontractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

c. The Subcontractor will notify DOE and the Contractor of any decision not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response period required by the relevant patent office.

d. The Subcontractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under (identify the Subcontract) awarded by the United States Department of Energy. The Government has certain rights in the invention."

7. <u>Subcontracts</u>

a. The Subcontractor will include this Article, suitably modified to identify the parties, in all Lower-tier Subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by a small business firm or domestic nonprofit organization. The Lower-tier Subcontractor will retain all rights provided for the Subcontractor in this Article, and the Subcontractor will not, as part of the consideration for awarding a Subcontract, obtain rights in a Lower-tier Subcontractor's subject invention.

b. The Subcontractor shall include in all other Lower-tier Subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work the patent rights article at DEAR 952.227-13.

c. In the case of Lower-tier Subcontracts, at any tier, DOE, the Lower-tier Subcontractor, and the Subcontractor agree that the mutual obligations of the parties created by this Article constitute a contract between the Lower-

tier Subcontractor and DOE with respect to the matters covered by this Article; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under Paragraph 10 of this Article.

8. <u>Reporting on utilization of subject inventions</u>

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

9. <u>Preference for United States Industry</u>

Notwithstanding any other provision of this Article, the Subcontractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States, unless such person agrees that any product embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by DOE upon a showing by the Subcontractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

10. <u>March-in-rights</u>

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

a. Such action is necessary because the Subcontractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

b. Such action is necessary to alleviate health or safety needs that are not reasonably satisfied by the Subcontractor, assignee, or their licensees;

c. Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Subcontractor, assignee, or licensees; or

d. Such action is necessary because the agreement required by Paragraph 9 of this Article has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

11. <u>Special provisions for subcontracts with nonprofit organizations</u>

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

a. Rights to a subject invention in the United States may not be assigned without the approval of DOE, except where such assignment is made to an organization which has as one of its primary functions the management of inventions; provided, that such assignee will be subject to the same provisions as the Subcontractor;

b. The Subcontractor will share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (when DOE deems it appropriate), when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;

c. The balance of any royalties or income earned by the Subcontractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions will be utilized for the support of scientific research or education; and

d. It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and that it will give a preference to a small business firm when licensing a subject invention, if the Subcontractor determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided, that the Subcontractor is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the Subcontractor. However, the Subcontractor agrees that the Secretary of Commerce may review the Subcontractor's licensing program and decisions regarding small business applicants, and the Subcontractor will negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when that Secretary's review discloses that the Subcontractor could take reasonable steps to more effectively implement the requirements of this subparagraph 11.d.

12. <u>Communications</u>

a. The Subcontractor shall direct any notification, disclosure, or request to DOE provided for in this Article to the DOE Patent Counsel assisting the procuring activity, with a copy of the communication to the Contracting Officer and the Contractor.

b. Each exercise of discretion or decision provided for in this Article, except subparagraph 11.d, is reserved for the DOE Patent Counsel and is not a claim or dispute and is not subject to the Contract Disputes Act of 1978.

c. Upon request of the DOE Patent Counsel or the Contracting Officer, the Subcontractor shall provide any or all of the following:

(i) A copy of the patent application, filing date, serial number and title, patent number, and issue date for any subject invention in any country in which the Subcontractor has applied for a patent;

(ii) A report, not more often than annually, summarizing all subject inventions which were disclosed to DOE individually during the reporting period specified; or

(iii) A report, prior to closeout of this Subcontract, listing all subject inventions or stating that there were none.

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

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

1. <u>Definitions</u>

a. "Invention" as used in this Article, means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the United States Code or any novel variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.).

b. "Practical application" as used in this Article, means: to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

c. "Subject invention" as used in this Article, means any invention of the Contractor conceived or first actually reduced to practice in the course of or under this Subcontract.

d. "Patent Counsel" as used in this Article, means the Department of Energy Patent Counsel assisting the procuring activity.

e. "DOE patent waiver regulations" as used in this Article, means the Department of Energy patent waiver regulations at 41 CFR9-9.109- 6 or successor regulations. See 10 CFR part 784.

f. "Agency licensing regulations" and "applicable agency licensing regulations" as used in this Article, mean the Department of Energy patent licensing regulations at 10 CFR Part 781.

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

2. <u>Allocations of principal rights</u>

a. Assignment to the Government. The Subcontractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention, except to the extent that rights are retained by the Subcontractor under subparagraph 2.b and Paragraph 4 of this Article.

b. Greater rights determinations.

(i) The Subcontractor, or an employee-inventor after consultation with the Subcontractor, may request greater rights than the nonexclusive license and the foreign patent rights provided in Paragraph 4 of this Article on identified inventions in accordance with the DOE patent waiver regulations. A request for a determination of whether the Subcontractor or the employee-inventor is entitled to acquire such greater rights must be submitted to the Patent Counsel with a copy to the Contracting Officer and the Contractor at the time of the first disclosure of the invention pursuant to subparagraph 5.b of this Article, or not later than eight (8) months thereafter, unless a longer period is

authorized in writing by the Contracting Officer for good cause shown in writing by the Subcontractor. Each determination of greater rights under this contract shall be subject to Paragraph 3 of this Article, unless otherwise provided in the greater rights determination, and to the reservations and conditions deemed to be appropriate by the Secretary of Energy or designee.

(ii) Within two (2) months after the filing of a patent application, the Subcontractor shall provide the filing date, serial number and title, a copy of the patent application (including an English-language version if filed in a language other than English), and, promptly upon issuance of a patent, provide the patent number and issue date for any subject invention in any country for which the Subcontractor has been granted title or the right to file and prosecute on behalf of the United States by the Department of Energy.

(iii) Not less than 30 days before the expiration of the response period for any action required by the Patent and Trademark Office, Subcontractor or inventor must notify the Patent Counsel and the Contractor of any decision not to continue prosecution of the application.

(iv) Upon request, the Subcontractor shall furnish the Government an irrevocable power to inspect and make copies of the patent application file.

3. Minimum rights acquired by the Government

a. With respect to each subject invention to which the Department of Energy grants the Subcontractor principal or exclusive rights, the Subcontractor agrees as follows:

(i) The Subcontractor hereby grants to the Government a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced each subject invention throughout the world by or on behalf of the Government of the United States (including any Government agency).

(ii) The Subcontractor agrees that with respect to any subject invention in which DOE has granted it title, DOE has the right, in accordance with the procedures in the DOE patent waiver regulations (10 CFR part 784), to require the Subcontractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Subcontractor, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if it determines that: (1) such action is necessary because the Subcontractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use; (2) such action is necessary to alleviate health or safety needs, which are not reasonably satisfied by the Subcontractor, assignee, or their licensees; (3) such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or (4) such action is necessary because the agreement required by Paragraph 9 of this Article has neither been obtained nor waived or because a licensee of the exclusive right to

use or sell any subject invention in the United States is in breach of such agreement.

(iii) The Subcontractor agrees to submit, on request, periodic reports, no more frequently than annually, on the utilization of a subject invention or on efforts at obtaining such utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Subcontractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Subcontractor, and such other data and information as DOE may reasonably specify. The Subcontractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceedings undertaken by that agency in accordance with subparagraph 3.a(ii) of this Article. To the extent data or information supplied under this section is considered by the Subcontractor, its licensee, or assignee to be privileged and confidential and is so marked, the Department of Energy agrees that, to the extent permitted by law, it will not disclose such information to persons outside the Government.

(iv) The Subcontractor agrees, when licensing a subject invention, to arrange to avoid royalty charges on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government, to refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government, and to provide for such refund in any instrument transferring rights in the invention to any party.

(v) The Subcontractor agrees to provide for the Government's paid-up license pursuant to subparagraph 3.a(i) of this Article in any instrument transferring rights in a subject invention and to provide for the granting of licenses as required by subparagraph 3.a.(ii) of this Article, and for the reporting of utilization information as required by subparagraph 3.a.(iii) of this Article, whenever the instrument transfers principal or exclusive rights in a subject invention.

b. Nothing contained in this Paragraph 3 shall be deemed to grant to the Government any rights with respect to any invention other than a subject invention.

4. Minimum rights to the Subcontractor

a. The Subcontractor is hereby granted a revocable, nonexclusive, royalty-free license in each patent application filed in any country on a subject invention and any resulting patent in which the Government obtains title, unless the Subcontractor fails to disclose the subject invention within the times specified in subparagraph 5.b of this Article. The Subcontractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Subcontractor is a part and includes the right to grant sublicenses of the same scope to the extent the Subcontractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of DOE except when transferred to the successor of that part of the Subcontractor's business to which the invention pertains.

b. The Subcontractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of the

subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in 37 CFR Part 404 and agency licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the Subcontractor has achieved practical applications and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

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

d. The Subcontractor may request the right to acquire patent rights to a subject invention in any foreign country where the Government has elected not to secure such rights, subject to the conditions in subparagraphs 4.d.(i) through 4.d.(vii) of this Article. Such request must be made in writing to the Patent Counsel as part of the disclosure required by subparagraph 5.b of this Article, with a copy to the DOE Contracting Officer and the Contractor. DOE approval, if given, will be based on a determination that this would best serve the national interest.

(i) The recipient of such rights, when specifically requested by DOE, and three years after issuance of a foreign patent disclosing the subject invention, shall furnish DOE a report stating:

- **The commercial use that is being made, or is intended to be made, of said invention; and**
- **The steps taken to bring the invention to the point of practical application or to make the invention available for licensing.**

(ii) The Government shall retain at least an irrevocable, nonexclusive, paid-up license to make, use, and sell the invention throughout the world by, or on behalf of, the Government (including any Government agency) and States and domestic municipal governments, unless the Secretary of Energy or designee determines that it would not be in the public interest to acquire the license for the States and domestic municipal governments.

(iii) If noted elsewhere in this Subcontract as a condition of the grant of an advance waiver of the Government's title to inventions under this subcontract, or, if no advance waiver was granted but a waiver of the Government's title to an identified invention is granted pursuant to subparagraph 2.b of this Article upon a determination by the Secretary of Energy that it is in the Government's best interest, this license shall include the right of the Government to sublicense foreign governments pursuant to any existing or future treaty or agreement with such foreign governments.

(iv) Subject to the rights granted in subparagraphs 4.a, b and c of this Article, the Secretary of Energy or designee shall have the right to

terminate the foreign patent rights granted in this subparagraph 4.d in whole or in part, unless the recipient of such rights demonstrates to the satisfaction of the Secretary of Energy or designee that effective steps necessary to accomplish substantial utilization of the invention have been taken or within a reasonable time will be taken.

(v) Subject to the rights granted in subparagraphs 4.a, b and c of this Article, the Secretary of Energy or designee shall have the right, commencing four years after foreign patent rights are accorded under this subparagraph 4.d to require the granting of a nonexclusive or partially exclusive license to a responsible applicant or applicants, upon terms reasonable under the circumstances, and in appropriate circumstances to terminate said foreign patent rights in whole or in part, following a hearing upon notice thereof to the public, upon a petition by an interested person justifying such hearing:

- **If the Secretary of Energy or designee determines, upon review of such material as he deems relevant, and after the recipient of such rights or other interested person has had the opportunity to provide such relevant and material information as the Secretary or designee may require, that such foreign patent rights have tended substantially to lessen competition or to result in undue market concentration in any section of the United States in any line of commerce to which the technology relates; or**

- **Unless the recipient of such rights demonstrates to the satisfaction of the Secretary of Energy or designee at such hearing that the recipient has taken effective steps, or within a reasonable time thereafter is expected to take such steps, necessary to accomplish substantial utilization of the invention.**

(vi) If the Subcontractor is to file a foreign patent application on a subject invention, the Government agrees, upon written request, to use its best efforts to withhold publication of such invention disclosures for such period of time as specified by Patent Counsel, but in no event shall the Government or its employees be liable for any publication thereof.

(vii) Subject to the license specified in subparagraphs 4.a, b, and c of this Article, the Subcontractor or inventor agrees to convey to the Government, upon request, the entire right, title, and interest in any foreign country in which the Subcontractor or inventor fails to have a patent application filed in a timely manner or decides not to continue prosecution or to pay any maintenance fees covering the invention. To avoid forfeiture of the patent application or patent, the Subcontractor or inventor shall, not less than 60 days before the expiration period for any action required by any patent office, notify the Patent Counsel, with copy to Contractor, of such failure or decision, and deliver to the Patent Counsel, the executed instruments necessary for the conveyance specified in this paragraph.

5. <u>Invention identification, disclosures, and reports</u>

a. **The Subcontractor shall establish and maintain active and effective procedures to assure that subject inventions are promptly identified and disclosed to Subcontractor personnel responsible for patent matters within six (6) months of conception and/or first actual reduction to practice, whichever occurs first in the performance of work under its contract. These procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and records that show that the procedures for identifying and disclosing the inventions are followed. Upon request, the Subcontractor shall furnish the Contracting Officer a description of such procedures for evaluation and for determination as to their effectiveness.**

b. **The Subcontractor shall disclose each subject invention to the DOE Patent Counsel with a copy to the Contracting Officer and Contractor, within two (2) months after the inventor discloses it in writing to Subcontractor personnel responsible for patent matters or, if earlier, within six (6) months after the Subcontractor becomes aware that a subject invention has been made, but in any event before any on sale, public use, or publication of such invention known to the Subcontractor. The disclosure shall be in the form of a written report and shall identify the subcontract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale, or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to DOE, the Subcontractor shall promptly notify Patent Counsel, with copy to the Contractor, of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Subcontractor. The report should also include any request for a greater rights determination in accordance with subparagraph 2.b of this Article. When an invention is disclosed to DOE under this paragraph, it shall be deemed to have been made in the manner specified in Sections (a)(1) and (a)(2) of 42 U.S.C. 5908, unless the Contractor contends in writing at the time the invention is disclosed that was not so made.**

c. **The Subcontractor shall furnish the Contracting Officer, with a copy to the Contractor, the following:**

(i) **Interim reports every 12 months (or such longer period as may be specified by the Contracting Officer) from the date of this Subcontract, listing all subject inventions during that period, and including a statement that all subject inventions have been disclosed (or that there are not such inventions), and that such disclosure has been made in accordance with the procedures required by subparagraph 5.a of this Article.**

(ii) **A final report, within three (3) months after completion of the work, listing all subject inventions or containing a statement that there were no such inventions, and listing all Lower-tier Subcontracts at any tier containing a patent rights article or containing a statement that there were no such Lower-tier Subcontracts.**

d. **The Subcontractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly, in writing, to personnel identified as responsible for the administration of**

patent matters and in a format suggested by the Subcontractor, each subject invention made under this Subcontract, in order that the Subcontractor can comply with the disclosure provisions of Paragraph 3 of this Article, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by subparagraph 5.b of this Article.

e. The Subcontractor agrees, subject to FAR 27.302(j), that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this Article.

6. <u>Examination of records relating to inventions</u>.

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

(i) Any such inventions are subject inventions;

(ii) The Subcontractor has established and maintains the procedures required by subparagraphs 5.a and d of this Article; and

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

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

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

7. <u>Withholding of payment</u>

a. Any time before final payment under this Subcontract, the Contractor may, withhold payment until a reserve not exceeding $50,000 or 5% of the amount of this Subcontract, whichever is less, shall have been set aside if, in the Contractor's opinion, the Subcontractor fails to:

(i) Convey to the Government, using a DOE-approved form, the title and/or rights of the Government in each subject invention as required by this Article;

(ii) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to subparagraph 5.a of this Article;

(iii) Disclose any subject invention pursuant to subparagraph 5.b of this Article;

(iv) Deliver acceptable interim reports pursuant to subparagraph 5.c(i) of this Article; or

(v) Provide the information regarding subcontracts pursuant to subparagraph 8.d of this Article.

b. Such reserve or balance shall be withheld until the Contractor has determined that the Subcontractor has rectified whatever deficiencies exist

and has delivered all reports, disclosures, and other information required by this Article.

c. Final payment under this Subcontract shall not be made before the Subcontractor delivers to the Contractor or DOE Contracting Officer all disclosures of subject inventions required by subparagraph 5.b of this Article, and an acceptable final report pursuant to subparagraph 5.c.(ii) of this Article, and the Patent Counsel has issued a patent clearance certification.

d. The Contractor may decrease or increase the sums withheld up to the maximum authorized above. No amount shall be withheld under this paragraph while the amount specified by this paragraph is being withheld under other provisions of this Subcontract. The withholding of any amount or the subsequent payment thereof shall not be construed as a waiver of any Contractor rights under this Subcontract.

8. <u>Subcontracts</u>

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

b. In the event of a refusal by a prospective Lower-tier Subcontractor to accept such an article, the Subcontractor:

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

(ii) Shall not proceed with such Lower-tier Subcontract without the written authorization of the Contracting Officer.

c. In the case of Lower-tier Subcontracts at any tier, DOE, the Subcontractor, and Contractor agree that the mutual obligations of the parties created by this Article constitute a contract between the Lower-tier Subcontractor(s) and DOE with respect to those matters covered by this Article.

d. The Subcontractor shall promptly notify the Contracting Officer in writing upon the award of any Lower-tier Subcontract at any tier containing a patent rights article by identifying the Lower-tier Subcontractor, the applicable patent rights article, the work to be performed under the Lower-tier Subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Subcontractor shall furnish a copy of such Lower-tier Subcontract, and, no more frequently than annually, a listing of the Lower-tier Subcontracts that have been awarded.

e. The Subcontractor shall identify all subject inventions of a Lower-tier Subcontractor of which it acquires knowledge in the performance of this Subcontract and shall notify the Patent Counsel, with a copy to the Contracting Officer, promptly upon identification of the inventions.

9. Preference for United States Industry

Unless provided otherwise, no Subcontractor that receives title to any subject invention and no assignee of any such Subcontractor shall grant to any person the exclusive right to use or sell any subject invention in the United States, unless such person agrees that any products embodying the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement may be waived by the Government upon a showing by the Subcontractor or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

10. Atomic energy

a. No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted with respect to any invention or discovery made or conceived in the course of, or under, this Subcontract.

b. Except as otherwise authorized in writing by the Contracting Officer, the Subcontractor will obtain patent agreements to effectuate the provisions of subparagraph 5.a of this Article from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.

11. Background Patents

a. Background Patent means a domestic patent covering an invention or discovery which is not a subject invention and which is owned or controlled by the Subcontractor at any time through the completion of this Subcontract:

(i) Which the Subcontractor, but not the Government, has the right to license to others without obligation to pay royalties thereon; and

(ii) Infringement of which cannot reasonably be avoided upon the practice of any specific process, method, machine, manufacture, or composition of matter (including relatively minor modifications thereof) which is a subject of the research, development, or demonstration work performed under this Subcontract.

b. The Subcontractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive license under any background patent for purposes of practicing a subject of this Subcontract by or for the Government in research, development, and demonstration work only.

c. The Subcontractor also agrees that upon written application by DOE, it will grant to responsible parties, for purposes of practicing a subject of this Subcontract, nonexclusive licenses under any background patent on terms that are reasonable under the circumstances. If, however, the Subcontractor believes that exclusive rights are necessary to achieve expeditious commercial development or utilization, then a request may be made to DOE by the Subcontractor for DOE approval of such licensing.

d. Notwithstanding subparagraph 11.c of this Article, the Subcontractor shall not be obligated to license any background patent if the Subcontractor demonstrates to the satisfaction of the Secretary of Energy or designee that:

(i) **A competitive alternative to the subject matter covered by said background patent is commercially available or readily introducible from one or more other sources; or**

(ii) **The Subcontractor or its licensees are supplying the subject matter covered by said background patent in sufficient quantity and at reasonable prices to satisfy market needs, or have taken effective steps or within a reasonable time are expected to take effective steps to so supply the subject matter.**

12. **Publication**

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

13. **Forfeiture of rights in unreported subject inventions**

a. **The Subcontractor shall forfeit and assign to the Government, at the request of the Secretary of Energy or designee, all rights in any subject invention which the Subcontractor fails to report to Patent Counsel within six months after the time the Subcontractor:**

(i) **Files or causes to be filed a United States or foreign patent application thereon; or**

(ii) **Submits the final report required by subparagraph 5.c.(ii) of this Article, whichever is later.**

b. **However, the Subcontractor shall not forfeit rights in a subject invention if, within the time specified in subparagraph 13.a of this Article, the Subcontractor:**

(i) **Prepares a written decision based upon a review of the record that the invention was neither conceived nor first actually reduced to practice in the course of, or under, this Subcontract and delivers the decision to Patent Counsel, with a copy to the Contracting Officer and the Contractor; or**

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

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

c. **Pending written assignment of the patent application and patents on a subject invention determined by the Secretary of Energy or designee to be forfeited (such determination to be a final decision under the Disputes Article of this Subcontract), the Subcontractor shall be deemed to hold the invention and the patent applications and patents pertaining thereto in trust for the Government. The forfeiture provision of this Paragraph 13 shall be in addition to and shall not supersede other rights and remedies which the Government may have with respect to subject inventions.**

A.25 ALLOWABLE COST AND PAYMENT

1. Invoicing

Contractor shall make payments to Subcontractor when requested, as work progresses, but not more often than once each calendar month, (except for small business concerns) in amounts determined to be allowable by Contractor in accordance with FAR 31.2 or FAR 31.1 for Educational Institutions or FAR 31.7 for Nonprofit Organizations and DEAR 931.2 (not applicable to Educational Institutions and Nonprofit Organizations) in effect on the date of this Subcontract, and the terms of this Subcontract. Subcontractor may submit to Contractor, in such form and in reasonable detail as Contractor may require, an invoice supported by a statement of the claimed allowable cost for performing this Subcontract. Reasonable detail of costs includes, but is not limited to:

a. Labor categories used;

b. Hours expended for each category;

c. Direct labor rate(s) for each category;

d. Direct labor cost for each category;

e. Overhead rate(s) and total;

f. G&A (if applicable);

g. Travel costs (number of trips, number of days in a travel status; location of travel); and

h. Material costs and other direct costs (with identification of purchases >$5,000 per Unit).

2. Reimbursing Costs

a. For the purpose of reimbursing allowable costs (except as provided in subparagraph 2.b, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term "costs" includes only:

(i) Those recorded costs that, at the time of the request for reimbursement, Subcontractor has paid by cash, check, or other form of actual payment for items or services purchased directly for this Subcontract performance in the ordinary course of business;

(ii Cost incurred, but not necessarily paid, for:

- **Materials issued from Subcontractor's inventory and placed in the production process for use on this Subcontract,**
- **Direct labor,**
- **Direct travel,**
- **Other direct in-house costs, and**
- **Properly allocable and allowable indirect costs, as shown in the records maintained by Subcontractor for purposes of obtaining reimbursement under subcontracts; and**

(iii) The amount of progress payments that have been paid to Subcontractor's Lower-tier Subcontractors under similar cost standards.

b. **Subcontractor's contributions to any pension, profit-sharing, or employee stock ownership plan funds that are paid quarterly, or more often, may be included in indirect costs for payment purposes; provided that Subcontractor pays the contribution to the fund within 30 days after the close of the period covered. Payments made 30 days or more after the close of a period shall not be included until Subcontractor actually makes the payment. Accrued costs for such contribution that are paid less often than quarterly shall be excluded from indirect costs for payment purposes until Subcontractor actually makes the payment.**

c. **Notwithstanding the audit and adjustment of invoices or vouchers under Paragraph 7 of this Article, allowable indirect costs under this Subcontract shall be obtained by applying indirect cost rates established in accordance with Paragraph 4.**

d. **Any statements in specifications or other documents incorporated in this Subcontract by reference designating performance of services or furnishing of materials at Subcontractor's expense or at no cost to Contractor shall be disregarded for purpose of cost reimbursement under this Article.**

3. **<u>Small Business Concerns</u>**

A small business concern may be paid every 2 weeks and may invoice and be paid for recorded costs for items or services purchased directly for this Subcontract, even through the concern has not yet paid for the items or services.

4. **<u>Final Indirect Cost Rates</u>**

a. **Final annual indirect cost rates and the appropriate bases shall be established in accordance with FAR 42.7 and DEAR 942.7 in effect for the period covered by the indirect cost rate proposal.**

b. **Subcontractor shall, within 90 days after the expiration of each of its fiscal years, or by a later date approved by Contractor, submit to the cognizant Contracting Officer responsible for negotiating its final indirect cost rates and, if required by DOE procedures, to the cognizant audit activity, proposed final indirect cost rates for that period and supporting cost data specifying the Subcontract and any Lower-tier Subcontract(s) to which the rates apply. The proposed rates shall be based on Subcontractor's actual cost experience for that period. The appropriate Government representative and Subcontractor shall establish the final indirect cost rates as promptly as practical after receipt of Subcontractor's proposal.**

c. **Subcontractor and Contractor shall execute a written understanding setting forth the final indirect cost rates. The understanding shall specify:**

(i) **The agreed-upon final annual indirect cost rates;**

(ii) **The bases to which the rates apply;**

(iii) **The periods for which the rates apply;**

(iv) **Any specific indirect cost items treated as direct costs in the settlement; and**

(v) **The affected Subcontract and/or Lower-tier Subcontract(s), identifying any with advance agreements or special terms and the applicable rates.**

The understanding shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this

Subcontract. The understanding is incorporated into this Subcontract upon execution.

d. Failure by the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of the Disputes Article.

5. <u>Billing Rates</u>

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

6. <u>Quick-closeout Procedures</u>

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

7. <u>Audit</u>

At any time or times before final payment, Contractor may have Subcontractor's invoices or vouchers and statements of cost audited. Any payment may be reduced by amounts found by Contractor not to constitute allowable costs or adjusted for prior overpayments.

8. <u>Final Payment</u>

a. Subcontractor shall submit a completion invoice, designated as such, promptly upon completion of the work, but no later than 1 year (or longer, as Contractor may approve in writing) from the completion date. Upon approval of that invoice, and upon Subcontractor's compliance with all terms of this Subcontract, Contractor shall promptly pay any balance of allowable costs and that part of the fee (if any) not previously paid.

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

expenses, incurred by Subcontractor under the patent clauses of this Subcontract, excluding, however, any expenses arising from Subcontractor's indemnification of Contractor or the Government against patent liability.

9. <u>Determination of Allowability</u>

In no case, however, shall the foregoing arrangement and provisions preclude determination by the Contractor of the allowability or unallowability of Subcontractor costs claimed for reimbursement by the Subcontractor.

A.26 FIXED FEE

Contractor shall pay Subcontractor for performing this Subcontract the fixed fee specified; provided, that after payment of 85% of the fixed fee, Contractor may withhold further payment of fee until a reserve is set aside in an amount that Contractor considers necessary to protect the Contractor's interests. This reserve shall not exceed 15% of the total fixed fee, or $100,000, whichever is less.

A.27 LIMITATION OF COST

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

2. Subcontractor shall notify Contractor in writing whenever it has reason to believe that:

a. The cost Subcontractor expects to incur under this Subcontract in the next 60 days when added to all costs previously incurred, will exceed 75% of the total estimated cost specified; or

b. The total estimated cost for the performance of this Subcontract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.

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

4. Except as required by other provisions of this Subcontract, specifically citing and stated to be an exception to this Article:

a. Contractor is not obligated to reimburse Subcontractor for costs incurred in excess of the total estimated cost specified; and

b. Subcontractor is not obligated to continue performance under this Subcontract (including actions under the Termination Article of this Subcontract) or otherwise incur costs in excess of the total estimated cost specified, until Contractor:

(i) Notifies Subcontractor by written modification of this Subcontract, that the total estimated cost has been increased and

(ii) Provides a revised total estimated cost of performing this Subcontract.

5. No notice, communication, or representation in any form other than that specified in subparagraph 4.b or from any person other than Contractor, shall affect the total estimated cost of this Subcontract to Contractor. In the absence of the specified notice, Contractor is not obligated to reimburse Subcontractor for any costs in excess of the total estimated cost, whether those excess costs were incurred during the course of this Subcontract or a result of termination.

6 If the total estimated cost is increased, any costs Subcontractor incurs before the increase that are in excess of the previously estimated cost shall be allowable to the same extent as if incurred afterward, unless Contractor issues a termination or other notice directing that the increase is solely to cover termination or other specified expenses.

7. Change orders shall not be considered an authorization to exceed the total estimated cost unless they contain a statement specifically increasing the total estimated cost.

8. If this Subcontract is terminated or the total estimated cost is not increased, Contractor and Subcontractor shall negotiate an equitable distribution of all property produced or purchased under this Subcontract, based upon the share of costs incurred by each.

A.28 ACCRUAL SCHEDULE

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

A.29 NOTICE OF INTENT TO DISALLOW COSTS

1. Notwithstanding any other article of this Subcontract:

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

   b. The Subcontractor may, after receiving a notice under subparagraph 1.a of this Article, submit a written response to Contractor, with justification for allowance of the costs. If the Subcontractor does respond within 60 days, Contractor shall, within 60 days of receiving the response, either make a written withdrawal of the notice or issue a written decision.

2. Failure to issue a notice under this Notice of Intent to Disallow Cost Article shall not affect Contractor's rights to take exception to incurred cost.

A.30 PAYMENT FOR OVERTIME PREMIUMS

1. The use of overtime is authorized under this Subcontract only for work:

   a. Necessary to cope with emergencies such as those resulting from accidents, natural disasters, breakdowns of production equipment, or occasional production bottlenecks of a sporadic nature;

   b. By indirect labor employees such as those performing duties in connection with administration, protection, transportation, maintenance, standby plant protection, operation of utilities, or accounting;

   c. To perform tests, industrial processes, laboratory procedures, loading or unloading of transportation conveyances, and operations in flight or afloat that are continuous in nature and cannot reasonably be interrupted or completed otherwise; or

   d. That will result in lower overall costs to Contractor.

2. Any request for estimated overtime premiums that does not involve the work specified in Paragraph 1 of this Article shall include all estimated overtime for Subcontract completion and shall:

   a. Identify the work unit, e.g., department or section in which the requested overtime will be used, together with present workload, staffing, and other

data of the affected unit sufficient to permit Contractor to evaluate the necessity for the overtime;

b. Demonstrate the effect that denial of the request will have on the Subcontract delivery or performance schedule;

c. Identify the extent to which approval of overtime would affect the performance or payments in connection with other Government-related contracts, together with identification of each affected contract; and

d. Provide reasons why the required work cannot be performed by using multi-shift operations or by employing additional personnel.

A.31 SUBCONTRACTING

Subcontractor shall select its Lower-tier Subcontractors on a competitive basis to the maximum practicable extent consistent with the objectives and requirements of this Subcontract.

A.32 ACQUISITION OF REAL PROPERTY

1. Notwithstanding any other provision of this Subcontract, the prior approval of the Contractor shall be obtained when, in performance of this Subcontract, the Subcontractor acquires or proposes to acquire use of real property by:

a. Purchase, on the Contractor's behalf or in the Subcontractor's own name, with title eventually vesting in the Government.

b. Lease, and the Contractor assumes liability for, or will otherwise pay for, the obligation under the lease as a reimbursable subcontract cost.

c. Acquisition of temporary interest through easement, license or permit, and the Contractor funds the entire cost of the temporary interest.

2. Justification of and execution of any real property acquisitions shall be in compliance with directions provided by the Contractor.

3. The substance of this Article, including this Paragraph 3, shall be included in any Lower-tier Subcontract occasioned by this Subcontract, under which property described in Paragraph 1 of this Article will be acquired.

A.33 LEGAL COSTS

1. Regarding any Legal Costs that Subcontractor proposes for reimbursement under this subcontract –

a. Subcontractor agrees to provide to Contractor (i) prior notice with regard to non-litigation Legal Costs, and (ii) prior or contemporaneous notice with regard to Legal Costs related to litigation; and

b. Subcontractor agrees to comply with Contractor's direction for managing such Legal Costs, including, without limitation, compliance with Contractor's Legal Management Plan.

2. For purposes of this clause, "Legal Costs" include, without limitation, administrative expenses associated with the provision of legal services by retained legal counsel or in-house attorneys; the costs of legal services provided by retained legal counsel; the costs of the services of accountants, consultants, or others retained by the Subcontractor or by retained legal counsel to assist retained legal counsel; and any similar costs incurred by or in connection with the services of retained legal counsel.

A.34 COMPLIANCE WITH LAWS

Subcontractor shall procure all necessary permits or licenses and abide by all applicable laws, regulations, and ordinances of the United States and of the state, territory, and political subdivision in which the work under this Subcontract is performed.

A.35 COOPERATION WITH THE OFFICE OF INSPECTOR GENERAL (OIG)

1. The Subcontractor must ensure that all their employees understand that they must:

(i) Comply with requests for interviews and briefings and must provide affidavits or sworn statements, if so requested by an employee of the OIG so designated to take affidavits or sworn statements.

(ii) Not impede or hinder another employee's cooperation with the OIG.

(iii) Ensure that reprisals are not taken against employees who cooperate with or disclose information to the OIG or other lawful appropriate authority.

A.36 COMPLIANCE WITH INTERNET PROTOCOL VERSION 6 (IPV6) IN ACQUIRING INFORMATION TECHNOLOGY

1. If this Subcontract involves the acquisition of Information Technology (IT) that uses Internet Protocol (IP) technology, the Subcontractor agrees that: (1) all deliverables that involve IT that uses IP (products, services, software, etc.) will comply with IPv6 standards and interoperate with both IPv6 and IPv4 systems and products; and (2) it has IPv6 technical support for development and implementation and fielded product management available.

2. Should the Subcontractor find that the statement of work or specifications of this Subcontract do not conform to the IPv6 standard, it must notify the Contractor of such nonconformance and act in accordance with instructions of the Contractor.

A.37 PROTECTION OF PERSONALLY IDENTIFIABLE INFORMATION (PII)

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

37.2 Subcontractor agrees to allow access only to those employees who need the PII to perform services under this Contract and agrees that PII will be used solely for the purpose of performing services under this Contract. The Subcontractor shall ensure that its employees will not discuss, divulge or disclose any such PII to any person or entity except those persons within the Subcontractor's organization directly concerned with performance under the Contract.

37.3 The Subcontractor shall administer a monitoring process to ensure compliance with the provisions of the clause. Immediately upon discovery of a real or suspected loss of PII promptly report any breaches to the BEA Subcontract Administrator, and implement immediate, appropriate corrective actions to contain and prevent recurrence.

37.4 PII is an individual's first name or first initial and last name in combination with any one or more of the following data elements including, but not limited to, social security number, passport number, credit card numbers, clearances, bank

numbers, biometrics, date and place of birth, mother's maiden name, criminal, medical and financial records, educational transcripts, etc.

37.5 Contractor may terminate this Contract for default if Subcontractor or an employee of the Subcontractor fails to comply with the provisions of this clause. Contractor may also exercise any other rights and remedies provided by law or this Contract, including criminal and civil penalties.

37.6 The Subcontractor shall include this clause in all appropriate lower-tier subcontracts. However, such provision in the subcontracts shall not relieve Subcontractor of its obligation to assure compliance with the provisions of this clause.

SECTION B

SECTION B APPLIES WHEN SUBCONTRACTOR PERSONNEL, OR LOWER-TIER SUBCONTRACTOR PERSONNEL, ARE PRESENT AT PREMISES OWNED, LEASED, OR CONTROLLED BY CONTRACTOR OR THE U.S. GOVERNMENT, REGARDLESS OR PRICE

ARTICLE NO.

B.1 INCORPORATED BY REFERENCE

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

B.2 OCCURRENCE NOTIFICATION AND REPORTING BY SUBCONTRACTOR

Subcontractor shall report to Contractor any unusual occurrence or unplanned event occurring within the boundaries of the INL during the performance of this Subcontract. The report shall be provided, either orally or in writing, to the Contractor's Procurement Agent or Technical Representative. Occurrence/events which require reporting include any out-of-the-ordinary situations which occur. A list of situations that require reporting will be provided to Subcontractor by Contractor prior to Subcontractor's arrival on site. The list will not be all-inclusive, but will provide necessary guidance.

B.3 ENVIRONMENTAL, SAFETY AND HEALTH

The Subcontractor shall take all reasonable precautions in the performance of the work under this Subcontract to protect the safety and health of employees and of members of the public and shall comply with all applicable safety and health regulations and requirements (including, reporting requirements) of Contractor and DOE. The Contractor shall notify the Subcontractor, in writing, of any noncompliance with the provisions of this Article and what corrective action is to be taken. After receipt of such notice, the Subcontractor shall immediately take the corrective action. Under subcontracts to provide construction, maintenance, installation, fabrication or related services, or under any subcontract when directed by the Contractor, Subcontractor shall accept and implement the INL ES&H management program and implementation plan, which is available from the Contractor. In the event that the Subcontractor fails to comply with the aforementioned regulatory requirements of Contractor and DOE, the Contractor may, without prejudice to any other legal or contractual rights of the Contractor, issue an order stopping all or any part of the work; thereafter, a start order for resumption of the work may be issued at the discretion of the Contractor. The Subcontractor shall make no claim for an extension of time or for compensation of damages by reason of, or in connection with, such work stoppage.

B.4 WHISTLE BLOWER PROTECTION FOR SUBCONTRACTOR EMPLOYEES

The Subcontractor shall comply with the requirements of the "DOE Contractor Employee Protection Program" in 10 CFR Part 708.

The Subcontractor shall insert, or have inserted, the substance of this Article, including this paragraph, in Lower-tier Subcontracts at all tiers, with respect to work performed on site at a DOE-owned or-leased facility, as provided for in 10 CFR Part 708.

B.5 COMPLIANCE, PERMITS, AND INDEMNIFICATION

THIS ARTICLE SUPERSEDES ARTICLE A.34, COMPLIANCE WITH LAWS

1. At its expense, Subcontractor shall comply with all federal, state, county, and municipal laws, ordinances, and regulations applicable to the work to be

performed under this Subcontract. Subcontractor shall secure all required licenses and permits prior to commencing the Work.

2. Subcontractor shall indemnify and hold harmless the Government, the Contractor (Battelle Energy Alliance, LLC), and each of their respective officers, directors, employees, agents, and successors in interest from and against all liability, claims, suits, damages, losses, costs, fines, civil penalties, remediation, corrective action or other response action costs, and any associated expense (including, without limitation, costs of: (i) defense; (ii) settlement; (iii) reasonable attorneys fees; and (iv) costs incurred in enforcing this indemnification) arising out of or in connection with any of the following attributable to the conduct of Subcontractor, its lower-tier subcontractors, or their respective employees, agents, or representatives:

a. Injury or death of persons or damage to property;

b. Contamination of, or adverse effects on, the environment;

c. Subcontractor's failure to comply with all applicable laws, ordinances, or regulations or to secure and/or comply with licenses or permits required to perform the Work including, without limitation, violations, or alleged violations, of the following federal laws and any state or federal implementing laws or regulations:

(i) Clean Water Act as amended, 33 U.S.C.A., Section 1251 et seq. (including, but not limited to, liability for fines incurred by the indemnified parties for Subcontractor's violations of the Construction Storm Water Discharge Regulations or Requirements);

(ii) Comprehensive Environmental Response Compensation and Recovery Act as amended, 42 U.S.C. Section 9601 et seq.;

(iii) Resource Conservation and Recovery Act as amended, 42 U.S.C.,Section 6901 et seq.;

(iv) Clean Air Act as amended, 42 U.S.C. Section 7401 et seq.;

(v) Toxic Substances Control Act as amended, 15 U.S.C.A. 2601 et seq.;

(vi) Atomic Energy Act as amended (including, but not limited to, DOE orders and ALARA requirements), 42 U.S.C.A. 2014 et seq.; and

(vii) Sections 234A, 234B, and 234C(42 U.S.C. Sections 2282a, 2282b, and 2282c) of the Atomic Energy Act, including, but not limited to, applicable nuclear and industrial/construction safety regulations, requirements or orders.

d. Subcontractor's generation and management of, or arranging the transportation, treatment, storage, or disposal of, waste generated at the INL at a treatment, storage, or disposal facility or other location that has not been approved in writing by the Contractor;

e. Loss of fee suffered by Contractor under its prime contract with DOE;

f. Any claim maintained in tort against the Government or Contractor for negligence or otherwise concerning any injury or death of a Subcontractor employee or lower-tier subcontractor employee which was, or could have been, the basis for a statutory worker's compensation claim. To make the indemnity under this subparagraph fully effective, Subcontractor hereby expressly waives the exclusive remedy and indemnity limitation under the Idaho Worker's Compensation Law of Title 72 of the Idaho Code or under any other applicable state or federal worker's compensation law; and

g. Costs incurred by Contractor under applicable Federal Acquisition Regulation and/or Department of Energy Acquisition Regulation provisions addressing Costs Related to Legal and Other Proceedings.

3. Nothing in the foregoing indemnification of the Government and Contractor by Subcontractor shall be construed to indemnify or save harmless the Government or Contractor from any liability arising out of, or resulting from, a nuclear incident or solely as a result of negligence of the Government or Contractor.

4. Subcontractor shall procure or cause to be procured, at its expense, and likewise shall maintain, or cause to be maintained, during performance of the Work, and for such period thereafter as may be necessary under the circumstances, insurance sufficient to protect the Subcontractor, Contractor, Contractor's subcontractors, and the US DOE against all liability with respect to bodily injury or death, or property loss or damage which may be imposed by law upon Subcontractor or which is assumed by Subcontractor under this Subcontract. Such insurance shall be written on an "occurrence" basis and shall be with a company or companies with an AM Best rating of "A" or better and in such forms as are satisfactory to Contractor. At a minimum, Subcontractor shall maintain the following insurance coverages and limits under this Article:

a. Commercial General Liability

(i) Each Occurrence: $1 Million

(ii) Fire Damage (any one fire): $100,000

(iii) Medical Expense (any one person): $5,000

(iv) Personal and Advertising Injury: $1 Million

(v) General Aggregate: $2 Million

(vi) Products/Completed Operations Aggregate: $2 Million

b. Automobile Liability

(i) Combined Single Limit (each accident): $1 Million

c. Worker Compensation and Employer Liability

(i) Worker Compensation: Statutory Limits

(ii) Employer Liability (each accident): $100,000

(iii) Employer Liability Disease/Each Employee: $100,000

(iv) Employer Liability Disease/Policy Limit: $500,000

d. Asbestos Liability (if the Work includes any asbestos-related work, i.e., inspection, handling, removal, or other)

(i) Per Occurrence/Annual Aggregate: $2 Million

5. Subcontractor's insurance policies shall be endorsed to include:

a. "Battelle Energy Alliance, LLC and its successors in interest" and the "US Department of Energy" named as additional insured parties for all coverage specified in this Article, including Worker Compensation and Employer Liability.

b. Waiver of subrogation in favor of Battelle Energy Alliance, LLC and its successors in interest and the US Department of Energy.

c. Subcontractor's insurance is primary.

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

6. **A certificate(s) of insurance shall be furnished to the Contractor's SA upon the earlier of either ten calendar days after award of this Subcontract or before Subcontractor begins any work under this Subcontract on Contractor or DOE controlled property or facilities. Each certificate of insurance shall include the endorsements required by Paragraph 5 of this Article and shall be signed by an authorized representative of the insurance company who must indicate the capacity in which he/she is signing. Separate certificates shall be provided by each insurance company providing coverage to the Subcontractor.**

7. **Subcontractor's procurement, maintenance, limits, or coverage of any insurance policies, whether or not approved by Contractor, shall not relieve Subcontractor from any liability assumed pursuant to this Article.**

8. **Failure by Subcontractor to comply with the insurance requirements of this Article, including timely submittal of properly executed certificates, is a basis for termination under the Article entitled Default, of these General Provisions.**

9. **Subcontractor shall include all the requirements of this Article, including the specifically required insurance coverage, in all lower-tier subcontracts under this Subcontract that require work on Government-owned premises. Subcontractor shall obtain appropriate certificates of insurance from said lower-tier subcontractors, maintain the certificates on file, and make the certificates available to the Contractor upon request.**

B.6 STOP WORK AUTHORITY

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

   a. **Observation and determination of conditions that present an immediate threat to the life and/or health of employees, workers, or the general public.**

   b. **Observation of any activity or action, which is determined to be a threat to the environment or surrounding ecology.**

   c. **Observation and determination of any activity that could result in the potential or actual damage to Government material, property, facilities, or equipment.**

   d. **Subcontractor fails to comply with the Quality requirements of this Subcontract.**

   e. **Subcontractor fails to comply or fails to provide resolution to a noncompliance with applicable ES&H requirements.**

2. **If Work is stopped by a representative of Contractor or the Government, other than the technical point-of-contact or the procurement agent, the Subcontractor shall immediately notify the procurement agent or his/her supervisor.**

3. **Contractor may issue a work stoppage for an indefinite period to time, i.e., time necessary to effect corrective action or to resolve a specifically identified condition.**

4. **Subcontractor's failure to comply with "Stop Work" direction pursuant to this Article may result in termination of this Subcontract for default.**

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

B.7 RADIOLOGICAL CONTROL REQUIREMENTS FOR SUBCONTRACTOR AND/OR LOWER-TIER SUBCONTRACTOR PERSONNEL

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

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

SECTION C

SECTION C APPLIES WHEN PRICE IS GREATER THAN $25,000

ARTICLE NO.

C.1 INCORPORATED BY REFERENCE

1. FAR 52.222-35 Affirmative Action for Special Disabled and Vietnam Era Veterans >$25,000

2. FAR 522.222-37 Employment Reports on Special Disabled Veterans and Veterans of the Vietnam Era >$25,000

C.2 EXAMINATION OF RECORDS BY THE COMPTROLLER GENERAL

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

SECTION D

SECTION D APPLIES WHEN PRICE IS GREATER THAN $100,000

ARTICLE NO.

D.1 NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT

1. The Subcontractor shall report to the Contractor, promptly and in reasonable written detail, each notice or claim of patent or copyright infringement, based on the performance of this Subcontract, of which Subcontractor has knowledge.

2. In the event of any claim or suit against the Contractor or the Government on account of any alleged patent or copyright infringement arising out of the performance of this Subcontract, or out of the use of any supplies furnished or work or services performed hereunder, Subcontractor shall furnish to the Contractor or the Government upon request all evidence and information in possession of Subcontractor pertaining to such suit or claim. Such evidence and information shall be furnished at the expense of the Government except in those cases in which Subcontractor has agreed to indemnify the Contractor and the Government.

3. This Article shall be included in all Lower-tier Subcontracts and purchase orders priced greater than $100,000.

D.2 COVENANT AGAINST CONTINGENT FEES

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

2. “Bona fide agency,” as used in this Article, means an established commercial or selling agency, maintained by Subcontractor for the purpose of securing business, that neither exerts nor proposes to exert improper influence to solicit or obtain contracts nor holds itself out as being able to obtain any contracts through improper influence.

3. “Bona fide employee” as used in this Article, means a person, employed by Subcontractor and subject to Subcontractor’s supervision and control as to time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain contracts nor holds out as being able to obtain any contracts through improper influence.

4. “Contingent fee,” as used in this Article, means any commission, percentage, brokerage, or other fee that is contingent upon the success that a person or concern has in securing a contract.

5. “Improper influence,” as used in this Article, means, any influence that induces or tends to induce a Contractor or Government employee or officer to give consideration, or to act, regarding a Contractor subcontract, on any basis other than the merits of the matter.

D.3 ANTI-KICKBACK PROCEDURES

<u>Definitions</u>

“Kickback,” as used in this Article, means any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind which is provided, directly or indirectly, to any prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable

treatment in connection with a prime contract or in connection with a subcontract relating to a prime contract.

"Person," as used in this Article, means a corporation, partnership, business association of any kind, trust, joint stock company, or individual.

"Prime contract," as used in this Article, means a contract or contractual action entered into by the United States for the purpose of obtaining supplies, materials, equipment, or services of any kind.

"Prime Contractor," as used in this Article, means a person who has entered into a prime contract with the United States.

"Prime Contractor employee" as used in this Article, means any officer, partner, employee, or agent of a prime contractor.

"Subcontract," as used in this Article means a contract or contractual action entered into by a prime contractor or subcontractor at any tier, for the purpose of obtaining supplies, materials, equipment, or services of any kind under a prime contract.

"Subcontractor," as used in this Article, means any person, other than the Prime Contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a lower-tier subcontract entered in connection with such prime contract, and includes any person who offers to furnish or furnishes general supplies to the Prime Contractor or a higher-tier subcontractor.

"Subcontractor employee," as used in this Article, means any officer, partner, employee or agent of a subcontractor.

The Anti-Kickback Act of 1986 (41 U.S.C. 51-58) (the Act), prohibits any person from:

Providing or attempting to provide or offering to provide any kickback;

Soliciting, accepting, or attempting to accept any kickback; or

Including, directly or indirectly, the amount of any kickback in the subcontract price charged by a Subcontractor to a Prime Contractor or higher-tier subcontractor.

When the Subcontractor has reasonable grounds to believe that a violation described in Paragraph 2 of this Article may have occurred, the Subcontractor shall promptly report, in writing, the possible violation. Such reports shall be made to Contractor and to the Inspector General of the U.S. DOE or to the U.S. Department of Justice.

The Subcontractor shall cooperate fully with any federal agency investigating a possible violation described in Paragraph 2 of this Article.

Contractor may withhold from sums owed to Subcontractor the amount of the kickback, which may be paid to the Government.

The Subcontractor agrees to incorporate the substance of this Article, including this Paragraph 6, in all Lower-tier Subcontracts under this Subcontract priced greater than $100,000.

D.4 UTILIZATION OF SMALL, SMALL DISADVANTAGED AND WOMEN-OWNED SMALL BUSINESS CONCERNS

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

Subcontractor hereby agrees to award subcontracts and purchase orders pursuant to Paragraph 1 of this Article to the fullest extent consistent with efficient Subcontract performance. Subcontractor further agrees to cooperate in any studies or surveys as may be conducted by the United States Small Business Administration or the Contractor, as may be necessary to determine the extent of Subcontractor's compliance with this Article.

As used in this Subcontract, the term "small business concern" shall mean a small business as defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated thereto. The term "small business concern owned and controlled by socially and economically disadvantaged individuals" shall mean a small business concern which is at least 51 percent unconditionally owned by one or more socially and economically disadvantaged individuals, or, in the case of any publicly-owned business, at least 51 percent of the stock of which is unconditionally owned by one or more socially and economically disadvantaged individuals; and whose management and daily business operations are controlled by one or more of such individuals. This term also means a small business concern that is at least 51 percent unconditionally owned by an economically disadvantaged Indian Tribe or Native Hawaiian Organization, or a publicly-owned business having at least 51 percent of its stock unconditionally owned by one of these entities and which has its management and daily business controlled by members of an economically disadvantaged Indian Tribe or Native Hawaiian Organization, and which meets the requirements of 13 CFR 124. The Contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and other minorities, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act. The Subcontractor shall presume that socially and economically disadvantaged entities also include Indian Tribes and Native Hawaiian Organizations.

The term "small business concern owned and controlled by women" shall mean a small business concern:

Which is at least 51 percent owned by one or more women, or, in the case of a publicly-owned business, at least 51 percent of the stock of which is owned by one or more women; and

Whose management and daily business operations are controlled by one or more women.

D.5 ORGANIZATIONAL CONFLICTS OF INTEREST

(This Article applies when the Subcontract involves any work or effort, the principal purpose of which is to provide advisory and assistance services as defined at 48 CFR 37.201. Such services typically include: assistance in preparing program plans; evaluation, monitoring or review of Contractor's activities or proposals submitted by prospective Subcontractors; and preparation of preliminary designs, specifications, or statements of work.)

The purpose of this Article is to ensure that the Subcontractor is not biased because of its financial, contractual, organizational, or other interests which relate to the work under this

Subcontract, and does not obtain any unfair competitive advantage over other parties by virtue of its performance of this Subcontract.

The restrictions described herein shall apply to performance or participation by the Subcontractor and any of its affiliates or their successors in interest (hereinafter collectively referred to as the "Subcontractor") in the activities covered by this Article as a prime subcontractor, lower-tier subcontractor, cosponsor, joint venturer, consultant, or in any similar capacity. For the purpose of this Article, affiliation occurs when a business concern is controlled by or has the power to control another or when a third party has the power to control both.

The Subcontractor shall be ineligible to participate in any capacity in Contractor's subcontracts or proposals therefore (solicited and unsolicited), which stem directly from the Subcontractor's performance of work under this Subcontract for a period of one (1) year after the completion of this Subcontract. Furthermore, unless so directed in writing by the Contractor, the Subcontractor shall not perform any advisory and assistance services work under this Subcontract on any of its products or services or the products or services of another firm, if the Subcontractor is, or has been substantially involved in their development or marketing. Nothing in this Paragraph 3 shall preclude the Subcontractor from competing for follow-on subcontracts for advisory and assistance services.

If, under this Subcontract, the Subcontractor prepares a complete, or essentially complete, statement of work or specifications to be used in competitive acquisitions, the Subcontractor shall be ineligible to perform, or participate in any capacity, in any contractual effort which is based on such statement of work or specifications. The Subcontractor shall not incorporate its products or services in such statement of work or specifications, unless so directed in writing by the Contractor, in which case the restriction in this Paragraph 4 shall not apply.

Nothing in this Article shall preclude the Subcontractor from offering or selling its standard commercial items to the Government.

If the Subcontractor, in the performance of this Subcontract, obtains access to information, such as Contractor plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (5 U. S. C. 552a), or data which have not been released or otherwise made available to the public, the Subcontractor agrees that, without prior written approval of the Contractor, it shall not:

- **Use such information for any private purpose unless the information has been released or otherwise made available to the public;**
- **Compete for work for the Contractor, based on such information for a period of six (6) months after either the completion of this Subcontract or until such information is released or otherwise made available to the public, whichever is first;**
- **Submit an unsolicited proposal to the Government, which is based on such information until one (1) year after such information is released or otherwise made available to the public; and**
- **Release such information unless such information has previously been released or otherwise made available to the public by the Contractor or DOE.**

Subcontractor also agrees that to the extent it receives or is given access to proprietary data, data protected by the Privacy Act of 1974 (5 U. S. C. 552a), or other confidential or

privileged technical, business, or financial information under this Subcontract, it shall treat such information in accordance with any restrictions imposed on such information.

Subcontractor may use technical data it first produces under this Subcontract for its private purposes consistent with this Article and the patent, rights in data, and security provisions of this Subcontract.

Subcontractor agrees that, if changes, including additions, to the facts disclosed by it prior to award of this Subcontract, occur during the performance of this Subcontract, it shall make an immediate and full disclosure of such changes in writing to the Contractor. Such disclosure may include a description of any action which the Subcontractor has taken or proposes to take to avoid, neutralize, or mitigate any resulting conflict of interest. The Contractor may, however, terminate this Subcontract for convenience, if it deems such termination to be in the best interest of the Government.

In the event that Subcontractor was aware of facts required to be disclosed, or the existence of an actual or potential organizational conflict of interest, and did not disclose such facts or such conflict of interest to the Contractor, Contractor may terminate this Subcontract for default.

For breach of any of the foregoing restrictions or for nondisclosure or misrepresentation of any facts required to be disclosed concerning this Subcontract, including the existence of an actual or potential organizational conflict of interest at the time of or after award, the Contractor may terminate this Subcontract for default, disqualify the Subcontractor from subsequent related contractual efforts, and pursue such other remedies as may be permitted by law or this Subcontract.

Requests for waiver under this Article shall be directed in writing to the Contractor and shall include a full description of the requested waiver and the reasons in support thereof. If it is determined to be in the best interests of the Contractor and the Government, the Contractor shall grant such a waiver in writing.

D.6 RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT

1. **Except as provided in Paragraph 2, the Subcontractor shall not enter into any agreement with an actual or prospective Lower-tier Subcontractor(s), nor otherwise act in any manner, which has or may have the effect of restricting sales by such Lower-tier Subcontractor(s) directly to the Government of any item or process (including computer software) made or furnished by the Lower-tier Subcontractor for this Subcontract or under any follow-on production order.**
2. **The prohibition in Paragraph 1 does not preclude the Subcontractor from asserting rights that are otherwise authorized by law or regulation.**
3. **The Subcontractor agrees to incorporate the substance of this Article, including this Paragraph 3, in all Lower-tier Subcontracts under this Subcontract priced greater than $100,000.**

SECTION E

SECTION E APPLIES WHEN PRICE IS GREATER THAN $500,000

ARTICLE NO.

E.1 INCORPORATED BY REFERENCE

1. FAR 52.230-2 Cost Accounting Standards

2. FAR 52.230-5 Cost Accounting Standards—Educational Institutions

3. FAR 52.230-6 Administration of Cost Accounting Standards

NOTE: Flowdown is required for negotiated Lower-tier Subcontracts valued > $500,000. Either 52.230-5 or –6 shall be flowed down, dependent upon the classification of the Lower-tier Subcontractor, i.e., -5 is flowed down to educational institutions and –6 is flowed down to large businesses.

E.2 SMALL BUSINESS AND SMALL DISADVANTAGED BUSINESS SUBCONTRACTING PLAN

1. "Commercial product," as used in this Article, means a product in regular production that is sold in substantial quantities to the general public and/or industry at established catalog or market prices. It also means a product which, in the opinion of the Contractor, differs only insignificantly from the Subcontractor's commercial product.

2. Subcontract," as used in this Article, means any agreement (other than one involving an employer-employee relationship) entered into by Subcontractor calling for supplies or services required for performance of this Subcontract.

3. Subcontractor shall include the Article in this Subcontract entitled "Utilization of Small, Small Disadvantaged and Women-Owned Small Business Concerns" in all Subcontracts that offer further subcontracting opportunities, and require all Lower-tier Subcontractors (except small business concerns) who receive subcontracts in excess of $550,000 ($1,000,000 for construction of any public facility), to adopt a plan similar to the plan agreed to by the Subcontractor.

4. Subcontractor shall: (i) cooperate in any studies or surveys as may be required; (ii) submit periodic reports, to allow the Contractor to determine the extent of compliance with the Subcontracting Plan; (iii) submit semiannual subcontracting reports current as of the last day of March and of September and a subcontracting report at the completion of this Subcontract, in accordance with the requirements of the U.S. DOE's internet-based Electronic Subcontract Reporting System (eSRS); and (iv) ensure that its Lower-tier Subcontractors agree to submit subcontracting reports in accordance with the instructions at (iii) of this paragraph 4. Subcontracting reports required by subparagraphs (iii) and (iv) of this paragraph 4 shall be submitted within 30 days following the end of each reporting period.

5. Subcontractor shall perform the following functions:

a. Assist small business and small disadvantaged business concerns by arranging solicitations, time for the preparation of bids, quantities, specifications, and delivery schedules so as to facilitate the participation by such concerns. Where the Subcontractor's lists of potential small and small disadvantaged lower-tier subcontractors are excessively long, reasonable effort shall be made to give all such business concerns an opportunity to compete over a period of time.

b. Provide adequate and timely consideration of the potential of small business and small disadvantaged business concerns in all "make-or-buy" decisions.

c. Counsel and discuss lower-tier subcontracting opportunities with representatives of small and small disadvantaged business firms.

d. Provide notice to Lower-tier Subcontractors concerning penalties for misrepresentation of business status as small business or small disadvantaged business for the purpose of obtaining a Lower-tier Subcontract that is to be included as part or all of a goal contained in the Subcontracting Plan.

6. The failure of the Subcontractor or a Lower-tier Subcontractor to comply in good faith with the Article of this Subcontract entitled "Utilization of Small Disadvantaged and Women-Owned Small Business Concerns," or Subcontractor's approved Subcontracting Plan required by this Article, shall be a material breach of this Subcontract.

E.3 DISPLACED EMPLOYEE HIRING PREFERENCE

<u>Definition</u>. "Eligible employee" means a current or former employee of a contractor or subcontractor employed at a Department of Energy Defense Nuclear Facility:

Whose position of employment has been, or will be, involuntarily terminated (except if terminated for cause);

Who has also met the eligibility criteria contained in the Department of Energy guidance for contractor work force restructuring, as may be amended or supplemented from time to time; and

Who is qualified for a particular job vacancy at the time the particular position is available.

Consistent with Department of Energy guidance for contractor work force restructuring, as may be amended or supplemented from time to time, the Subcontractor agrees that it will provide a preference in hiring to an eligible employee, to the extent practicable, for work performed under this Subcontract.

The requirements of this Article shall be included in Lower-tier Subcontracts at any tier (except for subcontracts for commercial items pursuant to 41 U.S.C. 403), expected to exceed $500,000.

E.4 LIABILITY FOR INCREASED COSTS OR INTEREST

The Subcontractor is liable to the Government for any increased costs or interest resulting from Subcontractor's failure to comply with FAR 52.230-2, "Cost Accounting Standards," FAR 52.230-5, "Administration of Cost Accounting Standards-Educational Institutions," or FAR 52.230-6, "Administration of Cost Accounting Standards-General." The subcontract price is subject to adjustment by the Contractor to cover any increased costs or interest resulting from such failure.

SECTION F

SECTION F APPLIES WHEN SUBCONTRACTOR RECEIVES ACCESS TO CLASSIFIED INFORMATION, UNCLASSIFIED SENSITIVE INFORMATION OR SPECIAL NUCLEAR MATERIAL OR AUTHORIZED UNRESTRICTED ACCESS TO AREAS CONTAINING THESE, REGARDLESS OF PRICE

ARTICLE NO.

F.1 INCORPORATED BY REFERENCE

1. DEAR 952.204-70 Classification/Declassification

2. DEAR 970.204-1 Counterintelligence

F.2 CLASSIFIED INVENTIONS

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

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

The Subcontractor is responsible to ensure the proper identification, access, control and disposition of all commodities and technical data protected as export-controlled, as defined in, and controlled by: the Arms Export Control Act; Assistance to Foreign Atomic Energy Activities, 10 CFR 810; Atomic Energy Act of 1954; Export Administration Regulations, 15 CFR 730-799; Export and Import of Nuclear Equipment and Material, 10 CFR 110; International Traffic in Arms Regulations, 22 CFR 120-130; Missile Technology Control Regime, 22 CFR 120.29; the Nuclear Non-proliferation Act of 1978; and associated laws and regulations.

F.3 SECURITY REQUIREMENTS

Processing Each Subcontractor, i.e., principals and employees, requiring security clearance access to the Contractor's facilities must complete and submit to Contractor an "Initial background Investigation Packet." Upon successful completion of the background investigation each individual shall also complete a "Clearance Packet."

Termination Each Subcontractor, i.e., principals and employees, that has obtained a security clearance must complete the Termination Briefing for Cleared Employees and form ID F 5631.29, Security Termination Statement, prior to termination.

Access Authorization All Subcontractor personnel must possess an active DOE access authorization (clearance) prior to being granted access to classified programs, classified information or Special Nuclear Material. Subcontractor personnel must be assigned to a Subcontract that involves performance of work associated with, and/or required by, a classified project or program to be processed for a DOE access authorization. Prior to granting such access authorization(s) to Subcontractor personnel, the Subcontractor shall

have been certified in accordance with Foreign Ownership, Control and Influence requirements.

Access to INL/Contractor facilities without an active DOE access authorization may be granted and shall be determined and authorized as prescribed by the Contractor Safeguards and Security Manual in accordance with applicable procedures. A background/suitability check may be required prior to the issuance of a Building Access Only (BAO) picture pass and granting unescorted access to some Contractor areas and facilities. Subcontractor personnel may be subject to pre-employment and unannounced drug screening as a condition for unescorted access to the INL facilities.

Responsibility It is the Subcontractor's duty to safeguard all classified information, unclassified sensitive information, special nuclear material, and other DOE property. The Subcontractor shall, in accordance with Contractor and DOE security and classified and unclassified sensitive information protection requirements, be responsible for safeguarding all classified information, unclassified sensitive information, and special nuclear material from acts of sabotage, espionage, loss, theft, and diversion. This shall include all classified information, unclassified sensitive information, and special nuclear material in the Subcontractor's possession as the result of the performance of work under this Subcontract. Except as otherwise expressly provided in this Subcontract, the Subcontractor shall, upon completion or termination of this Subcontract, transmit to the Contractor any classified or unclassified sensitive matter in the possession of the Subcontractor or any person under the Subcontractor's control in connection with the performance of this Subcontract. If retention by the Subcontractor of any classified or unclassified sensitive matter is required after completion or termination of this Subcontract and such retention is approved by the Contractor, the Subcontractor must complete a certificate of possession to be furnished by the Contractor specifying the classified or unclassified matter to be retained. The certification shall identify the items and types or categories retained, the conditions governing the retention of the matter, and the period of retention, if known. If retention is approved by the Contractor, the security provisions of this Subcontract will continue to be applicable to the matter retained. Special nuclear material shall not be retained after the completion or termination of this Subcontract.

Foreign Travel All current or former subcontractors and their employees who possess a current access authorization, or have had an access authorization within the last five (5) years, shall report foreign travel when they travel on: official business to any country to discuss a sensitive topic; travel on official business to a sensitive country, as defined in DOE order 1500.3; or travel for personal reasons to a sensitive country. Such travel shall be reported to the Contractor's Security Foreign Travel Administrator.

Regulations The Subcontractor agrees to conform to all security and classified and unclassified sensitive information protection requirements of the Contractor and DOE.

Definitions

> **Classified Information. The term "Classified Information" means Restricted Data, Formerly Restricted Data, or National Security Information.**
>
> **Restricted Data. The term "Restricted Data" means all data concerning: design, manufacture, or utilization of atomic weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy; but shall not include data declassified or removed from the Restricted Data category pursuant to Section 142 of the Atomic Energy Act of 1954, as amended.**

Formerly Restricted Data. The term "Formerly Restricted Data" means all data removed from the Restricted Data category under section 142d. of the Atomic Energy Act of 1954, as amended.

National Security Information. The term "National Security Information" means any information or material, regardless of its physical form or characteristics, that is owned by, produced for or by, or under the control of the United States Government, that has been determined pursuant to executive Order 12356 or prior orders to require protection against unauthorized disclosure, and which is so designated.

Special Nuclear Material (SNM). "SNM" means: plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which pursuant to the provisions of Section 51 of the Atomic Energy Act of 1954, as amended, has been determined to be special nuclear material, but does not include source material; or any material artificially enriched by any of the foregoing, but does not include source material.

Unclassified Sensitive Information. "Unclassified Sensitive Information" means information, the disclosure of which could reasonably be expected to adversely affect national or DOE interests.

<u>Security Clearance of Personnel</u> The Subcontractor shall not permit any individual to have access to any classified information, except in accordance with the Atomic Energy Act of 1954, as amended, Executive Order 12356, and the Contractor's or DOE regulations or requirements applicable to the particular level and category of classified information to which access is required.

<u>Criminal Liability</u> It is understood that unauthorized disclosure of any classified or unclassified sensitive information relating to the work or services ordered hereunder to any person not entitled to receive it, or failure to properly safeguard any classified or unclassified sensitive information, may subject the Subcontractor, its agents, employees, or Lower-tier Subcontractors to criminal liability under the laws of the United States. (See the Atomic Energy Act of 1954, as amended 42 U.S.C. 2011 et seq.; Executive Order 12356; 18 U.S.C. 793 and 794; International Traffic in Arms Regulations; the Export Administration Regulations; the Nuclear Nonproliferation Act; Federal Regulation 10 CFR Part 810; and applicable DOE Orders.)

F.4 CLASSIFICATION OF UNCLASSIFIED SENSITIVE INFORMATION

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

F.5 CONTROL OF UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION (UCNI)

Subcontractor shall handle and control information designated as unclassified controlled nuclear information (UCNI) in accordance with 10 CFR Part 1017.

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